Submission to the Australian Law Reform Commission Inquiry into Discovery in Federal Courts

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Executive Summary

We welcome the Commission's inquiry into discovery. It is necessary and timely. The volume of information and documents created by business continues to increase as the use of information technology accelerates. Litigation has grown more complex. The cost of litigation is borne not by those whose chose to litigate but by the broader community, and may impede access to justice.

As active participants in the Court process with significant experience advising clients in relation to discovery and in assisting them to comply with discovery orders, we believe that we are in a position to make an informed contribution to any discussion concerning the discovery process. We thank you for the opportunity to do so.

Our response to the Commission's Consultation paper follows the structure of the Paper. Our submission essentially falls into three parts:

- consideration of proposals which, in our view, are likely to contribute materially to greater efficiency, reduction of costs and the proper discharge of legal advisers' professional responsibilities in relation to the discovery process. Some of our proposals build on those identified in the Commission's Paper. Examples include:
  - the use of discovery plans and pre-discovery conferences; and
  - greater judicial education in relation to electronic discovery.
- discussion of proposals addressed in the Commission's Paper which, while having potential merit, should only be considered in a broader context. Such proposals, if adopted, would have a much broader impact on dispute resolution procedures (including litigation) than the discovery process which is the focus of the Commission's Paper. Adoption of any such proposals should be preceded by a broader ranging enquiry into their potential merits. Such proposals include the use of pre-action protocols.
- consideration of a number of proposals in the Commissioner's Paper which, in our view, would increase the cost and inefficiency of litigation and be antithetical to a policy of improving access to justice. In many cases, those proposals address problems which, in our view, do not exist or which are substantially over-stated. Examples include:
  - a requirement that parties exchange 'key' documents early in the proceedings; and
  - modification of the existing cost sanctions and misconduct regime.

We make the overarching submission that in the vast majority of cases the Courts are already armed with necessary powers to adequately control (indeed, to actively shape) the discovery process in a manner consistent with the rights of the parties to the litigation as well as the broader public interest. Any response to perceived difficulties associated with the discovery process must have at its heart the objective of educating judicial officers so that they are armed with information which permits them to use their existing powers more actively and creatively.

1 The role of judges

Submission

We endorse the requirement for leave for discovery of documents.

Judges should not endorse orders for discovery without actively considering the relevant factors and testing the parties on their discovery proposals.

The docket judge should manage the discovery process. We do not support any suggestion that special masters should manage discovery as a matter of routine.

There is no need to detail the Court's case management powers in primary legislation. It is unlikely to cause the desired cultural shift in the judiciary, and the Court already has sufficient power to regulate discovery.

A greater emphasis should be placed on the education and training of judicial officers in the discovery process, particularly electronic discovery.

In *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, Gummow, Hayne, Crennan, Kiefel and Bell JJ considered that judicial case management is now an "accepted aspect of the system of civil justice administered by Courts in Australia" and is "required to tackle the problems of delay and cost in the litigation process".[1] However, despite a legislative regime that provides for the Federal Court of Australia ("**Court**") to control discovery and complex litigation that demands it, judges are sometimes reluctant to fully engage in the task of understanding the scope of discovery, to test the utility of a particular discovery regime having regard to the issues in dispute, and to actively manage the discovery phase.

1.1 The statutory regime provides for the Court to regulate discovery

The Federal Court Rules ("**Rules**") provide that parties to proceedings must have the leave of the Court to file and serve a notice for discovery and that the Court may order discovery.[2] Practice Note CM 5 states that the Court will have regard to "the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit" in determining whether to order discovery.[3]

The Rules provide that the Court may limit the scope of discovery. It may order that discovery be limited to specific documents or classes of documents, or matters in question in the proceedings.[4] It may also order that discovery is not required at all. Practice Note CM 5 reinforces the expectation that the Court will eliminate or reduce the burden of discovery by stating that the Court "will not order general discovery as a matter of course" and "will fashion any order for discovery to suit the issues".

1 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 211.

2 Rules O 15 rr 1, 5.

3 Practice Note CM 5.

4 Rules O 15 r 3(1).

Practice Note CM 5 suggests that the Court will take an interventionist approach to the discovery process. The Practice Note provides that the Court expects practitioners to be able to state whether discovery is necessary at all, and if so for what purposes. The Practice Notes also states that practitioners should know whether those purposes can be achieved by a means less expensive than discovery, by discovery only in relation to particular issues or by discovery only of defined categories of documents.

The Court is also required to interpret and apply the Rules in the way that best facilitates the just resolution of disputes "according to law and as quickly, inexpensively and efficiently as possible".[5]

The Court is the notional gatekeeper to discovery. The Rules allow for the discovery process to be controlled by the Court, and Practice Note CM 5 suggests that the Court will unilaterally reduce the burden of discovery. The Court is provided with criteria to consider in any discovery application. Its broad discretion is guided by factors set out in the Rules and Practice Note CM 5. All of the necessary tools are available to the Court.

However, experience suggests that judges do not always use those powers to regulate the use of discovery so as to ensure that it is confined to document categories likely to assist in the resolution of matters in dispute. They are guided by the parties and, in most cases, consent orders are made without the parties' discovery proposals having been sufficiently tested by the Court and without consideration being given to the possible consequences of those orders, particularly in relation to the discovery of electronically stored information ("**ESI**"). While it is in the first instance the responsibility of the parties' legal advisers to craft discovery orders which sensibly balance cost and forensic value, there is an inevitable tendency (particularly where the parties have an imperfect understanding of their opponents' internal systems and records) to err on the side of caution and ask for too much rather than to take the risk of failing to uncover potentially vital documents. Further, there can be a tendency to "horse trade": Party A will accede to an overreaching request by Party B for fear that Party B will retaliate and oppose Party A's discovery request. The Court, as neutral arbiter, can control these tendencies. The Rules, the Act and Practice Note CM 5 allow the Court to control the scope of discovery and provide factors for judges to consider in exercising their discretion.

1.2 Judges need to engage with discovery

The use and production of electronic material in business has grown exponentially. This has led to the review, production and tender of massive volumes of documents in litigation. Active judicial management of the discovery process is essential to prevent discovery causing inordinate cost and delay. As Slicer J noted in *Mentyn v Law Society of Tasmania* [2004] TASSC 24 "modern practice and complexity require intervention".[6]

We endorse the requirement for leave for discovery of documents in civil proceedings in the Court. However, judges should not make orders for discovery (by consent or otherwise) without first turning their minds to the issues in dispute and the likely utility of the discovery sought. Amongst other things, judges should actively consider the factors outlined in the Rules and Practice Note

5 Federal Court of Australia Act 1976 (Cth) ("**Act**") s 37M(1).

6 *Mentyn v Law Society of Tasmania* [2004] TASSC 24, [50].

CM 5. Parties should be prepared to justify each request, having regard to the principles set out in Practice Note CM 5.

We agree with the Commission's preliminary view that the docket judge should manage the discovery process.[7] Practice Note CM 1 notes that the "overarching purposes of case management within the individual docket system is the *just* resolution of disputes as *quickly*, *inexpensively* and *efficiently* as possible".[8] The advantage of the docket system is that the judge is engaged in the particular matter, familiar with the issues and thus able to ensure the just and efficient conduct of the proceedings. We do not endorse any suggestion that special masters should manage discovery as a matter of routine. The docket judge has the greatest familiarity and engagement with the proceedings and accordingly is best placed to limit discovery obligations to the real issues in dispute. Referral to another judicial officer should only occur if required by the exigencies of a particular matter or unavailability of that docket judge.

1.3 A cultural shift in the judiciary

The Commission's preliminary view is that detailing the Court's case management powers in primary legislation may encourage the judiciary to confine the scope of discovery and reduce the burden of litigation. Whilst clearer statutory prescription may "raise awareness of the ways in which the discovery process can be managed and encourage greater and more effective use of case management powers", the Court already has sufficient power to regulate the discovery process. The Rules and Practice Note CM 5 outline with sufficient particularity the case management powers the Court may employ in determining an application for discovery.

It is unlikely that a legislative amendment in the form suggested will cause an immediate shift in judicial approach. Indeed, in 2000 the Commission recognised the need for Court supervision and control over the use of discovery in the Court.[9] Subsequently, the Rules were amended to require a party to obtain leave of the Court to file and serve a notice for discovery of documents.[10] Yet, precisely the same concerns are identified in the 2010 Consultation Paper and the authorities and sources cited by it.[11] The Commission noted "concerns that the Court has abdicated its responsibility for supervising the parties and managing the development of categories for discovery."[12] What is needed instead is a cultural shift.

1.4 Judges should be informed as to the nature of electronic discovery

Judges do not always test practitioners on the proposed conduct of electronic discovery. The method employed to retrieve, review and produce the material is generally left to the parties. Unless the issue is raised by a party, judges do not always balance the cost of retrieving and reviewing the material with the probative value of the documents sought to be obtained. Greater knowledge of the discovery process may lead to judges further engaging with these issues.

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7 Consultation Paper. [3.193].

8 Practice Note CM1, 2.1 (emphasis in original).

9 See Commission, *Managing Justice: A Review of the Civil Justice System,* Report 89 (2000) ("**Commission Report 89**") [6.73], [7.190].

10 *Federal Court Amendment Rules (No 3) 2002* (Cth).

11 Consultation Paper, [2.43]-[2.46], [3.83]-[3.84], [3.92], [3.99]-[3.100].

12 Consultation Paper, [3.85].

We submit that a greater emphasis should be placed on the education and training of judicial officers in the discovery process. It is our view that suitable education and training will better equip judges and further improve their awareness and understanding of the practical aspects of discovery including the costs involved. More informed judges will exercise greater control over the process and create a new culture of active judicial case management.

Judges should have some general understanding of the nature and process of electronic discovery, including standard document retention policies, document storage systems, standard legal databases (and the time and costs involved in maintaining them), and the use of outsourcing in the discovery process. In the manner proposed below, they should be given relevant information specific to the particular parties and matter to equip them to play an active role in monitoring and controlling the process.

Judges in the United Kingdom currently play a limited role in the discovery process; each party proactively discloses all relevant documents that both support and adversely affect other parties.[13] However, recommendations have recently been made by Lord Justice Jackson, which would require the judiciary to order discovery that would be "proportionate to the circumstances of the case". Lord Justice Jackson recommended that judges receive training in electronic discovery as a means of equipping them with the skills necessary to manage the cost of discovery.[14] Lord Justice Jackson also noted that "service providers will have a part to play in such CPD or training" within the context of a "well structured programme, which is provided or approved by the relevant professional bodies."[15] We support the introduction of similar training in the Court. We also endorse the Commission's preliminary views outlined in paragraphs 3.231 - 3.232 of the Consultation Paper.

2 Discovery plans and pre-discovery conferences

Submission

We agree that proposals 3-1 to 3-4 in the Consultation Paper have utility, but propose the following procedure to ensure appropriate and proportionate discovery orders are made particularly in relation to ESI:

- once a discovery application is made, each party should serve a discovery plan, which includes proposed discovery categories and procedures for identifying documents to be discovered;
- the plan should be accompanied by information concerning the party's hard copy and electronic documents relevant to matters in issue, including details of relevant storage systems, volume and location of documents, document retrieval requirements and costs etc;
- the parties should then meet and confer to attempt to prepare a

[13] Civil Procedure Rules 1998 (UK), Rule 31.6.

