**Submission to the Australian Law Reform Commission**

**Review of Discovery Laws to Improve Access to Justice**

## 1. Terms of reference

To identify law reform options, the ALRC will have regard to:

- Alternatives to discovery.
- The role of courts in managing discovery, including the courts' case management powers and mechanisms to enable the court to better exercise those powers in the context of discovery.
- Implications of the cost of discovery on the conduct of litigation, including means to limit the extent to which discovery gives rise to satellite litigation and the use of discovery for strategic purposes.
- Costs issues, for example cost capping, security for costs, and upfront payment.
- The sufficiency, clarity and enforceability of obligations on practitioners and parties to identify relevant material as early as possible.

## 2. Introduction

In 1996, the Australian Law Reform Commission released an adversarial background paper on civil practice and procedure in which it noted that the purpose of discovery is to overcome the inequality of information which can undermine adversarial fact-finding and to provide the parties to proceedings with all the relevant evidence in a party's possession in order to prevent ambush at trial. [1] Discovery is considered a crucial element of the decision-making process of courts.

Despite its potential to facilitate justice, the process of discovery is frequently cited as a barrier to justice due to the immense costs with which it is often associated. Reform is necessary for essentially the same reason that discovery was originally introduced: to promote justice. It is our view that the cost of litigation prevents many would-be litigants from pursuing or defending claims in court and is a major factor in the decision of parties to disputes to reach out-of-court settlements. Discovery remains one of the most costly elements of litigation, however the amount of money spent on discovery is often disproportionate to the number of documents produced which are of real consequence in the proceedings. Reform of the discovery process presents an opportunity to reduce the cost of litigation and enhance access to justice.

The process of discovery is shaped by laws which enable courts to order discovery, and the legal framework within which proceedings are conducted. I propose a number of reforms to reduce the number of documents discovered in proceedings, empower judges to tailor orders to reflect the nature of the proceedings in question, change the habits of practitioners conducting discovery and to impose sanctions on parties who use discovery improperly.

## 3. Relevant law

The Federal Court Rules (**FCR**) do not provide a right to general discovery.[2] Parties are required to seek discovery by leave of the court. If leave is granted, the documents required to be disclosed

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[1] Australian Law Reform Commission, *Adversarial Background Paper: Civil Practice and Procedure*, 1996.

[2] Federal Court Rules Order 15, rule 1

are any of the following documents that the party giving discovery is, after a reasonable search, aware at the time discovery is given:

- documents on which the party relies; and
- documents that adversely affect the party's own case; and
- documents that adversely affect another party's case; and
- documents that support another party's case.[3]

The Court may, before or after any party has been required to give discovery, order that discovery shall not be required or shall be limited to such documents or classes of documents, or to such matters in question in the proceeding, as may be specified in the order. The Court may also make such orders as are necessary to prevent unnecessary discovery.[4]

In addition, Order 62A of the FCR contains a mechanism which empowers the court to specify the maximum costs that may be recovered on a party-party basis. The purpose of the rule is:

- to give people of ordinary means access to justice;[5]
- to apply principally to commercial litigation at the lower end of the scale in terms of the complexity and the amount in dispute – to keep costs proportionate to low value litigation;[6]
- "to define a budget so that the management of the case might be tailored according to its economic limits" (though this is not a limitation on the availability of the order and there is no reason why it should not apply, in appropriate situations to cases that are somewhat complex).[7]

The Court is not required to fix a dollar amount, though it may choose to do so. It may cap costs by reference to a scale of fees in the FCR or by reference to the cost of certain things. The only limitation is that the cap must operate against the parties equally.[8]

All of these Court powers are useful but they are not frequently exercised to good effect.

## 4. Rationale and areas for reform

Reform of the process of discovery is a necessary step towards the goal of improving access to justice. Reform is necessary for the following reasons:

- the costs of complying with discovery orders are often very high;

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[3] Federal Court Rules Order 15, rule 2

[4] Federal Court Rules Order 15, rule 3

[5] Adrian Ryan, 'Discovery: The law's need to adapt to changing times' (2008) 18 JJA 116 at 128

[6] *Sacks v Permanent Trustee of Australia* (1993) 45 FCR 509, per Beazley J at 511

[7] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, per Bennett J at 53

[8] *Sacks v Permanent Trustee of Australia* (1993) 45 FCR 509; followed in *Hanisch v Strive Pty Ltd* (1997) 143 ALR 641 at 647

- the costs of complying with discovery orders are often disproportionate to the forensic value of the discovered documents to the issues in dispute;
- discovery is one of the most expensive elements of litigation;
- discovery and inspection of documents is frequently a major contributor to significant delay in proceedings;
- the high cost of litigation can prevent prospective litigants from pursuing or defending claims in court; and
- the cost of litigation is often a significant factor in the decision of the parties to discontinue proceedings and reach settlements out of court.

There is a dearth of research into the factors which combine to make discovery an often cumbersome and expensive process.[9] However, various commentators suggest that the following factors contribute:

- lawyers have become accustomed to diligently searching for and discovering all relevant, and potentially relevant, documents pertinent to the issues in the proceedings;
- the primary criterion used in determining the scope of discovery continues to be the issues in dispute between the parties, irrespective of how central those issues are to the real dispute;
- lawyers fear becoming the subject of professional negligence suits and, as a consequence, leave no stone unturned;
- junior lawyers are often assigned to conduct the document retrieval and discovery process and they tend to include more documents than necessary as a result of caution and inexperience;
- judges are reluctant to make orders imposing real limits on discovery in the early stages of proceedings if they have a limited knowledge of the parties and issues in the proceedings; and
- discovery is sometimes used as a weapon by stronger parties to force parties of modest financial means to settle disputes out of court or to discontinue proceedings.

