ALSM

Association of Legal Support Managers (Queensland)

SUBMISSIONS TO THE ALRC: DISCOVERY IN FEDERAL COURTS

Submissions to the ALRC: Discovery in Federal Courts

Introduction

The Association of Legal Support Managers (Queensland) (**ALSMQ**) thanks the Australian Law Reform Commission (**ALRC**) for the opportunity to make submissions to its inquiry in relation to discovery in the Federal Court.

By way of background, the ALSMQ is an unincorporated association that was formed in 2004 by a group of litigation support professionals sharing a common interest in developing, creating an understanding of, and in progressing the litigation support profession. The ALSMQ has a broad membership of legal and practice support professionals (including in-house litigation support professionals in local and national firms and government agencies, external service providers, lawyers, and judicial officers), many of whom work across Australian jurisdictions. The Association of Legal Support Managers also has branches in other states.

As part of its mission statement, the ALSMQ aims to:

- be an educational resource for lawyers, law firms and corporate legal departments; and
- contribute to the quality and efficiency of the delivery of legal services.

The ALSMQ welcomes the ALRC's inquiry and hopes that its work will lead to increased awareness of the issues arising in discovery and available methodologies for addressing those issues.

Given the experience of the ALSMQ membership in providing practical support in litigation, the following submissions will focus on particular areas within section 3 of the ALRC's Consultation Paper. Nevertheless, the ALSMQ would like to make some general observations regarding the other sections of the Paper.

Terms of reference of the inquiry

The objective of the ALRC in its inquiry is to identify law reform options to improve the practical operation and effectiveness of discovery of documents.

The ALSMQ believes there is an important area of potential law reform that has not been adequately considered. This is in relation to record keeping obligations of corporations. Perhaps the single greatest challenge in discovery is how to effectively and efficiently deal with the ever increasing volume of records being retained by organisations (noting that, due to email and social networking, many of the records retained may not relate directly to the business at all). Technology has facilitated the easy retention of all records coming into, leaving, or created in, organisations. Conversely, technology has also made it particularly difficult to destroy records that are no longer required. The appropriate destruction of records is made more complex by numerous legal considerations.

Compounding the difficulties faced when dealing with these increasing number of records is the fact that many organisations do not have in place systems for managing records. Accordingly, when a lawyer wishes to undertake a review of records for the purpose of case preparation or discovery, the lawyer often encounters large numbers of disorganised records and is tasked with having to create a system for managing those records before any consideration can be given to commencing a review.

The ALSMQ believes these difficulties will continue to worsen, and have a detrimental flow on effect to litigation, unless organisations take steps to implement appropriate record keeping and management systems.

The ALSMQ would therefore encourage the ALRC to consider whether there is scope for law reform directed at what may be a root cause of many of the issues currently arising in discovery.

Legal Framework for Discovery in Federal Courts

The ALSMQ believes that the Federal Court has a strong legal framework for discovery. In particular, the requirements of CM6 are reflective of internationally recognised best practice in relation to discovery.

Unfortunately the experience of the ALSMQ is that CM6 is not being used in practice. The ALSMQ believes that this may stem from a combination of an insufficient practical knowledge of technology (both in business and in the practice of litigation) and a lack of familiarity with newer practices and trends in the management of discovery. Although the position is improving, members of the ALSMQ are still too often seeing lawyers and their clients approach the task of discovery in matters that involve significant volumes of material (generally electronic) using methodologies developed for relatively small numbers of paper based documents.

The number of records (electronic or otherwise) being encountered by lawyers when preparing for and undertaking discovery continues to increase. Indeed clients are regularly making available, for potential review, volumes of material that eclipse the number of documents understood to have been contained in an electronic database in the C7 case (85,653 documents). Perhaps more concerning is the fact that lawyers and clients are continuing to deliver electronic media (easily containing many gigabytes or more of data) to litigation support professionals with directions to print the content, without having undertaken the simple and inexpensive exercise of determining the number of pages, the cost, and the many inefficiencies involved.

The ALSMQ is also concerned that electronic information remains an afterthought for many parties and legal practitioners faced with litigation. They tend to start with paper and it is only when concerns are raised as to the adequacy of the documentation gathered that they begin to consider electronic information. This delay in considering electronic information can cause additional costs to be incurred, and delays to the overall proceeding.