[14] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report (2009) [372] http://www.judiciary.gov.uk/ at 367.

[15] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2009) [367, http://www.judiciary.gov.uk/.

joint discovery proposal; and

- once a joint discovery proposal has been filed, the matter should then be listed for a pre-discovery conference at which time the Court will consider the appropriate discovery orders to be made.

The parties should be permitted to seek leave to waive these requirements in appropriate circumstances.

A new practice note should be issued in relation to this procedure.

An initial witness list and brief summary of expected testimony is not necessary, would inappropriately front-load costs and lead to unnecessary "fishing expeditions", directed to witness credit.

2.1 The current position

Practice Note CM5 does not impose any requirements on parties which assist in limiting the scope of discovery in proceedings. Whilst it does set out the expectations parties should have in relation to discovery, the statistics referred to in the Consultation Paper[16] make it clear that in most cases discovery orders are made by consent and so there is no guarantee that the parties have properly considered the time and costs involved in discovery or that they have been tested on the proposed orders by the Court. It is not uncommon for unforeseen difficulties, particularly with discovery of ESI, to arise after discovery orders have been made.

Practice Note CM6 only comes into effect after orders for discovery of ESI have been made. Moreover, Practice Note CM6 is expressed as an expectation rather than a requirement.

Most litigation now involves discovery of ESI. The volume of the electronic documents discovered will differ from case to case, but the issues in relation to them, including whether they exist and any difficulties involved in discovering them, should be considered at an early stage of the proceedings and certainly before discovery orders are made. As it presently stands, parties are not required to consider practical issues in relation to the discovery of ESI until after an order for discovery is made. Reform is needed so that the Court is apprised of all issues relevant to the discovery process before discovery is ordered.

2.2 The Commission proposal

Proposals 3-1 to 3-4 suggest that the following regime be implemented in relation to discovery orders:

(a) prior to a pre-discovery conference any party seeking an order for discovery is required to file and serve a statement or statements which sets out the following:

(i) a narrative of the factual issues;

(ii) a statement of the legal issues in order of importance;

[16] Consultation Paper, [2.66].

(iii) each document or category of documents which the party seeks discovery of and describes those documents which they reasonably believe are within the possession, custody or power of another party; and

(iv) an initial witness list and a brief summary of the expected testimony of the witness.

(b) a pre-discovery conference is set down to define the core issues in dispute in relation to which documents might be discovered. Presumably discovery orders or directions in relation to discovery would be made at the pre-discovery conference or shortly thereafter;

(c) where discovery orders/directions relate to discovery of documents in an electronic format, the following procedural steps are followed:

(i) the parties and their lawyers meet and confer to discuss a practical and cost-effective discovery plan in relation to ESI;

(ii) the parties jointly file with the Court a discovery plan which outlines the matters in relation to which the parties agree and disagree; and

(iii) the Court determines any areas of disagreement and makes any adjustments considered necessary to the discovery plan to ensure the proposed discovery and searches for ESI are reasonable;

(d) the Court may then make orders for discovery by approving the parties' discovery plan.

The above procedure has the advantage of requiring both the Court and the parties to consider more carefully whether and, if so to what extent, orders for discovery should be made. However, the procedure envisages that the Court will make directions in relation to the discovery of ESI before the parties are required to give a proper consideration to the time and cost involved in providing discovery of such documents or have adequate information about their opponents' documents and storage and retrieval systems, which is one of the downfalls of the current position. We believe that an alternative procedure should be adopted to address this.

2.3 Response to the Commission's Proposal

Procedure for discovery orders

We agree that the provision of a statement of facts and issues would be useful prior to a pre-discovery conference being held, but in many cases more detail about the ESI to be discovered would also be beneficial at this stage. In reality, parties are often making enquires in relation to the existence of the ESI and the process for retrieving and reviewing that information at an early stage of the proceedings in order to assess the costs involved in the discovery process. It would therefore seem sensible for the procedure for obtaining discovery orders to capture that information at an early stage and include a mechanism for having that information put before the Court at the time discovery orders are being considered.

In our view the following procedure would be more effective to ensure appropriate and proportionate discovery orders are made:

(a) once an application for a discovery order has been made the parties are required to serve a discovery proposal which sets out:

(i) a statement of the issues in dispute in order of importance;

in respect of discovery by another party:

(ii) each document or category of documents which the party seeks discovery of; and

(iii) a description of those documents which they reasonably believe are within the possession, custody or power of another party which may fall within those categories; and

in respect of a party's own discovery (and bearing in mind the categories of documents referred to in O 15 r 2(3)):

(iv) a summary of the location of potentially discoverable documents (eg archives, computer servers, email accounts, back up tapes) and the relationship between them (ie are the same documents likely to be stored in more than one place);

(v) a list of individuals, employees, agents or contractors who may hold relevant documents (categories may therefore be framed by reference to the individuals who hold, created or received documents so as to avoid the need for a more extensive and costly search); and

(vi) any difficulties or issues that they foresee arising with the discovery of documents. For example costs, time, confidentiality, accessibility of ESI and any potential gaps in ESI where, for example, emails are deleted after a certain amount of time.

It is common in relation to ESI for parties to seek to discharge their discovery obligations by using search terms to identify potentially relevant documents from a larger pool of data. Search terms are framed so as to balance, on the one hand, the risk of failing to detect relevant documents, and on the other hand, capturing a large number of irrelevant documents. Disputes often arise over the use of search terms and how they are framed. The protocol should require each party to disclose any search terms proposed to be used. Any similar proposal for automating the process should also be disclosed. Consideration should be given to requiring parties to disclose document storages (including ESI) which are to be excluded from the process on the basis that they replicate other groups of documents to be searched or believed, on reasonable grounds, to involve search and retrieval costs out of proportion to the likely value of any document set produced.

A party's discovery proposal should also indicate whether they consider documents to be reasonably accessible. For a further discussion of the factors relevant to that consideration see 6.2 below.

(b) once the parties have served their discovery proposals they are required to meet (in person or by phone) and confer with a view to preparing a joint discovery proposal, along the lines of the procedure set out in Proposal 3-4, but not limited to ESI. The purpose of this meeting is for

the parties to discuss, and to the extent possible agree, a proposal for discovery. The parties should prepare a joint discovery proposal which sets out:

(i) the legal issues in order of importance as agreed by the parties, or if agreement cannot be agreed, the statement from each party's discovery plan should be included;

(ii) the areas of agreement, including in relation to categories of documents for discovery and, where applicable, the proposed searches to be undertaken in respect of ESI; and

(iii) the areas of disagreement between the parties, including a description of the proposal by each of the parties in relation to these areas.

(c) once the parties have filed the joint discovery proposal the matter should be listed for the pre-discovery conference so that the Court can consider the following:

(i) what discovery orders should be made;

(ii) whether the areas of agreement in joint discovery proposal are appropriate and should form part of the discovery orders; and

(iii) how to resolve any areas of disagreement in the joint discovery proposal.

The outcome of the procedure will be orders endorsing a discovery plan which addresses the documents that need to be discovered and the process the parties are required to undertake in order to identify those documents, including the agreed reasonable searches that should be undertaken. Accordingly, in the ordinary course once parties have agreed on the discovery plan and the Court has made orders in accordance with it there should be no departure or modifications arising should further documents be located in the future. This is a key issue for large corporate defendants when dealing with huge volumes of both electronic and hard copy documents. Expansion of discovery categories often requires retrieval processes to be repeated at considerable cost.

This procedure will require parties and the Court to properly consider all aspects of discovery, including the costs and time involved in discovering ESI, before discovery orders are made, rather than orders being made in a vacuum and those issues being addressed only after such orders are made and costs incurred.

The procedure should also result in fewer issues arising with the discovery process after discovery orders have been made, particularly issues with ESI.

Where the parties to the proceedings consider that the procedure is unnecessary in the context of particular proceedings, for example where very limited discovery will be sufficient, it would be open to the parties to make an application for limited discovery and seek to have the requirements for the provision of discovery plans waived by the Court.

Guidance in relation to this procedure

A new practice note would be necessary to outline the procedure and provide guidance to parties in relation to it. The practice note should set out issues the

parties need to consider in relation to ESI along the lines of the information in the questionnaire attached to the UK practice direction.[17] While we do not think the parties should be required to complete a questionnaire of this kind, the questions included in that document are a useful guide as to the issues that parties should be considering in relation to ESI, for example where ESI is located and how that information could be searched for potentially relevant documents.

Witness list

In general, we do not believe that introducing a requirement to provide an initial witness list and a brief summary of the expected testimony of each witness is necessary, though it may be appropriate for particular cases or classes of cases. To require parties to provide a summary, even a brief summary, will front-load costs in relation to evidence preparation and the benefit of such a summary is limited in circumstances where the parties have not had discovery of documents relevant to the proceedings. The provision of a list of persons who may hold relevant documents, including employees where a party is a company, should have the desired effect and does not require unnecessary work at an early stage of the proceedings. Such disclosure may prompt requests for discovery of documents directed to potential witnesses' credit, and thus increase the discovery burden.

Costs

While the above procedure may result in greater costs being incurred by parties before discovery orders are made, we believe it will reduce the overall costs incurred as it will promote a more efficient discovery process.

The procedure also reflects work that is already being undertaken in practice or which should be undertaken at this early stage to ensure that appropriate and proportionate discovery orders are made. In large litigation, where parties are aware that some form of order for electronic discovery is likely to be made, parties will typically discuss the process necessary to obtain and review ESI with IT experts (whether in-house or external consultants) at an early stage, and often before any order for discovery is sought. Clients want to know the likely costs involved in litigation, and especially discovery, and these enquiries are necessary to assess that.

Other concerns

The concern that parties will prepare ill-considered or under-developed plans is countered by the fact that there will be an incentive for parties to develop a plan properly where they know it is required by the Court (rather than just expected) and will be actively reviewed by the Court. The purpose of the plan is to ensure that discovery is only provided to the extent that is necessary and reasonable in the context of the proceedings. However, judges will need to be diligent in enforcing these requirements so that parties know that ill-considered plans will not be accepted by the Court.

[17] *Practice Direction 31B: Disclosure of Electronic Documents*

3 Key documents

Submission

A new procedure for the identification and exchange of key or core documents early in the proceedings is not necessary. Existing procedures are sufficient.

3.1 Proposal for the exchange of key documents before discovery

A procedure whereby parties are required to identify and exchange key or core documents early in the proceedings is not necessary. The Rules already provide a mechanism for the provision of documents referred to in the pleadings (see O 15 r 10). Documents which are relevant to the proceeding should be referred to in the claim or at the very least particularised and production of them can be sought under the Rules. To the extent that the particulars are inadequate and do not refer to relevant documents, this can be dealt with in the usual course by a request for further and better particulars.

