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10 February 2011

Ms S. Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: trisha.manning@alrc.gov.au

Dear Ms Wynn,

Inquiry into Discovery in Federal Courts

1. We refer to the Australian Law Reform Commission's (ALRC) Inquiry into Discovery in Federal Courts and Consultation Paper released on 15 November 2010, inviting feedback from stakeholders on law reform options to improve the practical operation and effectiveness of discovery of documents in federal courts.

2. Thank you for granting us a further extension to 11 February 2011 to make this submission.

3. AGS is one of the largest users of the Federal Court, representing many Commonwealth agencies in the Court at any given time.

4. Our Special Counsel Tax Litigation Catherine Leslie welcomed the opportunity to contribute to the Inquiry as a member of the ALRC Advisory Committee to the Inquiry, and through participation in panel discussions in Sydney on 19 August 2010.

5. Our comments are directed to discovery in the Federal Court. We have not sought to address all questions and proposals in the Paper.

Observations on discovery practice

6. While AGS has an extensive High Court, Federal Court and Federal Magistrate's Court practice, it is relatively uncommon for significant issues around discovery to arise in the kinds of cases in which we are usually involved, particularly in High Court and Federal Magistrate's Court cases. That said, extensive discovery can be a feature in many of our matters in the Federal Court[1].

[1] Such as tax and trade practices cases.

7. In our experience, approaches to discovery in the Federal Court can be variable as to efficiency, consistency, management, timeliness and costs, depending on the claims made, issues, parties, legal representatives and judges involved in each case.

8. The Consultation Paper refers to commentary from a range of sources, including judicial, querying the benefits of discovery measured against the often very high costs of discovery. Many of these comments are informed by experiences in what has been termed "mega litigation" and the impact of technology on the volumes of documents which are discoverable. It is undoubtedly the case that discovery in larger and more complex cases raises very real concerns. On the other hand, it is relatively easy with the benefit of hindsight to say that discovery in a particular case yielded little benefit to the party obtaining discovery, but in practice it can be very difficult for a party seeking discovery to predict in advance whether the exercise will be worthwhile.

9. Discovery (especially in limited terms), in an appropriate case, is an important feature of common law systems which helps to ensure that parties in the adversarial process can proceed on an equal footing and without ambush, and that relevant materials are before the court. However, AGS considers that there is considerable scope to improve the way that discovery operates in the Federal Court.

10. Perhaps unsurprisingly there are differing views within AGS as to the scope of appropriate reform. This is reflective of differences within the broader profession about what is undoubtedly a difficult issue.

11. One view is that discovery is too often sought on a speculative basis and too often results in inspection of vast numbers of documents which 'relate' to the issues in a loose sense, but which have no real relevance, let alone of a kind which assists the applicant for discovery. Those of this view suggest that discovery should be the exception rather than the norm and a threshold requirement should be imposed to control discovery which is speculative. One possibility would be to require an applicant for discovery to show that it is not only in the interests of justice, but that the purpose sought to be achieved cannot otherwise be attained.

12. Another view is that the problem is not discovery *per se*, but rather the way in which discovery is managed, both by the Court and litigants. On this view, reform should be aimed at reducing unnecessary discovery and achieving better practice and management of the discovery process, rather than limiting the availability of discovery at a more general level.

Proportionality of cost v benefit of discovery

13. We view the consideration of proportionality of costs to benefit of discovery and complexity of the matter as a significant and a legitimate one for the Court when assessing applications for leave for discovery. We agree, however, with the ALRC's comments at 2.51 - 2.57 that the introduction of a new statutory threshold test in the

Federal Court to limit the availability of discovery (such as the test contained in s 45 of the Federal Magistrates Act) is unwarranted given the recent enactment of s 37M of the *Federal Court of Australia Act,* 1976 (Cth) (FCA). The overarching purpose requirement in s 37M should guide the exercise of judicial discretions through the whole case management process, including the ordering of discovery and the management of the process.

14. We consider that s 37M is well adapted to allow the Court to take into account whether the likely benefit of discovery in a particular case is proportionate to the likely costs. These considerations may be relevant both to exercising the discretion to order discovery and to the scope of discovery which is allowed.

Control of discovery through identification of issues

15. A key aim of any reforms should be to minimise unnecessary discovery. In this regard, we very much agree with the ALRC's preliminary view that reforms "to ensure clearer definition of the real issues in dispute, prior to discovery, would have the greatest practical impact on limiting the ambit of discovery and reducing the overall burden of the discovery process"[2].

16. Defining issues in dispute at the earliest stages should have the flow on effect of limiting the scope of discovery to what is necessary in the case. Pleadings that clearly define the issues that comprise the actual dispute necessarily inform the limits of discovery.[3]

17. One option canvassed in the Paper is the exchange of statements of issues in dispute. We agree that such a requirement may be beneficial in helping to crystallise the issues truly in dispute in some cases, particularly those which do not involve pleadings or where the issues may not fully emerge until after pleadings have closed (although in such matters, amendment of pleadings may be possible).

18. The desirability of greater definition of the issues in dispute also directs attention to whether greater rigour might be introduced into the process of pleading as it is applied in the Federal Court.

19. Arguably, the Federal Court Rules (FCR) relating to pleading are less prescriptive than those in some other jurisdictions. For example, the requirements for pleading defences by traverse set out in Order 11, Rule 13 do not encourage defendants to admits undisputed facts. These rules leave open the possibility for defendants to opt to traverse an allegation by non-admission, thereby leaving the allegation in dispute and so needing to be proved, with a costs order being the only sanction.

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[2] At 3.137.