The ALSMQ would encourage any reforms that were directed to:

- requiring parties to meet and confer in relation to discovery;
- requiring parties to comply with CM6 in all matters (recognising that it is flexible enough to be of little burden to parties in matters where there are few records likely to be gathered or produced); and
- educating clients, lawyers and the judiciary on practical approaches to managing discovery in the modern age.

The above matters are discussed further in these submissions.

Discovery Practice and Procedures in Federal Courts

Introductory comments

Sections 3.5 to 3.31 of the Consultation Paper discuss 'planning for electronic discovery' in the Federal Court. Reference is made to CM6 and the Electronic Discovery Reference Model (**EDRM**). The EDRM is a well recognised process for conducting electronic discovery. It is the ALSMQ's view that the principles contained within the EDRM can also be applied, with some modification, to paper based discovery. Similarly, the ALSMQ sees no reason why CM6 (which has clearly been drafted in a manner that is consistent with the EDRM) should be limited to those cases where the court orders that discovery be given in electronic format.

The ALSMQ's comments regarding certain questions and proposals in Section 3 of the Consultation Paper are set out below.

Question 3-2

The ALSMQ is not in a position to comment as to whether the amount of money spent on discovery processes generates too little or too much information. However, given the increasing volume of records being encountered, the ALSMQ would expect that this would lead to the production of more documents during discovery than would have been encountered in the past.

In its experience, the ALSMQ believes that the most significant costs in discovery are being incurred during the collection and review phases. Further, the ALSMQ believes those costs can often be significantly avoided through the use of well planned information management processes (discussed further below).

Question 3-3

As stated above, the ALSMQ believes that practices developed for electronic discovery can be applied equally well to paper based discovery.

The ALSMQ's experience is that electronic information is encountered in the vast majority of matters. Accordingly, before parties agree that documents will be exchanged in hardcopy, they ought to have considered whether exchanging in hard copy is appropriate and effective in respect of documents that were originally in an electronic format. Of course considerations of proportionality do not necessarily mean electronic records need to be managed using a complex database. In such cases they can often be managed using 'off the shelf' systems (such as spreadsheet or word processing programs or, more simply, file structures on a computer storage device). However the ALSMQ believes that printing such documents, and then relying solely on the hard copies, adds costs and inefficiencies in the long run and should therefore be avoided.

As a general observation, discovery should always be approached in a methodical and well-planned manner. Early agreement between parties as to how documents (electronic or otherwise) are to be practically managed in the proceedings should also be encouraged. Unnecessary costs can readily be incurred if a party has to later change its approach.

The ALSMQ has developed guidelines (available on its website and included with this submission) directed to assisting lawyers in undertaking discovery or other information gathering exercises. The guidelines seek to deal with issues arising in relation to electronic information as well as other forms of information encountered. The EDRM was referenced when preparing the guidelines.

Members of the ALSMQ are also familiar with a range of tools that have been developed to assist parties to deal with electronic information more efficiently and effectively. For example:

- There is the ability to review information 'live' on a client's server (ie without having to take copies of data). This facilitates a more targeted collection, instead of the more traditional mass record gathering exercise.
- There are tools that can provide a 'snapshot' of the number and types of records held (ie emails, word processing files, spreadsheets, images), and can be used to estimate the likely time and cost of undertaking a review.
- Advanced concept searching software, and more recently predictive coding technology (which is much more accurate than keyword searching), can quickly process large quantities of data and assist in identifying records relating to particular issues. This can be used not only to eliminate clearly irrelevant material, but can significantly reduce the amount of review time required.
- Most tools now enable parties and their representatives to review files in their original 'native' format. This can save parties the potentially high cost of rendering all electronic documents gathered to other formats (such as PDF or TIFF). There may be certain circumstances where some files need to be rendered (for example where they are permitted to be redacted), however this can be done on a case by case basis. Similarly, if the Court directs that a single file format be used for the purposes of a hearing, the parties could render the required documents to the necessary format at that time.
- The removal of duplicates is now commonplace and can significantly reduce the volume of material to be collected and reviewed. This can be enhanced by processes that exclude near duplicates such as email trails - leaving only the 'top' email for review rather than each and every email that went into the trail.
- The conversion of paper based documents to fully searchable electronic records is readily available, and generally at minimal (if any) additional cost to photocopying. The addition of searchability provides benefits in later processes of review and general case preparation.
- Once information has been gathered, there are a number of electronic databases (with varying degrees of functionality) that enable information to be easily managed and searched. These databases can provide numerous benefits throughout the entire course of litigation. They can generally be used concurrently by clients and their representatives, regardless of location.