A procedure that requires the exchange of key documents after pleadings and before discovery is, in our view, unlikely to significantly reduce applications for discovery orders. Further, it is likely to result in disputes between the parties as to what constitutes a "key document", rather than facilitating the provision of documents outside of a discovery process or to obviate the need for discovery completely. Therefore, on balance we think, it will only add a further (and unnecessary) step to the litigation process with little or no practical benefit.

4 Rule clarification

Submission

The Rules should be amended to:

- provide that, subject to contrary order, a party must only enumerate the documents which are or have been in their possession, custody or power within the last six months prior to the commencement of the proceedings; and
- provide that a party need not discover a document if it wholly came into existence after the commencement of the proceedings.

4.1 Documents no longer in the possession, custody or power of a party

The Rules currently provide that a party must enumerate the documents which are or have been in their possession, custody or power.[18] Order 15 rule 6(6) requires a party to state, as to any document which was but is no longer in their possession, custody or power, when they parted with it and what has become of it.

The Uniform Civil Procedure Rules (NSW) ("**UCPR**") take a different approach. Part 21 rule 3(2)(a)(ii) of the UCPR requires only that a party enumerate

[18] Rules O 15 r 6(2).

documents that are not, but that *within the last 6 months prior to the commencement of the proceedings have been*, in the possession, custody or power of the party.

We consider that the approach taken in the UCPR is preferable. It is unrealistic for a discovering party to account for documents that ceased to be in its possession, custody or power for an indefinite period prior to the commencement of the proceedings. We submit that the Rules be amended to provide that a party must enumerate the documents which are or have been in their possession, custody or power within the last six months prior to the commencement of the proceedings.

4.2 Documents coming into existence after the commencement of proceedings

Under the Rules, parties have an obligation to discover documents that come into existence after the commencement of proceedings. In New South Wales, the UCPR excludes from discovery "any document that wholly came into existence after the commencement of the proceedings".[19]

While it is important that parties have an ongoing obligation to discover pre-existing documents that come to their *attention* once the "official" discovery process has concluded, they should not be required to discover documents that come into *existence* after proceedings have commenced unless the Court so orders having regard to the matters in dispute.[20] Many (if not most) of these documents would be the subject of legal professional privilege, and it is arguable that the probative value of the remainder would be negligible. Requiring the discovery of documents that come into existence after proceedings have commenced also introduces greater confusion and uncertainty into the discovery process, increasing costs and delay in preparing for trial. We suggest that Order 15 rule 5(4) of the Rules be amended to provide as follows:

> (4) However, unless the Court otherwise orders a document is not required to be disclosed if:
>
> > *(a) the document wholly came into existence after the commencement of the proceedings; or*
> >
> > *(b)* the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given.

4.3 Application of "possession", "custody" and "power" to electronic discovery

"Possession", "custody" and "power" are not defined in the Act or the Rules. Case law on the meaning and application of these words developed in the era of paper discovery. Given the quantity of ESI involved in a typical discovery, the scope of these concepts may need to be reviewed.

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19 UCPR, Part 21 rule (1)(c).

20 For example, documents going to relief including quantification of loss or an account of profits may be generated after proceedings have commenced.

5 Costs sanctions to prevent inappropriate discovery practices

Submission

Existing controls on costs and charging practices are adequate. An additional layer of regulation, such as giving the Court an explicit statutory power to limit costs to the "actual costs" of discovery, would be unlikely to assist and could give rise to additional litigation.

There should be no presumption that a party requesting discovery of documents pay the estimated cost in advance. However, the Court should have power to so order in appropriate cases and an advance payment may be appropriate for discovery of data that is not "reasonably accessible".

Taxation of the costs of discovery should provide for recognition that electronic discovery frequently requires for parties to incur "internal" costs and requires the assistance of IT experts and other non-legal service providers; provision should be made for the recovery of some part of those costs.

5.1 Giving the Court additional powers to restrict costs

The Court should not be given explicit statutory powers to limit solicitor-client costs to the "actual costs" of carrying out the work.[21] The importance of discovery to achieve fair outcomes in litigation and the need to ensure legal input and oversight into the process is highlighted in the Consultation Paper. Limiting recovery for work in connection with that process to cost treats it as only a minor administrative process which is inconsistent with a policy of reinforcing the professional and ethical responsibility of lawyers and their duties to their clients and the Courts.

As noted by the Commission in paragraphs 3.213 and 3.218 of the Consultation Paper, the Court's legislation and the various State and Territory costs disclosure/assessment and professional discipline regimes are capable of dealing with instances where law firms engage in inappropriate charging practices. An additional layer of regulation would be unlikely to assist in containing discovery costs. In any event, creating an additional power could give rise to additional litigation about such matters as what constitutes the "actual" or "reasonable" costs of carrying out discovery.

In the case of large-scale litigation, costs and charging practices are also controlled by the highly competitive nature of the market for legal services, and by the nature of the clients who are involved in large scale litigation . These clients are generally commercially astute and in a position to negotiate legal fees and costs and monitor the work being done.

5.2 Presumption of advance payment

There should not be a presumption that a party requesting discovery of documents pay the estimated cost in advance. As suggested in paragraph 3.209

[21] See Consultation Paper, [3.204]-[3.219].

of the Consultation Paper, this would most likely result in satellite litigation seeking to rebut the presumption or dispute the amount of any estimate. As noted in paragraph 3.206 of the Consultation Paper, an additional problem may arise in that a party who makes an advance payment but is ultimately successful in proceedings may be unable to recoup those costs. Requiring advance payment could prevent some parties from obtaining discovery, and might be used by others as a means of denying their opponents access to justice.

Where, however, a party is required to discover data that is not "reasonably accessible" (see 6 below), it is submitted that some or all of the cost of extracting or retrieving that data (eg from back-up tapes) might be borne by the party requesting it. In such cases, an advance payment may be appropriate to cover some or all of the costs of putting the data in "reasonably accessible" form.

5.3 Electronic discovery and the costs of IT experts

Law firms frequently work with forensic IT specialists (either employed or retained by the firm) for the purposes of giving electronic discovery. Use of these specialists is essential to the location, retrieval, organisation and production of electronic data. However, the Court's current taxation regime does not always permit recovery of the costs of such experts where they are in-house. In our experience there is a tendency for a successful party to recover a greater percentage of these costs if they are incurred as a disbursement by using an external expert.

6 Discovery of data that is not "reasonably accessible"

Submission

The Rules or Practice Notes should limit discovery to data that is "reasonably accessible" unless otherwise ordered.

The Practice Note should indicate the factors to be considered when determining which data, in a given case, is "reasonably accessible" and not "reasonably accessible".

The Court should have the power to order, where discovery of data that is not "reasonably accessible" is ordered, that the party requesting the data meet some or all of the costs of restoring that data to an "accessible" form, after which ordinary costs principles should apply.

As noted in paragraphs 3.71 and 3.75 of the Consultation Paper, the critical issue in electronic discovery is whether the conduct of any search for electronic data is reasonable. This test raises considerable uncertainty amongst parties and their advisers when determining whether they should be required to search through back-up tapes or disaster recovery systems to obtain electronic data.

We submit that this issue could be addressed by the Rules or Practice Notes stipulating that, unless the Court orders otherwise, discovery should be limited to data that is "reasonably accessible" in the course of the discovering party's business/conduct. While parties should be required to indicate the existence of data that is not "reasonably accessible" in the course of their business/conduct, it

should not be presumed that parties are required to discover this data. If a party requires another party to discover this data:

(a) they should be required to demonstrate to the Court that this is appropriate (eg that the data would have significant relevance or probative value and cannot be obtained in any other way); and

(b) the Court should consider "cost-shifting" (ie the party requesting the data paying some or all of the expenses associated with making the data "reasonably accessible").

As proposed in 2.3 above, information exchange prior to a pre-discovery conference should include disclosure of the existence of such data, its likely utility and the cost of data retrieval and review. Parties should disclose any proposal not to retrieve or review such data.

6.2 What is "reasonably accessible"?

It is not possible to formulate fixed rules about whether data is reasonably accessible in the ordinary course of business, but the Practice Note should list the factors that the Court must consider when deciding this question, including:

(a) the purpose for which the data is being held in its current format (eg why has it been stored in this way/for what purpose?);

(b) the party's historical use of the data (eg do they access it regularly?);

(c) the format of the data (eg data which is stored in such a way as to require forensic expertise to restore it to usable form); and

(d) the method(s) required to access the data and the time and costs involved in accessing the data.

6.3 When should discovery be ordered of data that is not reasonably accessible?

The United States' Federal Rules of Civil Procedure stipulate that, unless the Court orders otherwise, parties need search and produce only from "reasonably accessible" sources of electronic information, provided that they also identify to the other side those sources which are "not reasonably accessible". The party requesting the data, if it requires production of data that is "not reasonably accessible", must establish that there is just cause for its production. Some of the factors to be considered when deciding whether the documents are to be produced are:

(a) the burden or expense outweighs the data's likely benefit or relevance;

(b) the request is unduly cumulative or duplicative;

(c) the quantity of data involved;

(d) a party's inability to obtain the same or equivalent information from more accessible sources;

(e) the magnitude of the issues at stake in the litigation; and

(f) the resources of the parties involved.[22]

Similarly, English Courts dealing with requests to discover backup tapes have refused to order discovery unless it is established that there is a sufficient likelihood of retrieving information that is both relevant and significant.[23] Regard has also been given to whether the data sought would overlap with other data already available.[24]

The Sedona Conference has also recommended an approach that presumes that data that is not "reasonably accessible" should not ordinarily be discoverable:

> *8 The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.*[25]

6.4 When should the costs of retrieving data that is not "reasonably accessible" be shifted to the party requesting the data?

If the Court decides that a party should be required to discover data that is not "reasonably accessible", consideration should be given to whether the party requesting the data should meet some or all of the costs of extracting that data. We submit that only the cost of restoring the data to "reasonably accessible" form might be shifted to the requesting party. Once that task has been completed, ordinary costs principles should apply.[26]

The following factors were considered in *Zubulake v UBS Warburg LLC* when considering whether and to what extent the cost of restoring backup tapes should be shifted to the party requesting them, though the Court cautioned against a mechanical application of these factors:

(a) the extent to which the request is specifically tailored to discover relevant information;

(b) the availability of such information from other sources;

(c) the total cost of production, compared to the amount in controversy;

(d) the total cost of production, compared to the resources available to each party;

(e) the relative ability of each party to control costs and its incentive to do so;

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22 See United States' Federal Rules of Civil Procedure Rule 26(b)(2)).

23 See *Fiddes v Channel 4* (28 January 2010), approved [2010] EWCA Civ 516 URL: http://www.bailii.org/ew/cases/EWCA/Civ/2010/516.html

24 See *Picard (Representative of Bernard L. Madoff Investment Securities LLC) v FIM Advisers Llp* [2010] EWHC 1299 (Ch) (27 May 2010) URL: http://www.bailii.org/ew/cases/EWHC/Ch/2010/1299.html

25 The Sedona Principles for Electronic Document Production, Second Edition, Principle 8.

26 See eg *Zubulake v UBS Warburg LLC* 217 FRD 309 (United States District Court for the Southern District of New York 2003).