The cost of discovery can be reduced by limiting the number of documents discovered, and therefore the time required to retrieve, discover and inspect the relevant documents. The Federal Court Rules do equip the court with discretion to limit discovery. However, the default position under the laws relating to discovery should prescribe tighter limits on discovery, with discretion given to the courts to make wider orders if such orders are in the interests of justice.

## 5. Proposed reform

Legislative reform should focus on the laws which allow judges to order discovery and dictate the way in which those orders are framed, and on the legal framework within which proceedings are conducted. For cases in which an order for discovery is deemed appropriate, it should aim to make limited discovery the norm.

### 5.1 General discovery

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[9] Hon. Ronald Sackville AO, "The future of case management in litigation" (2009) 18 JJA 211

The status quo should be maintained in that there should be no right to general discovery. Discovery should only be available by order of the court on motion filed by the party seeking discovery. The party applying for discovery should be required to give reasons for the appropriateness of the scope of the order it seeks.

5.2 Scope of an order for discovery

In the event that an order for discovery is made, courts should be empowered to set the parameters of the discovery order more clearly.

I propose that orders for discovery be limited by reference to the following factors:

(a) the period over which discovery should be given;

(b) the central (as opposed to all) issues in dispute;

(c) the relevant people; and

(d) the relevant medium (i.e. paper, emails, database contents, facebook, Twitter, etc).

The scope of the order should be confined to a certain period, the dates of which should be drawn from the pleadings of the party seeking discovery.

The issues to which the order for discovery is confined ought to be those which go to the heart of the dispute in the proceedings. The parties should be required to identify the central issues in dispute and discovery should be limited to those issues, unless the Court is satisfied after application is made to expand the scope of discovery to other specific issues. The Court should resist such applications at an early stage in the proceedings.

The people by reference to whom discovery is ordered should be limited to specific individuals, or a class of individuals, who were involved in, or privy to, the actions, omissions or dealings in question. Given the time consuming and expensive process involved in retrieving email logs and records of other electronic communications from servers and other forms of electronic storage, all discovery orders should identify those specific individuals (or class of individuals) whose communications are to be discovered. This will clearly require a level of co-operation and goodwill as between the litigant's legal representatives and clear communications with the Court before directions are made as to discovery.

Finally, it is imperative (given the exploding variety of digital media available) that discovery orders be limited to specific forms of electronic media. While this may vary from case to case, I think it is important that the Court further develops its case management skills by considering any submissions from the parties on this specific subject before framing its discovery order. If no specific submissions are made, discovery should initially be limited to paper based records and email and should expressly exclude the necessity of searching back-up tapes, other off site storage media, cloud computing sources, etc, unless otherwise ordered.

Generally, if there is doubt as to the suitable breadth of a discovery order, courts should be encouraged to make the narrower of two competing orders under consideration unless parties can comfortably satisfy the court that a wider order is appropriate.

In making an order for discovery, courts should be required to consider the complexity of the case, the financial means of the parties and the likely effect of the order on the parties.

5.3 Other case management techniques

Courts should be given greater powers to ensure that the process of discovery achieves its purpose. Many courts have adopted case management principles that are intended to prevent excessively onerous and expensive obligations to give discovery. Legislative endorsement would

lend the principles of case management greater force and promote their uniform application. The context in which proceedings occur affects the complexity of the case, the number of documents available for discovery and the way in which the parties conduct discovery. In order to discourage parties from giving or seeking discovery of excessive numbers of documents, I propose the following reforms:

- Reduce the statute of limitation periods (for example, breach of contract claims be reduced from 6 to 3 years), necessitating earlier commencement of legal proceedings.

- Reduce the period between the commencement of proceedings and the hearing. Ideally, the period should not (absent extraordinary circumstances) be more than 12 months.

- Reduce the length of pleadings to no more than 20 pages, except in exceptional circumstances.

- It should be assumed that documents sent to a person have been read and understood, unless the contrary is proved (presumption of effective communication) – this will avoid lengthy and frequently unnecessary cross-examination of witnesses in relation to documents.

- Where an order for discovery is given, the number of documents to be tendered by each party to litigation should also be limited. Each party should be required to justify to the Court whenever any tender of documents exceeds a ratio of 1 tender document to every 10 discovery documents in the proceedings.

- In the event that an order for discovery is sought and the court is of the view that it is not sufficiently appraised of the issues in the proceedings to grant or refuse to make the order, the court should be have the power to order discovery in stages, such that an order is made at the outset in respect of the most essential documents, with the possibility that a more extensive order will be made later in the proceedings if the party seeking the order can justify it.

## 6. Conclusion

Discovery was introduced to the adversarial system in order to improve the quality of the justice. Unfortunately the costs associated with discovery have increased the cost of litigation to the point that it is often only accessible to those of significant financial means. The process of discovery should remain a feature of litigation; however limits ought to be imposed on its use so that it improves the quality of justice without preventing access to it.

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Murray Deakin