- For small to mid-scale matters, it is within the capability of most parties and their representatives to effectively manage documents in the proceedings using a spreadsheet program with 'hyperlinks' to electronic versions of the documents. This can assist in the speedy and cheap creation of lists of documents, chronologies, and briefs.

The ALSMQ also notes Justice Einstein's valuable observations made in *Richard Crookes Constructions Pty Limited v F Hannan (Properties) Pty Limited* [2009] NSWSC 142 regarding the benefits of electronic discovery. In that decision, His Honour noted:

> *...in a case with voluminous documents...electronic discovery will mean that the overall costs to the parties of the discovery and inspection process will be reduced.*
>
> *...an electronic data base of discovered documents is likely to be productive of greater flexibility, efficiency and utility in the proceedings.*
>
> *[In the creation of tender bundles, issues bundles, court books and the like] whereas human efforts must be employed (and further trees must be cut down) in the creation of new bundle in hard copy format, if electronic discovery is adopted that process occurs digitally and with minimum human effort. Further...it can occur immensely faster than the hard copy equivalent.*
>
> *...searches for documents which become significant during the course of a trial can occur at a greatly accelerated rate. As such, I accept that the trial is likely to run more quickly and efficiently...*
>
> *...the use of electronic discovery minimises the need to have proximity to the documents and the need for the storage of potentially multiple copies of documents. This, I accept, produces or is likely to produce significant work efficiencies in the preparation of the case.*

In relation to processes that can cause waste when dealing with electronic information, the ALSMQ notes the following:

- Failure to plan how discovery will be approached, and not agreeing with the other party how electronic records are to be exchanged, inevitably leads to difficulties.
- Over collection of records, rather than conducting targeted collection, can result in significant costs from an early stage.
- These costs are exacerbated if the records are then reviewed in a traditional linear manner (ie one document at a time) rather than first 'culling' clearly irrelevant material and removing duplicates.
- Converting electronic records to hardcopy, or to a non-searchable electronic format, adds unnecessary costs and results in inefficiencies in later processes.
- Coding of electronic records (ie data entry) for the purposes of generating lists of documents should be avoided as it can add significant costs. The metadata contained within the files (such as subject lines in emails or file names) is usually sufficient to provide an appropriate description of the record.
- Manually numbering electronic information (which necessitates conversion to hard copy first) is unnecessary. In many cases numbering of electronic records is best achieved by renaming the file to be exchanged to coincide with the agreed numbering format. If numbering is required on the face of the electronic document, this can be done using automated processes.

Concerns have also been raised that some of the content of the document protocols referred to in CM6 is unnecessarily complex for many matters, and that it leads to additional costs in negotiating and complying with the protocols. ALSMQ believes these protocols should be reviewed and, in particular, that consideration should be given to simplifying the default protocol.

Question 3-5

The ALSMQ strongly endorses the practice of parties preparing discovery plans and then conferring amongst themselves with a view to agreeing on how discovery will be conducted. This is the approach required under CM6. Unfortunately, as mentioned previously, the ALSMQ does not believe that CM6 is being routinely observed. From its experience parties are not properly planning for discovery and limited attempts are being made to reach agreement with opponents on how discovery should be conducted.

Although lawyers are increasingly becoming aware of and using document protocols (which facilitate the exchange of documents between parties), the ALSMQ does not believe there are any consistent efforts made to agree on the more substantive matters required in CM6 - such as the scope of discovery, strategies for conducting reasonable searches and, in particular, estimating the costs involved. In the ALSMQ's opinion, this is due to a combination of a lack of understanding by parties and a lack of enforcement by the courts

The ALSMQ believes that routinely requiring parties to exchange estimates of costs of discovery before any substantial information gathering and review exercise is conducted would have a number of benefits and should be encouraged.

Proposals 3-1 to 3-3

The ALSMQ supports the encouragement of parties to confer as early as practical in relation to how records should be managed in the litigation and how discovery is to occur.

The ALSMQ does not believe this can realistically be achieved using a one-off conference. It is more likely to be at least a two stage process, as follows.

- Parties should seek to agree, as soon as possible after proceedings are commenced, how records will practically be managed. In this respect they should be able to agree how documents will be exchanged, and the protocols to apply.

- Subsequently, when parties have had an opportunity to consider the issues arising in the proceedings, discussions will need to occur to address the scope of discovery required and proposed methods for conducting reasonable searches.