(f) the importance of the issues at stake in the litigation; and

(g) the relative benefits to the parties of obtaining the information.[27]

7 Ensuring professional integrity: ethical obligations and discovery

Submission

The Rules about discovery by categories need to clarify whether discovery by categories removes the need for any separate consideration of whether documents fall within O 15 r 2(3) of the Rules.

The delegation of discovery should be left to the parties and their lawyers to organise, subject always to the ultimate responsibility resting with the solicitor on the record.

Lawyers' existing ethical obligations are adequate and appropriate safeguards against abuse of the discovery process. The existing disciplinary structures for misconduct and its reporting are sufficient.

There should be an additional requirement in the Rules that, as a pre-requisite to discovery orders being made or a discovery notice being issued under O 15 of the Rules, a lawyer certify to the Court that the lawyer has complied with his or her key discovery-related obligations.

There is no need for additional professional conduct rules specifically relating to discovery.

There should be no special limit on recovery by law practices of costs for discovery. Existing regulations are sufficient.

We support the development of a practically focused commentary on the rules and obligations governing the proper conduct of discovery.

We recommend the development of a standard set of guidelines reflecting parties' discovery obligations, including in relation to electronic discovery which could be set out in a practice note or as a schedule to the Rules.

Existing legal education about discovery is sufficient.

7.1 Lawyers' approaches to discovery in the Court

Whether or not a particular document is relevant (for the purposes of discovery) is a matter about which competent and reasonable lawyers may legitimately form different views. This is perhaps inevitable given the complexity and range of issues in some proceedings and the trend towards ordering discovery by extensive and carefully drafted categories. However, notwithstanding the scope for differences of opinion of this kind, our experience is that lawyers involved in Court proceedings are generally diligent and conscientious in determining whether particular documents are discoverable.

[27] *Zubulake v UBS Warburg LLC* 217 FRD 309 [32] [323].

Paragraph 4.48 and questions 4-1 and 4-2 of the Consultation Paper raise the issue of what lawyers do when they encounter:

> *4-1 a document that falls within the scope of a discovery request or order but is not substantially relevant to the issues in dispute; or*
>
> *4-2 a document that is relevant but potentially falls outside the scope of a discovery request or order.*

These issues, while classified in the Consultation Paper as ethical problems, arise in part from ambiguity in the Rules. Order 15 r 2(3) stipulates that the documents required to be disclosed are:

> *any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given:*
>
> *(a) documents on which the party relies; and*
>
> *(b) documents that adversely affect the party's own case; and*
>
> *(c) documents that adversely affect another party's case; and*
>
> *(d) documents that support another party's case.*

However, this sub-rule is subject to Order 15 rule 3, which provides that the Court may order that discovery ". . . be limited to such documents or classes of documents, or to such of the matters in question in the proceeding, as may be specified in the order".

We consider below the following two issues when discovery has been ordered to be given by reference to specific documents or categories of documents:

(a) how legal practitioners generally treat relevant documents that do not fall within the categories specified in the discovery order; and

(b) whether the party giving discovery must simply produce all documents falling within the description of the documents or categories of documents, or must also test each document against paragraphs (a)-(d) of rule 2(3).

Where relevant documents fall outside discovery categories

Where discovery occurs by means of categories, the general approach is that if a document is relevant to issues in the proceedings but does not fall within any discovery category, it is not considered to be discoverable and is not produced. Of course, this does not mean that lawyers are free to completely disregard the existence of such documents. For example, the duties imposed by the various professional conduct rules on legal practitioners not to mislead the Court or an opposing party mean that a lawyer cannot represent to the Court that:

(a) a document does not exist, if the lawyer is aware that that the document does exist, but has not been required to be discovered; or

(b) that a particular state of affairs exists, if the lawyer is aware from a relevant but not discoverable document that the state of affairs does not exist.[28]

However, when discovery has been properly given by way of categories, in the absence of a further order for discovery or production by other means, there is no general residual duty upon a party to discover or produce all other relevant documents. This reflects the position that where discovery categories are used, it is because the parties or the Court have decided to balance the risk that some relevant documents may ultimately fall outside those categories against the benefit that the use of categories will reduce the overall discovery burden on the parties. The use of categories "displaces" the general discovery obligation to identify all relevant documents, by limiting the classes of documents that need to be identified and considered.

Where categories are used, do categories "displace" the search for relevance?

It is not clear whether an order for discovery of specific documents or categories of documents requires the party giving discovery simply to produce all documents falling within the description of the documents or categories of documents, or whether the party must also test each document against paragraphs (a)-(d) of rule 2(3). Our experience is that different approaches are sometimes adopted.

There is authority in the Federal Court that suggests that when discovery is ordered to be given by reference to categories, all of the documents falling within the categories must be discovered, regardless of whether those documents are relevant or whether they fall within the classes set out in Order 15 rule 2(3).[29] Although it is open to the parties or the Court to include a supervening requirement that a document must also be relevant in order to be discovered, or to incorporate the requirements of Order 15 rule 2(3) into the discovery orders, this is not the default position.

This approach - where categories displace relevance - is supported by decisions in the Supreme Court of New South Wales ("**Supreme Court**"), where a similar issue has arisen. Rule 21.2 of the UCPR relevantly provides that the Court may order discovery of documents within a class or classes specified in the order. These rules gave rise to the question of whether a party giving discovery by classes of documents was also to consider the relevance of each document. It was held that, in ordering discovery by classes or categories of documents, the Supreme Court "should consider the relevance of the classes of documents to the issues in the proceedings", so that the issue of relevance is "superseded" by the terms of the order.[30] In other words, the question for the party giving discovery is "whether a document under consideration falls within the terms of the Court's order, regardless of whether the party who is subject to the order believes the document to be relevant to a fact in issue".[31] This conclusion was said to follow from *Telstra Corp v Australis Media Holdings Pty Ltd* (unreported, NSWSC, McLelland CJ in Eq, 10 February 1997), where his Honour held that if the Court

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28 See Consultation Paper at [4.51] – [4.52]; also *Guss v Law Institute of Victoria Limited* [2006] VSCA 88 at [40].

29 *Australian Competition & Consumer Commission v Advanced Medical Institute Pty Ltd* [2005] FCA 366, [22].

30 See eg *Priest v New South Wales* [2006] NSWSC 12, [136]; *Falk v Finlay* [1999] NSWSC 1284, [43].

31 *Falk v Finlay* [1999] NSWSC 1284 [43].

chooses to order discovery of documents described by their nature rather than their relevance, questions of relevance were rendered otiose.

An amendment was made to rule 21.2 of the UCPR by the addition of subrule (4), which provides that "[a]n order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue". In *Owen v Barclays Bank Plc* [2010] NSWSC 1225, Hislop J held that, by consenting to an order for discovery by categories, the parties had accepted that the documents falling within the identified categories were relevant to a fact or facts in issue. His Honour concluded that it was wrong for a party to apply a "dual test" to discovery by deciding whether a given document fell into a particular category, and then determining whether it was relevant. [32]

Given the increasing adoption of discovery by categories, we therefore recommend that the Rules be amended to clarify whether discovering parties are to conduct a "dual test" (ie consider whether a document falls within a category **and** whether paragraphs (a)-(d) of O 15 r 3(3) are satisfied), or whether it is sufficient that the document falls within one or more of the categories.

If categories are not carefully considered, or where the existence of certain types of documents was not necessarily contemplated when the categories were formulated and approved by the Court, this often leads to the discovery of irrelevant documents or types of document, sometimes in substantial numbers. No legitimate criticism can be made of the parties (or their lawyers) for producing such documents, given that (as noted above) current authority indicates that where discovery categories are used, the parties are obliged to produce all documents falling within the categories, regardless of relevance. This increases the burden and cost of discovery, with no significant benefit to the parties or the Court. While the problem can be managed by sensible negotiation between the parties, it is not always possible or practical to do so.

This is a further reason to ensure that the matters set out earlier in this submission regarding the increased involvement of judges in controlling discovery and the importance of effective pre-discovery conferences are reflected in the Commission's ultimate recommendations.

Formulation of categories

As the Commission has identified, one of the factors that contributes to a high discovery burden is the increase in the amount of potentially relevant material that is being created and retained due to modern business practices and developments in information technology. In this context, if the result of being required to give discovery by categories is that a party must locate and review effectively the same overall body of documents that would need to be identified and reviewed in general discovery, the use of discovery categories is unlikely to substantially reduce the overall discovery burden on that party.

This emphasises the need to adopt appropriate reform measures that are designed to promote:

(a) the active and informed involvement of judges in the discovery process, in order to control and manage discovery efficiently; and

[32] *Barclays* Bank *Plc [2010] NSWSC 1225, [20]-[21]*

(b) accurate and full pre-discovery disclosure of the information parties require in order properly to formulate discovery categories that are most likely to obtain relevant documents in the most efficient way, and ensure that opposing parties are not designing categories in order to avoid discovering forensically significant documents.

The delegation of responsibility for reviewing and categorising documents

In any discovery, there should be an appropriate balance between the degree of seniority of lawyer who is engaged to review potentially discoverable documents and the costs of performing such a review. The more senior and experienced the lawyer, the greater the cost. On the other hand, the use of non-lawyers or lawyers who are unfamiliar with the issues in any given matter may give rise to a false economy which diminishes the effectiveness of the discovery process by necessitating a degree of double handling by lawyers required to review and correct decisions taken on an initial review.

In our experience, these issues generally only emerge as a critical logistical challenge in large-scale discoveries. As we have said elsewhere in this submission, such cases are exceptional. However, when they occur, very large discoveries are usually conducted by deploying more junior lawyers to perform the initial review of potentially discoverable documents, with appropriate oversight and supervision by more experienced lawyers, who also conduct reviews of documents which might involve more difficult decisions, for example about the existence of legal professional or other privilege.

Most junior lawyers in our firms are given carefully designed, internally-conducted training to ensure that they are familiar with the relevant discovery obligations and duties, to supplement the training provided in their undergraduate degrees and mandatory legal professional education. They are also properly inducted into matters to ensure that they have a good appreciation of the issues in the proceedings, and so can make informed judgments about the relevance of issues and documents.

These measures ultimately make the discovery process more efficient and cost-effective. Alternative approaches, such as providing material on an agreed without prejudice basis (so enabling the provision of material before it is carefully reviewed), or retaining non-lawyers to perform less rigorous reviews of material, usually mean that the burden of reviewing material is shifted onto other parties, or delayed for some period, but not ultimately avoided.

In our view, provided the persons conducting the initial review are familiar with the issues in the proceedings and are familiar with the rules and principles that govern discovery, the approach described above and currently in use represents an appropriately cost-effective and responsible model of conducting large-scale discovery reviews.

While the practice of outsourcing discovery review processes to overseas service providers is not yet widespread in Australia, we are aware that it occurs in other jurisdictions. Our views about the preferred approach to conducting discovery reviews, set out in this section, would apply with equal force to such processes. Concerns may in some cases arise as to whether outsourcing discovery processes to a service provider is consistent with the obligations owed to the Court by the legal practitioner on the record, depending on the particular activities chosen to be outsourced. This issue should be monitored.