[3] US Federal Judicial Center, Manual for Complex Litigation, Fourth 2004 §11.31 at p42

Uniform Civil Procedure Rules 1999 (UCPR) (QLD)

20. In contrast, the pleading rules in the Queensland UCPR are an example of a more rigorous approach which might be worth considering for introducing into the Federal Court's procedures.

21. In a similar provision to s 37M of the FCA, the UCPR expressly aims for the 'just and expeditious resolutions of the real issues in civil proceedings at minimum of expense'.[4] This aim is given force in the stringent requirements for pleading of denials and non-admissions. These requirements are aimed at forcing defendants to plead in a way that positively assists in narrowing the issues, rather than simply putting a plaintiff to proof.[5] Key features include:

— the clear distinction of 'denials' and 'non-admissions', where a party pleading a non-admission may not give or call evidence in relation to a fact not admitted: r 165(2)[6]

— the requirement that a party pleading a non-admission may only do so where they have made reasonable inquiries and remain uncertain as to the truth or falsity of the allegation: r 166(3)

— the requirement that a party's denial or non-admission of a fact must be accompanied by a direct explanation for that position: rule166(4)

— the condition that if a party's denial or non-admission does not provide the requisite direct explanation, the party is taken to have admitted the allegation: r 166(5)

— the condition that a party making a non-admission remains obliged to make further inquiries and if possible amend the pleading to an admission or a denial of the allegation: r 166(6)

— the imposition of cost sanctions for unreasonable denials and non-admissions: r 167.

22. The theory behind these requirements is that if it is not possible for a defendant to simply 'not admit' in the course of pleadings, defendants will be more likely to focus their minds on what can be admitted and what is to be denied, thereby crystallising the issues in dispute.

23. These requirements carry harsh consequences for defendants who misuse non-admissions and we can imagine some types of Federal Court case where a respondent will not have the requisite knowledge to be able to admit or deny an

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[4] UCPR 1999 (QLD), r5

[5] See commentary: Jackson S & Shirley M,"Pleadings", (Dec 1999) *The Queensland Lawyer* (20) 110; Colbran S, "An overview of the Uniform Civil Procedure Rules (Dec 1999) *The Queensland Lawyer* (20) 85; Riethmuller G, "Civil Litigation" (Dec 1999) *The Queensland Lawyer* (20) 14

[6] Except where the evidence relates to another part of the party's pleading.

allegation, such as in a tax appeal where sometimes the evidence supporting a taxpayer's assertions about a particular transaction with a third party will simply not be within the Commissioner's knowledge. In practice, the Queensland rules appear to be applied practically and flexibly, and in accordance with the stated objective of achieving the just and expeditious resolution of the proceeding (*Williams v Schollz* [2007] QSC 266; *Barker v Linklater* [2008] 1 Qd R 405; *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited* [2008] QSC 302). We expect that in the example just given, if the Federal Court had a rule like the Queensland rule, it would be open to the Commissioner to traverse the allegation by way of non-admission without any adverse consequences being applied to him in the litigation.

Case management of discovery practice

24. In our view, a second area of reform which bears consideration is to introduce tools which support active judicial management of the discovery process by the Federal Court. We consider a number of the ALRC case management mechanisms discussed in the Paper as potentially helpful in assisting judges to carry out their functions having regard to the overarching requirement mandated by s37M .

Proposal 5-2: Use of pre-trial oral examinations

25. The introduction of pre-trial oral examinations or 'depositions' would be a very substantial change to Australian court practice (although, as the ALRC has noted[7], the Federal Court Rules already contain a power to order that a person attend for examination). We think that it would be desirable to undertake a detailed investigation of the likely advantages of depositions and whether these outweigh the potential for this sort of process to increase costs. For example, it would be informative to carefully analyse the American experience.

26. That said, at a theoretical level at least, we can see the use of depositions directed to identifying evidence and documents that an opposing party may hold as a potentially useful adjunct to the discovery process. Depositions may allow a party who is considering seeking discovery to better assess what documents the other party has in its possession and whether it is relevant to a material issue in dispute. This could assist in reducing speculative discovery. One potential advantage of depositions is that answers are given on oath which may give a party seeking discovery the confidence to be more precise in targeting documents to be discovered without fear that potentially relevant documents or classes of documents might be missed.

27. If discovery depositions are adopted we consider that they should be part of the overall 'toolkit' of case management techniques available to judges and, when utilised, closely controlled as to scope, time and costs. Consideration would need to be given to whether depositions might occur only with leave.

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[7] At 5.99

Proposal 3-1

28. We consider the use of pre-discovery conferences and introduction of greater discretionary powers of case management as potentially worthwhile mechanisms to enable the Court to be more active in assisting parties to define core issues in dispute in relation to which documents might be discovered. However, requiring parties to exchange written statements of factual issues may be superfluous in most cases if a more rigorous pleading model is adopted.

Question 3-8: Introduction of Special Masters

29. We consider that the use of special masters to manage the discovery process is a potentially worthwhile mechanism to consider, although questions as to the scope of a master's powers, when matters are appropriately referred to a master, supervision of the master's decisions and costs of the process would need to be carefully considered.

Question 3-9: Presumption that discovery costs are to be paid in advance

30. We share the ALRC's reservations about introducing a presumption in favour of a party requesting discovery to pay costs upfront. As the ALRC has noted, the Court already has the power to order upfront payment in an appropriate case and upfront payment by default could be an unbearable burden for some litigants. A particular concern is the potential that inflated cost estimates, which may be hard to dispute, could be used to scare off an opposing party from seeking discovery.

31. Please contact me if you have any questions, or would like to discuss our comments.

Yours sincerely

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