At the time of the first 'conference' parties will only need to have a rudimentary understanding of the systems and types of records the clients have in place. It will simply set the framework for further record gathering and for later discovery. Technical issues such as whether records will be exchanged electronically and, if so, the formats they will be exchanged in, and the numbering and naming protocols to apply, should be agreed.

After the first conference, but prior to the second conference, there will most likely need to be some form of information gathering performed (to enable the parties to better identify the issues and prepare their respective cases). The protocols agreed at the first conference will assist to some extent. Most importantly, the parties should approach this exercise in a *proportionate* manner. The ALSMQ believes that there is no need to commence undertaking large and costly collection of records at this stage. There are many tools available (currently termed 'early case assessment' tools) that can assist in this early phase of identifying the issues and the records that may go to those issues.

By following the above steps, the ALSMQ believes parties would be better prepared to discuss and agree on the scope of discovery and the searches that should be conducted. They should also be better informed at that time of the likely costs of discovery.

At the time that the scope of discovery is to be defined, parties will need to agree on what the relevant issues are. Whether that should occur by the exchange of statements of issues is not a matter that the ALSMQ has any particular view on. Similarly, to assist parties to identify relevant records, the exchange of names of the main creators or custodians of records would be of great assistance. From a practical perspective, provided the issues have been defined and relevant people identified, the ALSMQ does not believe any great benefit would be derived from also having summaries of the likely evidence of those people.

Question 3-4

The ALSMQ believes that, in the absence of courts requiring parties to observe processes along the lines encouraged by CM6, any attempts made by parties to agree on categories are fraught with risk. Most attempts at agreement occur in a 'vacuum', with the parties having only a limited understanding of the number and types of documents held by the parties. Of more concern is that the discussion of categories is occurring well after parties have commenced steps to collect and review records (generally on a broad basis). Not only is there a tendency for too many documents to have been collected, but it can result in the duplication of costs as documents have to be reviewed again once the categories have been agreed.

The ALSMQ is also aware of instances where attempts to agree categories are made after a timetable for discovery has been set. It is highly doubtful that a realistic timetable can be arrived at until after the scope of discovery and the necessary searches have been agreed.

Questions 3-6 and 3-7

The ALSMQ supports the early exchange of 'key' documents, largely because it can assist parties in their understanding of the types of records likely to be required in any subsequent discovery and can therefore facilitate agreement on the issues and the scope of searches to be conducted. However from the experience of its members, the ALSMQ does not believe that there is currently sufficient early exchange of documents to achieve these benefits.

Given the two-stage approach suggested by it in the preceding section, the ALSMQ believes that there is room for reforms requiring parties to exchange documents *after* appropriate protocols are agreed *but before* any conference dealing with the scope of discovery. By that time parties ought to have gathered some information for the purposes of general case preparation and pleading. Accordingly, the ALSMQ believes it would not be too onerous to require the parties to exchange, at that time, documents upon which they intend to rely (located after a reasonable and proportionate search).

Proposal 3-4

Subject to the observations made in relation to Proposals 3-1 to 3-3, the ALSMQ supports this proposal.

For reasons already discussed, the ALSMQ does not believe that this proposal should be limited to those matters where a court has made directions for discovery to be given in electronic format. Rather, the proposed steps should be applied to all matters where discovery is to occur.

Question 3-9

The ALSMQ believes that arguments as to costs will be significantly reduced if the parties exchange estimates of the costs of discovery at an early stage and *before* those costs are incurred. By exchanging such details, the parties and the Court will be better informed to make an assessment as to whether the proposed approach is proportionate. The Court could then make an informed decision as to whether costs should borne by the requesting party.

Proposal 3-6

The ALSMQ wholeheartedly endorses this proposal, but believes it should clearly encompass training in relation to technology and practices that can be used to assist in litigation and discovery generally (not just discovery of electronic information). Members of the ALSMQ have had some involvement in this regard and would welcome opportunities to do so in the future.

A judiciary that is well educated in available technology and practices can ask the hard questions of parties and their representatives who are proposing approaches to discovery that may not be proportionate or efficient.

The ALSMQ also believes parties and their representatives require similar education.

Proposal 3-7

The ALSMQ support the proposal for funding to obtain data in respect of the costs associated with discovery, and its proportionality to the overall costs of litigation.