7.2 Abuse of the discovery process

Our general experience

As we stated above, in general, our experience is that lawyers are diligent and conscientious in ensuring that they, and their clients, do not abuse the discovery process.

Instances of parties or lawyers deliberately abusing the process for improper purposes are extremely rare. If a party is intent on deliberate non-compliance with their discovery obligations, and this becomes clear to the party's lawyer, the lawyer's duties are clear (see below). In our experience, a party who is counselled to observe the relevant discovery obligations almost invariably does so, without the lawyer being required to cease acting and withdraw from the case.

At a practical level, it is worth noting that lawyers involved in litigation in the Court operate in a highly competitive legal market. The good reputations of individual lawyers and law firms with substantial litigation practices are a valuable asset in such a market, and operate as an added incentive to comply with best practice, and so maintain the confidence of the Court, other law firms and of current and potential clients.

Common law obligations applicable to solicitors involved in discovery

Solicitors owe a number of obligations both to the Court and their clients when engaged in litigation, including discovery. In broad terms, solicitors are charged with the duty of advising their clients on the nature of discovery, scoping the discovery, and obtaining and reviewing the material required to be discovered.

Without being exhaustive, the most important common law discovery obligations of solicitors include the following:

(a) the solicitor has a positive duty to advise their client of their client's obligations. "It is not sufficient for the solicitor simply to enquire of his client or of a principal … if he has any documents and request that he send any documents he has to him… the solicitor is obliged to make an appraisal of the case and form his own opinions as to what documents probably are in existence and actively to seek out from the client or his interstate or foreign principal whether or not those documents exist"[33];

(b) the solicitor must take positive steps to ensure that the client appreciates, at an early stage in the proceedings, the obligations of discovery, its width and the importance of not destroying documents that might have to be disclosed;[34]

(c) if the client is a corporation, the solicitor must ensure that the discovery obligations are explained to anyone in the corporate organisation who may be involved;[35]

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[33] *Ferguson v Mackaness Produce Pty Limited* [1970] 2 NSWR 66 at 68; see also *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 435, [8].

[34] *Rockwell Machine Tool Co v EP Barrus (Concessionaires) Ltd* [1968] 2 All ER 98, 99; *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164, [369]–[370].

[35] *Rockwell Machine Tool Co* v *EP Barrus (Concessionaires) Ltd* [1968] 2 All ER 98, 99.

(d) the solicitor must examine the documents discovered by the client to ensure, as far as possible, that no relevant documents have been omitted;[36] and

(e) if a client insists on incomplete discovery or does not provide sufficient information for an accurate list of documents to be prepared, the solicitor should withdraw from the case.[37]

The common law duties stated above are owed by the solicitor to the Court as an officer of the Court.[38] Failure by a solicitor to properly perform these obligations may amount to professional misconduct.[39]

Discovery requirements under the Rules

Order 15 rule 6(8) of the Rules require solicitors to certify on the discovery list that according to the solicitor's instructions, the list and the statements in the list are correct.

While this obligation broadly incorporates some of the common law duties described above, there is no specific, positive duty on solicitors to actively participate in the discovery process. Under the current formulation of the Rules, solicitors may rely on their client's instructions that adequate disclosure has been made.

The wrongful destruction of documents

In our experience, the deliberate destruction of relevant and discoverable documents in anticipation of, or during, litigation by a party is a rare occurrence.

As set out in the preceding section, solicitors owe a duty to the Court to ensure that discovery is given properly. When deliberate document destruction by a client occurs and a lawyer becomes aware of it, a lawyer's ethical duties are clear. In our view, the civil and criminal consequences for litigants who destroy relevant documents are, when combined with a proper awareness on the part of their legal advisers of the legal adviser's duties in these situations, sufficient to address this type of conduct.

In addition, the technological advances and increasing use of electronic communication seen in the last 10 to 20 years mean that it is in any event much more difficult to destroy all traces of a document, especially electronically transmitted or stored documents, than it may have been in earlier times. If a person deletes an email from his or her computer in an attempt to conceal it, there generally remain multiple copies of that email on the sender's or recipient's (as the case may be) computer and on various intermediate email servers and repositories. Apparent gaps in the documentary record can be explored under the close scrutiny of cross-examination. For those reasons, attempts to delete documents can nowadays be more easily detected as the forensic process unfolds.

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36 *Woods v Martins Bank Limited* [1959] 1 QB 55, 60.

37 *Myers v Elman* [1940] AC 282 at 293; *Brookfield & Septic Products Australia Pty Ltd (in liq) v Davey Products Pty Ltd* (1998) ATPR 41-635, 41,010.

38 *Woods v Martins Bank Limited* [1959] 1 QB 55, 60; *Council of the Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408, 471; *Guss v Law Institute of Victoria Limited* [2006] VSCA 88, [39].

39 *Ferguson v Mackaness Produce Pty Limited* [1970] 2 NSWR 66, 68.

7.3 Informing lawyers and litigants about their responsibilities

The existing framework is sufficient

As the Commission has noted, lawyers and parties are already subject to substantial obligations in connection with discovery.[40] Many of the common law obligations of solicitors are set out in part 7.2 above.

Subject to some suggested improvements described below, the existing ethical duties upon lawyers and litigants in connection with discovery are an effective preventive and corrective force against abuses of the process. The existing framework of professional conduct rules, Court rules, Practice Directions and the common law impose appropriate obligations on lawyers and gives significant but appropriate powers to the Court. In our view, what is required are measures that will encourage all participants to become more engaged in the process of discovery before problems can arise.

Solicitor's certificate in relation to discovery obligations

Stakeholders have commented that parties (and their lawyers) abuse the discovery process. The Commission notes that parties make unnecessarily broad discovery requests and sometimes flood their opponents with irrelevant documents. Indeed, the Consultation Paper makes reference to achieving cultural change within law firms and ensuring professional integrity.

It is our view that concerns about deliberate abuse of the discovery process are overstated and, in large part, unsupported by evidence. However, to address any residual concern we believe there is merit in requiring practitioners to certify that they have given advice to their clients about the discovery process, including the potential costs consequences of discovery, before discovery orders are made. We do not anticipate that such certification would require any additional steps to be taken in the discovery process, but would rather ensure that advice, which most practitioners are already providing clients, is given consistently and at an appropriate time.

In addition to this, we consider that there is genuine merit in the development of 'best practice' guidelines that may be formally adopted and referred to by the profession when advising clients as to their discovery obligations. These guidelines could be adopted as a Practice Note or schedule to the Rules. It is our view that the development of expert witness guidelines that have been adopted in a number of jurisdictions (for example, Practice Note CM 7 Expert witnesses in proceedings in the Federal Court of Australia) have been a beneficial development and in a similar manner we believe the implementation of discovery guidelines would be of general benefit to the courts, parties and the legal profession as a whole.

In our view, if implemented together with other recommendations in this submission, a formal certification to be given at the time discovery orders are sought, will help to ensure that proposed discovery orders are appropriate and targeted to a just and efficient outcome. The additional certification requirement will also provide a formal measure against which lawyers may satisfy themselves that they have complied with their professional obligations in this area.

A requirement on the part of a lawyer to certify that certain things have occurred in the process of formulating a discovery proposal is similar to the now-familiar

[40] Consultation Paper, [1.32]-[1.34].

requirement to certify the proper basis of each allegation, denial or non-admission made in a pleading,[41] which in our view has been a positive development.

We consider that the solicitor's certificate should include three elements, which are discussed below.

(a) Explanation of discovery obligations to client

The Court rules in a number of State and Territory jurisdictions require solicitors to certify that they have advised their client of their client's discovery obligations.[42] We submit that similar certification should be required in the Court at the time discovery orders are sought. A formal certification requirement that the solicitor has provided their client with the 'best practice' guidelines and discussed the guidelines with them would reinforce and remind solicitors of their significant obligations to actively participate in the discovery process and ensure that parties are fully aware of their discovery obligations prior to orders being made. It would also give litigants greater confidence that the disclosure obligations on both sides had been properly discharged.

(b) Costs of discovery

We submit that, in addition to a statement that the solicitor has explained the discovery obligations to their client, the solicitor's certificate should include a statement confirming that the solicitor has discussed with their client the potential cost consequences of seeking the proposed discovery orders and also complying with discovery orders proposed by other parties. Costs are an important consideration of the discovery process; solicitors should (and in practice do) discuss discovery costs with their client, including the likely costs burden to which the client may become subject in relation to the other party's discovery.

It is not envisaged that practitioners will be required to have provided a formal cost estimate to clients at the time the certificate is provided, although that would obviously be sufficient for the purposes of the certificate, but rather to ensure they have discussed the likely costs involved. In our experience lawyers have these discussions with their clients at various stages of the discovery process, the purpose of the certificate is to ensure that the Court (and therefore the public) are aware that the discussions have taken place and that parties and their lawyers have considered the likely costs involved in discovery, prior to any order being made.

An understanding of the cost and extent of discovery is likely to be critical to the client's decision as to whether to settle the dispute, and the appropriate amount for which the client is willing to settle. Specific certification by solicitors would provide greater certainty that this important discussion about the costs of discovery has been conducted.

(c) Documents sought are probative to matters genuinely in issue

The Consultation Paper discusses issues relating to the broad scope of discovery and the costs wasted on searching for, producing and reviewing documents that

[41] Compare Rules O 11 r 1B

[42] Court Procedures Rules (ACT) r 608(4), Uniform Civil Procedure Rules (NSW) r 21.4, Uniform Civil Procedure Rules (Qld) r 226(1), Rules of the Supreme Court (WA) O 26 r 16A.

are ultimately irrelevant and are disproportionate in number to what is required to resolve the dispute. Many documents produced are never referred to at trial. Parties may also use discovery to engage in a "fishing expedition".

We agree with the Commission's preliminary view that cultural reform through changes to discovery practice and procedure will be more effective in reducing the time and expense of discovery than narrowing the test for the scope of discovery set out in the Rules.[43]

We suggest that amending the Rules to require solicitors to certify that their client seeks discovery of documents that are believed on reasonable grounds to have probative value in relation to matters genuinely in issue would help to reinforce desirable discovery practices on the part of solicitors and their clients.

The certification requirement, in conjunction with the proposal for the preparation of a discovery plan discussed in 2.3 above, would encourage solicitors to hold specific discussions with their clients with a view to narrowing and clarifying the issues in dispute at the time that discovery categories are formulated. A certification requirement would be likely to increase the amount of direction and assistance given by solicitors to clients in deciding whether or not documents are relevant and probative and should therefore be disclosed.

Conclusion

Accordingly, we submit that the Commission recommend that, as a pre-requisite to discovery orders being made or a discovery notice being issued under O 15 of the Rules, a lawyer should have a positive obligation to certify that:

(a) their client seeks discovery of documents that are believed on reasonable grounds to have probative value in relation to matters genuinely in issue;

(b) they have given their client the 'best practice' guidelines' which set out their obligations as to discovery and discussed the guidelines with them; and

(c) they have advised their client of the potential cost consequences of the proposed discovery orders (including any costs burden to which they may become subject in relation to the other parties' discovery).

It is envisaged that the certification would be provided at the same time as the joint discovery plan proposed in 2.3 above.

We note that the Commission has not proposed that solicitors provide such a certification however, we consider that a certificate of this nature will go some way to addressing the comments that suggest that lawyers (and their clients) abuse the discovery process. Whilst it is true that the certificate is effectively requiring solicitors to certify they have taken steps which are already occurring in practice, the benefit is that a certificate provides a formal acknowledgment that such steps are being taken, serves to ensure consistency of practice, and as such assists to demonstrate that lawyers are discharging their professional obligations.

[43] Rules O15 r 2 currently provides that the test for the scope of general discovery is a test of direct relevance.

7.4 Response to Commission's proposal 4-1

The Commission has put forward for comment the proposal that the Law Council of Australia, the Australian Bar Association and legal professional bodies in each State and Territory should develop commentary as part of, or as a supplement to, the professional conduct rules, with a particular focus on a lawyer's legal ethical obligations with respect to the discovery of documents.[44]

Generally speaking, we do not consider that it is necessary to develop and introduce additional professional conduct rules specifically relating to discovery. As we have stated above, we consider that, apart from suggested changes in relation to pre-discovery conferences and ESI, the existing framework of professional conduct rules, Court rules, Practice Directions and the common law is sufficient to govern the proper conduct of discovery by lawyers and parties to litigation. However, we also recognise that many of those rules are expressed in general or abstract terms, and may be less capable of easy application as a result, and that elaboration of some of these rules may be helpful.

Accordingly, we support the development of a practically focussed commentary on those rules and obligations, providing concrete examples of ethical and legal issues concerning discovery.

7.5 Costs

The general approach

Solicitors owe significant and weighty obligations to the Court and their clients. Solicitors are charged with the duty of advising their clients on the nature of discovery, scoping the discovery and obtaining and reviewing the material required to be discovered.

Solicitors should be able to charge for their time and the disbursements incurred in undertaking discovery. It is a legitimate expense and fundamental to the adversarial system of litigation that is adopted in Australia. The Commission has not identified a practice of widespread overcharging for discovery costs that would justify a separate regime for the charging of the costs of discovery. Adequate sanctions for over-charging already exist in the legal profession legislation.

Many of the concerns in relation to the costs of discovery stem from the mega litigation. The clients involved in mega litigation are sophisticated and able to exercise restraint on the costs involved through the negotiation of fee arrangements. The Australian legal market is a mature and highly competitive legal market in which there is considerable pressure on the commercial law firms to constrain costs.

Any proposal to place special limits on legitimate recovery of costs for such work would be inconsistent with the existing heavy ethical burden imposed upon legal advisers in relation to discovery which, if certain of the Commission's proposals were adopted, would become even heavier.

Response to the Commission's proposal 4-2

The discovery process is one legal service among many. There is already extensive regulation in relation to how and what legal practices may charge. For

[44] Consultation Paper, [4.138]-[4.140].

example in New South Wales, costs are recoverable under a costs agreement (unless it is set aside because it is not fair or reasonable) or according to the fair and reasonable value of the services provided.

The factors from the Draft National Law cited by the Commission for determining whether costs are fair and reasonable are a useful guideline.[45] In relation to large commercial litigation, it is important to recognise that the clients have "buying power" and are able to negotiate what they consider to be fair and reasonable fee arrangements.

7.6 Law firm culture

As noted at 7.2 above, there is a culture within the profession of reasonable and ethical discovery practice. Most parties and their solicitors take a sensible approach to compliance with discovery obligations and the adversarial process itself facilitates compliance with discovery obligations. The adversarial process means that decisions in relation to discovery are challenged where party A's solicitors suspect that party B has not complied with its discovery obligations. The deponent who verifies the list of documents can be cross examined on the compliance by the party with its obligations.

As set out at 7.4 above, we support the development of a practically focussed commentary on the rules and obligations governing the proper conduct of discovery, and this would support the continued development of a culture of ethical discovery practice.

Discovery 'best practice' guidelines

It can be difficult to explain to clients the importance of and need to comply with a party's discovery obligations. While large law firms have developed standard memoranda that explain this to their clients, this can be onerous for small firms. We recommend that a standard set of guidelines reflecting parties' discovery obligations be developed, similar to that provided to all expert witnesses in the NSW Uniform Civil Procedure Rules. This could be set out in a Practice Note or Schedule to the Rules, and the Practice Note could also require the party's deponent verifying the list to verify that he or she has read and understood the discovery guidelines. This would give more confidence to the participants in the litigation process that discovery obligations, including in relation to the discovery of ESI, had been explained to the parties in a clear and consistent form.

7.7 Misconduct and reporting/disclosing misconduct

The existing disciplinary structures are sufficient

Existing legal professional disciplinary structures are sufficient to deal with allegations of discovery abuse. We agree with the views of his Honour Justice Finkelstein at the recent Melbourne roundtable[46] that a focus on misconduct is a distraction from the main aim which is to get to trial as efficiently and fairly as possible.

In our view the focus should be on developing tools to help parties and their solicitors meet their discovery obligations as efficiently as possible, rather than focusing on punishment for misconduct.

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[45] Consultation Paper, [4.72].

[46] As recorded at www.talk.alrc.gov.au

We do not consider that there is any need for existing professional conduct rules to be amended to provide that a practitioner must disclose misconduct in relation to discovery to the relevant disciplinary body. That is so particularly given that:

(a) the Commission has not identified widespread misconduct, which is consistent with our experience that parties and their solicitors take their discovery obligations seriously;

(b) compliance with discovery obligations involves subjective decisions as to whether documents are relevant on which competent and reasonable lawyers may legitimately form different views, particularly in relation to documents of marginal relevance;

(c) the adversarial process allows for a party's compliance with its discovery obligations to be challenged and tested;

(d) the Court has the power to use cost sanctions against a party and its solicitors if they fail to observe their discovery obligations;[47]

(e) a failure of a solicitor or barrister to properly perform his or her duties as an officer of the Court in relation to discovery may amount to professional misconduct that can be addressed by existing disciplinary processes;[48] and

(f) it may be difficult for a practitioner to comply with a positive obligation to disclose misconduct. An allegation of misconduct not based on reasonable grounds could also be an abuse of process as the allegation being made may result in a party having to change its legal representation. It could lead to further interlocutory processes that extend the time and cost of the litigation process.

7.8 Ethical obligations for electronic discovery

The prevalence of ESI has greatly increased the burden of discovery. Large commercial litigation regularly involves the review of tens of thousands of electronic documents in order to determine those that are relevant.

A party's and its solicitor's ethical obligations are the same whether for electronic documents or hard copy documents. As set out at 7.7 above, the existing ethical framework is sufficient to govern the proper conduct of discovery, including electronic discovery, and we do not consider it necessary to introduce additional professional conduct rules specifically relating to discovery.

As discussed at 7.1 above, when discovery has been properly given by way of categories, in the absence of a further order for discovery or production by other means, there is no general residual duty upon a party to discover or produce all other relevant documents.

As discussed at 2.3 above, we support measures to ensure accurate and full pre-discovery disclosure of the information, particularly that in relation to electronic documents, which parties require in order to formulate discovery categories that are most likely to obtain relevant documents in the most efficient way, and

[47] Rules O 62, R 36(1); *Federal Magistrates Court Rules 2001 (Cth)* r 21.07(1); *Civil Procedure Act 2005* (NSW) s 99.

[48] See *Legal Profession Act 2004* (NSW); *Legal Profession Act 2007* (Qld); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas)*; Legal Profession Act 2004* (Vic)*; Legal Profession Act 2008* (WA); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT).

ensure that opposing parties are not designing categories in order to avoid discovering forensically significant documents.

Response to the Commission proposal 4-3

We support the proposal that the Law Council of Australia, the Australian Bar Association and legal professional bodies in each state and territory develop a practically focussed commentary on a lawyer's ethical obligations with respect to the electronic discovery of documents. This should include concrete examples of ethical and legal issues concerning electronic discovery.

7.9 Education

The challenges with discovery are in the practical application of the obligations on a party and its solicitor. While there may be some utility in increasing the amount of education about discovery at university level, in our view these issues are best discussed and taught through practical legal training (for example in NSW in the civil litigation practice subject) and through continuing legal education.

The new requirements that there be compulsory legal education in ethics each year, as adopted by NSW, Queensland, Victoria and the ACT,[49] are likely to lead to the development of courses on the ethical obligations of discovery. While not branded as ethics courses, there are Compulsory Legal Education ("**CLE**") courses on discovery which address the ethical obligations on both the parties and their solicitors.[50]

In our view there is no need for changes to the national CLE guidelines or requirements for legal practical training.

Response to the Commission proposal 4-4

We agree that the providers of legal education should give appropriate attention to addressing the issues in relation to discovery. In our view this is particularly relevant for the providers of practical legal training and development of continuing legal education programs given that it is the practical application of the ethical obligations which raise difficult issues.

Response to the Commission proposal 4-5

We support the proposal for legal professional bodies to issue their members with 'best practice' notes about the legal ethical obligations of lawyers with respect to discovery. This is consistent with our proposal for 'best practice' guidelines and should be focussed on the practical issues that arise in applying the obligations.

8 Alternatives to discovery - pre-action protocols

Submission

Pre-action protocols are not an "alternative" to discovery although their introduction may indirectly assist in resolving problems associated with the discovery process. Pre-action protocols are directed at ADR and the

[49] Consultation Paper, [4.226]-[4.229].

[50] Consultation Paper, [4.232].

resolution of disputes without proceedings. It would not be appropriate to tailor pre-action protocols to address specific problems arising in discovery.

The Commission's discussion of pre-action protocols suggests that a pre-action protocol might be an "alternative" to discovery. Similarly, the questions raised in the Consultation Paper suggest that, provided specific issues such as front-loading of costs can be addressed, greater use of pre-action protocols will address problems connected with current discovery practices.

As the Consultation Paper notes[51] pre-action protocols can be an important case management tool, facilitating ADR processes and early settlement of disputes. Where this is not possible, they may assist in narrowing the issues in dispute, which may reduce the extent of discovery required and thus reduce the time and expense associated with Court proceedings. However, we suggest that the formulation of pre-action protocols raise numerous issues that extend far beyond discovery and the scope of the present Inquiry. An appropriate pre-action protocol may go some way to addressing some of the problems with current discovery practices, but it will generally do so indirectly - by removing the need for litigation altogether, or by narrowing its overall scope. Pre-action protocols may yield some discovery-related benefits, but there does not appear to be any direct or necessary correlation.

It would also be inappropriate to attempt to tailor new or existing pre-action protocols with the aim of addressing discovery issues. To do so may undermine the primary aim of pre-action protocols - settlement of disputes. For instance, if a pre-action protocol is crafted with the purpose of maximising information exchange, it may result in parties using it as a "fishing expedition", a "dry run" for more extensive discovery at a later stage, or a mini-trial. In most cases, this would run counter to the philosophy underlying pre-action protocols.