Ensuring Professional Integrity: Ethical Obligations and Discovery

The ALSMQ is not aware of any culture on the part of lawyers aimed at intentionally abusing discovery processes. However its members have encountered enough instances where lawyers are adopting practices that are so inappropriate to the discovery task at hand that clients are incurring significant costs that ought not be incurred. It appears that in many of those cases the lawyers are unlikely to have considered or discussed with their clients the appropriateness of the approach adopted. While such conduct may not be intentional, the ALSMQ believes it raises important ethical and professional issues that should not be ignored by regulators of the profession.

It remains the ALSMQ's view, however, that reforms focussed on requiring parties to comply with practices encouraged by CM6 in combination with providing better education of all relevant stakeholders, would have a far greater practical impact on improving discovery than professional/ethical reforms.

Question 4-7

The ALSMQ does not believe there is any pattern of intentional destruction of records in anticipation, or in the course, of litigation. However the ALSMQ is concerned that this remains an area of risk and that reasonable steps can, and should, be taken to avoid the risk.

The practice of issuing formal 'litigation holds' is common in the United States (where courts appear to be more active in considering, and imposing sanctions in relation to, the destruction of records). The ALSMQ is not aware of any such practice being routinely followed in Australia at this time.

It is the ALSMQ's view that lawyers should, as a matter of course, be identifying the likely custodians of relevant materials as soon as possible, and then notifying them of their obligations in relation to the retention of records and in relation to discovery generally. To further avoid the risks of inadvertent or intentional destruction of records, steps should be taken to ensure that appropriate documented processes are adopted and observed.

The ALSMQ notes that CM6 has been drafted in a manner that encourages parties to consider issues relating to the preservation of records.

Alternatives to Discovery

The ALSMQ recognises that the exchange of information plays a critical role in the resolution of disputes. Whether that occurs through discovery or some other process is not of major concern to the ALSMQ.

From the ALSMQ's perspective, the important issue to bear in mind is that the party providing the information needs to first identify and collect the appropriate information. Given the various challenges arising during that phase, as detailed above and in the Consultation Paper, it is important that the practices adopted are appropriate and proportionate.

Regardless of whether the information gathering exercise is for discovery or not, it is submitted that the approach adopted should be consistent with the information management practices referred to earlier in this submission.

Conclusion

The ALSMQ is encouraged at the increasing awareness on the part of lawyers and their clients of more efficient ways to deal with discovery. Nevertheless there is room for improvement, and the ALSMQ hopes that it can continue to play a part in this regard.

In summary, the ASLMQ believes the following potential reforms may deliver substantial improvements to the process of discovery and should be considered further:

- requiring corporations (and other organisations to the extent possible) to adopt record management systems;
- requiring parties to consider issues of proportionality before undertaking the collection of records;
- requiring parties to meet and confer as soon as possible after proceedings commence to agree on technical matters and protocols regarding the exchange of information in the proceedings;
- requiring parties to exchange documents upon which they intend to rely (after a reasonable and proportionate search) prior to any conference directed to defining the scope of discovery;
- after the above, requiring parties to meet and confer for the purposes of defining the scope of discovery;
- requiring parties to comply with CM6 in all matters (recognising that it is flexible enough to be of little burden to parties in matters where there are few records likely to be gathered or produced);

- requiring parties to exchange estimates of the costs of discovery prior to undertaking significant record gathering and review processes;
- undertaking a review of CM6 (including, specifically, the default protocol);
- encouraging lawyers to advise clients at an early stage of their obligations regarding retention of records and discovery generally, and to assist clients to implement and monitor appropriate processes to ensure these obligations are being complied with; and
- educating clients, lawyers and the judiciary in relation to technology and practices that can be used to assist in litigation practices and discovery in the modern age.

It relation to points 2 to 7 above, the ALSMQ believes this will only require minimal changes to the Federal Court's legal framework. However experience suggests that parties and their representatives will be slow to change their practices. The ALSMQ believes more rapid change is required. Accordingly, to achieve success in this regard, there will need to be a greater level of engagement in, and management of, discovery processes by the judiciary from the commencement of proceedings.

Given the consistent trends occurring internationally in relation to the practice of discovery, and the increasing level of comfort people have with technology, the ALSMQ is confident that discovery will become less of a barrier to speedy and cost-effective justice in the future. The only question is when?

Thank you again for the opportunity to provide submissions to the inquiry, and we look forward to the ALRC's final report.

If we can be of any assistance to the inquiry in the meantime, feel free to contact us.

Yours faithfully

Andrew Shute

Chair, ALSM (Qld)

11 February 2011