An added concern and complexity is that pre-action protocols are not subject to the same regulation as, for example, preliminary discovery, where a party is required to have exhausted all other avenues of enquiry, and will only be granted discovery for the limited purposes of determining whether they have a case, or the identity of the person against whom they have a case.

As the Commission has noted, pre-action protocols have been introduced in the United Kingdom, and their implementation has given rise to considerable debate.

Subject to these overriding concerns about the appropriateness of discussion of pre-action protocols in the relatively narrow context of discovery, we offer the following comments on the relevant issues raised in Chapter 5 of the Consultation Paper.

8.1 What measures could be taken to reduce the front-loading of costs in relation to pre-action protocols?

Our view is that this question raises one of the most important aspects of the potential implementation of pre-action protocols. This issue goes beyond a discussion limited to discovery and for that reason we have restricted our response. The topic requires a very detailed response which we feel is beyond the current scope of the Consultation Paper.

[51] Consultation Paper, [5.2].

Other than by limiting the scope of pre-action protocols to the types of work ordinarily carried out by an applicant pre-action or a respondent pre-defence, which are necessary to properly prepare their case (such as a comprehensive letter of demand/response and the compilation of a core bundle of documents in support of a claim/defence and the drafting of pleadings), the only way to reduce the front-loading of costs is to limit the application of pre-action protocols to appropriate cases, and ensure that the relevant protocols are not overly prescriptive.

Pre-action protocols must not have general application but should be limited and tailored to specific types of disputes, so for example, where there is a clear benefit in pre-action disclosure of information so as to promote an early understanding and narrowing of the issues in dispute to encourage early settlement. In those circumstances, front loading of costs may be justifiable as it may lead to a decrease in the overall costs incurred in resolving the dispute. In such cases, the costs of complying with the pre-action protocols should be recoverable as the costs of any later proceedings.

Complex commercial disputes would by their nature be inappropriate cases for a specific pre-action protocol and are better suited to close case management by a judge. In such cases compliance with a pre-action protocol is likely to merely add an additional layer of cost.

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

The issue with respect to the application of pre-action protocols to individual litigants appears to arise from concerns that the protocols:

(a) will require those litigants to obtain legal advice regarding compliance with pre-action protocols; or

(b) could have the effect of unnecessarily restricting the individual's access to a fair hearing because his/her claim is deemed 'unmeritorious' prior to being considered by a Court.

However, the nature of litigation is such that all litigants (not just individual litigants) will require advice and assistance to properly prepare and run a case. The existence of pre-action protocols may add to the matters in relation to which litigants may seek advice, but their existence will not of themselves require litigants to obtain such advice. As far as the need to obtain advice is concerned, the position of an individual litigant is no different to the position of any other litigant.

The financial circumstances of the parties may be relevant to costs in circumstances where the court is asked to consider whether it is reasonable to require an individual litigant to comply with any of the steps required under a pre-action protocol.

Otherwise, we do not consider any other safeguards for individual litigants to be necessary.

8.3 What requirements can be incorporated into pre-action protocols to maximise information exchange between parties in civil proceedings before federal Courts?

Early exchange of information or documents may be beneficial in certain specific types of disputes and our view is that it more likely to be of benefit in smaller scale disputes without voluminous documentation. This may lead to efficiencies or a reduction in the scale of discovery should the dispute lead to the commencement of proceedings in the court. Our view is that the nature of the dispute and proportionality must be kept in mind when prescribing if, and to what extent information is to be disclosed under a pre-action protocol. Careful consideration should also be given to the drafting of limits that ensure a pre-action exchange of information does not lead to "fishing expeditions" and does not defeat the primary objective of early resolution of the dispute. Our concern is that in some instances, maximising information exchange may broaden, rather than narrow, the issues in dispute.

At a general level, we consider that it is too onerous to require parties attempting settlement in a pre-litigation phase to compile a list of 'critical documents' leading to a formal exchange with the other parties as this could unnecessarily distract or delay any settlement or ADR negotiations and, in our view, will lead to front-loading of costs. We are concerned about the rise of satellite litigation over the meaning of "documents critical to the resolution of the dispute" as will inevitably arise in connection with the introduction of pre-litigation requirements for early exchange already contained in Victorian and NSW legislation.[52] We do not consider the creation of specific obligations requiring an early exchange of documents will necessarily assist settlement and will be particularly ill-suited to large complex disputes.

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

This question appears to us to go beyond the issue of discovery and for that reason we have restricted our response.

While we do not think that compliance with pre-action protocols should be mandatory, we consider that there are some difficulties involved in relying on costs sanctions as a means of compliance.

There is a risk that costs sanctions for non-compliance will give rise to further disputes as to whether a party complied with a pre-action protocol, and a resulting risk of increased costs for both parties and impositions on the judicial system. We note also that most cases do not progress to final costs orders or subsequent taxation/assessment, and query how much of a discipline this will impose on any prospective plaintiff or defendant who is minded to abuse the process.

8.5 The Australian Government and the Federal Court, in consultation with relevant stakeholders, should work to develop specific pre-

[52] See section 34(2)(a) *Civil Procedure Act 2010* (Vic) - this provides for the ..."the exchange of appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute." Refer also to the as yet uncommented provisions of the *Civil Procedure Act* 2005 (NSW) as amended by the *Courts and Crimes Legislation Further Amendment Act* 2010 at section 18E(2)(c) providing for the exchange of ".. appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute.'

action protocols for particular types of civil dispute with a view to incorporating them in Practice Directions of the Court.

We endorse and support the view that broad consultation with all stakeholders should occur and is necessary for the development of specific and tailored pre-action protocols, if those protocols are to be successful.

The primary objective of pre-action protocols remains the early settlement of disputes with minimal Court involvement. While pre-action protocols may also be of assistance in managing the discovery process insofar as they may, in appropriate types of disputes, permit the early understanding and narrowing of the issues in dispute, it is our view that the net discovery related benefits may be limited. Given the number of other considerations relevant to pre-action protocols, their introduction ought to be considered in a context which is broader than their impact on discovery.

9 Alternatives to discovery - pre-trial examinations

Submission

An oral discovery deposition process could not and should not replace the current requirements imposed on parties to discover documents.

A discovery deposition process, within a wider discovery regime could assist in some cases to narrow the issues or number of documents in dispute, by helping to resolve disputes over the existence or otherwise of specific categories of documents, obtaining an explanation of the scope of the envisaged discovery exercise, and obtaining evidence about the potential meaning and relevance of specific documents.

An oral discovery deposition process is, however, likely to lead to increased costs and further delay in the pre-trial process.

We do not agree with the proposal for interim disclosure orders. If any such orders were to be made, they would need to take into account issues such as confidentiality, privilege, and the use of the documents.

9.1 The Commission's request

The Commission has sought stakeholder views as to whether a new pre-trial procedure should be introduced to enable parties to civil proceedings in the Court to examine orally, on oath or affirmation, any person who has information relevant to the matters in dispute in the proceedings.

In particular, could this approach work before document discovery is given? Could oral depositions assist to narrow the issues in dispute either before or during documentary discovery, limit costs and/or restrict or eliminate the need to call or test particular evidence?

9.2 Our response

Documentary discovery plays a critical role in the resolution and adjudication of disputes in the Court.

For the reasons discussed below, we are of the view that an oral deposition process akin to that observed in the United States ("**US**") could not, and should

not, replace the current requirements imposed on parties to discover documents pursuant to the Rules and the Practice Notes. [53]

In our experience, oral depositions can assist to narrow the issues or number of documents in dispute. However, certainly in complex cases and representative proceedings at least, if not in most commercial disputes, this is not a viable alternative to document discovery and may is likely to lead to an extension of the scope of discovery and a consequent increase in costs.

US oral deposition practice occurs as part of the discovery exercise, usually after production of some documents has occurred. Amongst other things, the oral deposition process is prone to be used as a tool to justify requests for further categories of documents, rather than as a device to focus and limit the document production exercise.

The growing importance of electronic discovery and the forensic data that could potentially be lost if meta data and electronic discovery was not produced is also most relevant. In view of the growing propensity of modern commercial people to use email as their preferred mode of communication, access to these records will be critical for the fair administration of justice.

It appears to us that the views the Commission has expressed about oral depositions go beyond documentary discovery and seek comments at a broader level, namely about whether oral depositions could replace, or at the very least supplement, the current evidentiary processes adopted before and during trial:

> *"The Commission agrees with the VLRC [Victorian Law Reform Commission] that the primary object of oral examinations is not preparation for trial, but the narrowing of issues in dispute in order to facilitate settlement, or if the matter proceeds to hearing, to restrict or eliminate the need to call or test particular evidence"*[54]

We believe that there is a very real distinction between the use of depositions as a further discovery device and replacing the modern case management approach which has seen greater reliance on affidavits and witness statements exchanged prior to trial for the purpose of evidence in chief. While the latter has not been expressly proposed by the Commission, there appears to be no justification for abandoning the modern case management regime. We note that any proposal to change the existing procedures for affidavit evidence in favour of the use of depositions would be a fundamental change, which would need to be the subject of careful and explicit consultation and consideration.

Irrespective of the breadth of the Consultation Paper on this topic, we believe that there is limited potential for the use of oral depositions in the discovery process to assist with narrowing discovery and ensuring that a proportionate approach is adopted by the parties to a dispute. Drawing on the current use of depositions in Australia,[55] when implemented with appropriate safeguards, and with the leave of the Court, oral depositions could assist parties and the Court to:

(a) resolve any dispute over the existence or otherwise of specific categories of documents;

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53 Rules O 15 r 2(3); Practice Notes CM5 and CM6.

54 Consultation Paper, [5.115].

55 For example, see *Trade Practices Act* 1975 (Cth) s155; [Section 155 of the *Competition and Consumer Act* 2010 with effect from 1 January 2011].

(b) in complex cases involving large corporations (often with an overseas parent) obtain an explanation of the scope of the discovery exercise that is envisaged to ensure that a proportionate approach is achieved;

(c) obtain evidence about the potential meaning and relevance of specific documents (although in certain cases this might be reserved for trial); and

(d) in turn, narrow the issues and number of documents in dispute.

The principal factor weighing against such an approach is the potential increase in costs where an additional interlocutory step is introduced. This is why active case management would be a pre requisite to any party obtaining leave to depose a company officer.

We do not agree with the proposal for interim disclosure orders.[56] If any such orders were to be made, they would need to take into account issues such as confidentiality, privilege, and the use of the documents.[57]

9.3 How could oral depositions complement the current discovery regime under the Rules?

The Commission has looked to the experience in the US and provided a series of examples of how depositions are already used in Australia.[58] For example, extra curially, ASIC, in investigating suspected breaches of the *Corporations Act 2001* (Cth), can compel a person to appear before an ASIC member for examination if ASIC "on reasonable grounds, suspects or believes that a person can give information relevant to a matter".[59] Furthermore, persons can be deposed with leave under Order 24 rule 1 of the Rules which provides:

> *"(1) The Court may, for the purpose of proceedings in the Court, make orders:*
>
> *(a) for the examination of any person on oath or affirmation before a Judge or before such other person as the Court may appoint as examiner at any place whether in or out of Australia; or*
>
> *(b) for the sending of a letter of request to the judicial authorities of another country to take, or cause to be taken the evidence of any person."*

The Commission has observed that pre-trial oral examinations are used predominantly in the US as a means of recording the evidence of parties and witnesses, and specifically to:

(a) discover evidence about the identity of potentially discoverable documents;

(b) discover how a witness will testify at trial;

(c) assess the credibility and suitability of the witness;

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56 Consultation Paper, [5.119].

57 Consultation Paper, [5.119]-[5.122].

58 Consultation Paper, [5.99]-[5.104].

59 Australian Securities and Investments Commission Act 2001 (Cth) s 19.

(d) preserve evidence in a case where witnesses are unable to testify at trial; and

(e) test the strengths or weaknesses of a party's case as to encourage earlier settlement negotiations.[60]

The US procedure could therefore be seen as an alternative to discovery in Australia as parties seek disclosure of information and documents without any orders from the Court or the necessity of the evidential interlocutory process. However, the Australian (and English) common law tradition has not accepted this approach in relation to (b) to (e) above.

The following comments focus on (a) above and the possibility of developing a bespoke "discovery deposition".

A discovery deposition?

The power conferred by Order 24 rule 1(1)(a) of the Rules is broad in scope and gives the Court flexibility to depose witnesses in a broad range of circumstances. Historically, the Courts have used this power where a witness is ill or otherwise unable to attend trial but it is clear that the power extends much further than this, including (a) above.

Our primary submission is that the Court already has clear power to order the deposition of witnesses to obtain evidence about the identity of potentially discoverable documents. An order by the Court made under Order 24 rule 1 could reduce the costs of discovery in circumstances where parties have:

(a) no knowledge of the location of key categories of documents and/or the volume of documents to retrieve; and

(b) there is the potential for parties to have to review vast quantities of documents (including both hard and soft copy material).

Oral depositions could take place in order to refine potential discovery categories and obtain information from corporate employees about the location, type and potential relevance of documents.

A discovery deposition under Order 24 rule 1 could also be used when there is a dispute as to the adequacy of discovery. This proposal should be considered in conjunction with our proposal for a pre-discovery conference. See section 2.3 above.

In addition, Order 15 rule 8 provides for inadequate discovery to be challenged through an order for particular discovery. Prima facie, an affidavit verifying a list of documents should be sufficient. In *Brookfield v Yevad Products Pty Ltd* [2002] FCA 1376, [21] Mansfield J observed:

> "*The purpose of verification of a list of documents by affidavit is to ensure that the Court receives from the discovery party a reliable list of the documents in its possession custody or power. The verified list of documents is provided as if in answer to an imaginary interrogatory, and developed in the Courts of Chancery as a means of securing disclosure of potentially relevant documents without the physical intervention of the Court or of a third party to*

[60] Consultation Paper, [117].

> *search for them. The responsibility of providing a reliable list of documents is a heavy one. The corollary of the Court's acceptance of a verified list of documents is its willingness to accept the parties' own statement as to the documents in its possession custody or power. Thus, a verified list of documents is generally conclusive of its contents. The Court is concerned to prevent a contest between two competing oaths that only a trial could resolve. See generally Bray*, *The Principles and Practice of Discovery* 1885, pp 127, 155, 220–223*, Cairns*, *Australian Civil Procedure* (Lawbook Co., 2002), p 289*. Although that position has been relaxed to some extent, the principle that a verified list of documents is generally conclusive of its contents has not been abolished. The Court will only order a further affidavit or permit cross-examination of a deponent of an affidavit verifying a list of documents in limited circumstances.*"

That prima facie position may be displaced in the circumstances described in O 15 r 8. Even if displaced, there remains a discretion[61].

The principle with regard to the conclusiveness of an affidavit verifying discovery had to be re considered when rules such as Order 15 rule 8 were introduced. In *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd (t/a Uncle Ben's of Australia)* [1994] FCA 1360 Sheppard J observed:

> *The rule enlarges the power to order discovery, enabling a party, even though his opponent's affidavits or documents may be sufficient in point of form, to make an application for an order that his opponent state whether he has or has had in his possession or power any specific document or documents.*

More recently, in *Metcash Trading Ltd v Bunn (2010)* 263 ALR 132*;* 84 IPR 482*;* [2010] FCA 8, Lander J has similarly observed:

> [17] … *Order 15 rule 8 was introduced to obviate the hardship of the rule that the affidavit of discovery was conclusive. Discovery is a process easily abused. If a party cannot go behind another party's discovery, there is in reality no way of ensuring that parties to a proceeding have complied with their obligations. If this rule is intractable, each party is only subject to that party's own audit of its compliance. The purpose of O 15 r 8 is to relax the effect of the rule that an affidavit of discovery is entirely conclusive.*

Pre-trial oral depositions under Order 24 rule 1 could complement this provision and prevent overuse in circumstances where a company officer has already given evidence about whether particular documents were in the possession of a specific party. Thus, it may provide further certainty.

At a general level, we agree with a number of the advantages of oral depositions that the Commission has highlighted and agree with the Commission that the challenge lies in leveraging these benefits.

However, we are also mindful of the disadvantages that are listed by the Commission and, in particular, the potential for oral depositions to:

(a) increase costs and delay by adding a further interlocutory step; and

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[61] *Fig Tree Developments Ltd v Australian Property Custodian Holdings Ltd* [2008] FCA 1041, [15] per Logan J.

(b) encourage "satellite litigation" in relation to contested oral depositions.

When referring to the Final Report of the Law Council of Australia entitled, "*Final Report in relation to Possible Innovations to Case Management* (2006)", the Commission stated that (as observed by the Law Council),

> *"oral depositions offer an alternative to interminable document discovery. They state that, in relation to certain documents, issues can be quickly dealt with by some questions of a witness which would otherwise be difficult to track through a paper trail".*[62]

However, a witness may not be able to recall certain facts about a particular document. Nor would this assist in dealing with the question of electronic discovery and issues over back up tapes and meta data.

We also question the ability of parties to utilise oral depositions in representative proceedings in order to limit discoverable documents in circumstances where it may be necessary to discover documents which relate to an unknown class of group members, as opposed to a single plaintiff.

We do, however, note the Commission's observations in Report 89 that oral depositions could assist to narrow common issues before an application is made pursuant to s 33N of the *Federal Court Act* and could be ordered pursuant to the general discretion in s 33ZF of the *Federal Court Act*. However, this goes beyond the scope of documentary discovery.

There is also the very real possibility that the process could be used as a fishing expedition and lead to the discovery of more documents, not less. However, on balance, it is our view that oral depositions under Order 24 rule 1 could, in appropriate cases and subject to control of the Court, play a narrow role in limiting the scope of the discovery process in the Court. The critical question is whether judges are prepared to use the power conferred

In reaching this conclusion, we reinforce that this is not the appropriate forum to discuss the potential for oral depositions to be introduced on a broader scale to replace affidavits and witness statements. Any proposal to replace affidavit evidence with depositions would represent a fundamental change to the current legal culture and procedure in Australia and would need to be the subject of separate consideration.

9.4 How could oral depositions assist to limit discovery?

We envisage the oral deposition process under Order 24 rule 1 could potentially act as part of the pre-discovery planning phase which would reinforce the procedures currently set out in Practice Note CM5 and CM6 or any new regime developed along the lines of our proposal in 2.3 above. A new Practice Note could assist in emphasising the power the Court currently possesses under Order 24 rule 1.

Consistent with the Consultation Paper,[63] we agree it is critical that, before parties provide documentary discovery, they define the issues in dispute.

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62 Consultation Paper, [5.108].

63 Consultation Paper, [3.103].

Once this has been carried out and distilled into a written document then the parties can proceed to prepare a discovery proposal along the lines proposed in 2 above.

Specifically, the parties should be required to make pre-discovery disclosure along the lines proposed in 2.3 above.

9.5 Discovery conference

As set out in 2.3 above, we fully endorse the need for a procedure in which parties are required to develop joint discovery plans to be filed with the Court. This procedure will help to identify the critical facts and issues and key people involved, determine what documents or categories of documents are required to prove or test the key facts and issues, facilitate agreement on a reasonable timetable for the retrieval, processing and review of the documents required to be produced.

Following the filing of a joint discovery plan, the matter should then be listed before the docket judge in order to test the proposed discovery regime and it is at this stage that the parties could have the opportunity to seek leave to depose witnesses for the purpose of limiting discovery and ascertaining further evidence as to the volume and categories that a party has in their possession.

This discovery focussed oral deposition process could take place to allow examination of key company officers in order to:

(a) determine the scope of the discovery exercise that has been proposed;

(b) the potential relevance of the categories and documents requested; and

(c) the relative ease or difficulty that a company will have in complying with the proposed discovery plan.

This process could clearly be addressed within existing procedures available in the Court, but perhaps could be emphasised with the addition of a practice note. For example:

(a) representatives for the party to give discovery could serve affidavit evidence which supports their contention about the discovery which ought to be given by their client;

(b) a discovery hearing then takes place during which the affidavit evidence is weighed up. If there is some serious contest about the evidence, in unusual cases, it might be necessary for evidence to be given by an officer of the party. In such cases this would usually be made apparent by an indication from the Court that the hearsay evidence was insufficient to justify the orders sought;

(c) if necessary cross examination could proceed on the affidavit with leave of the Court and subject to Court's jurisdiction to limit its scope to matters relevant to the discovery application; and

(d) the Court could make discovery orders on the basis of that evidence and submissions arising from it.

We emphasise that this process of pre-discovery oral dispositions can and should only be allowed by order of the Court (discussed in 9.6 below).

9.6 What considerations could a Court take into account in making an order for a discovery deposition under Order 24 rule 1?

The following factors could be considered by the docket judge before ordering a discovery deposition:

(a) the number of depositions which could be involved. This could be limited to a small maximum number per party (say two) with liberty to apply for further depositions if necessary;

(b) the potential length of the discovery deposition and thus the cost to the parties;

(c) the requirement for objections and/or arguments about admissibility issues; and

(d) whether the discovery deposition has a realistic prospect of assisting the parties to narrow the categories for discovery or the issues in dispute.

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10 Defined Terms

ABBREVIATION	DEFINITION
Consultation Paper	Commission Consultation Paper *Discovery in Federal Courts* (2010)
ADR	alternative dispute resolution
Commission	Australian Law Reform Commission
Rules	*Federal Court Rules*
ASIC	Australian Securities and Investments Commission
Act	*Federal Court of Australia Act 1976* (Cth)
UCPR	Uniform Civil Procedure Rules (NSW)
ESI	electronically stored information
Practice Note	Practice Note issued by Chief Justice of Federal Court of Australia
ALRC Report 89	ALRC, Managing Justice: A Review of the Civil Justice System, Report 89 (2000)
Court	Federal Court of Australia