Discovery Costs Questionnaire

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Introduction

1.1 On 10 May 2010, the Attorney-General requested the Australian Law Reform Commission (ALRC) to explore options to improve the process of discovery of documents in civil proceedings before the federal courts. The Terms of Reference for this Inquiry are available at the ALRC's website www.alrc.gov.au. In conducting its Inquiry, the Attorney-General requested that the ALRC give particular consideration to the issue of ensuring that cost and time required for discovery of documents is proportionate to the matters in dispute.

1.2 Concerns about the proportionality of discovery costs—in terms of the extent to which discovered documents are used to facilitate the just disposal of litigation—were raised by the Access to Justice Taskforce established by the Commonwealth Attorney-General's Department, in its report *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, which stated that:

> The cost of discovery continues to be very high, and often disproportionate to the role played by discovered documents in resolving disputes.[1]

1 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Rec 8.2.

1.3 The ALRC has released its Consultation Paper, *Discovery in the Federal Courts*, which, in particular, considers issues about the value or utility of the discovery process, relative to its costs.[2] The ALRC's Discovery Consultation Paper is available to view or download at www.alrc.gov.au and free CDROM copies can be ordered through the ALRC.

1.4 In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in the Consultation Paper must reach the ALRC by **Wednesday 19 January 2011**. The ALRC encourages stakeholders to use the online submission form available at <www.alrc.gov.au/inquiries/discovery>.

Purpose of this questionnaire

1.5 The ALRC seeks to gauge practitioners' impressions—based on practical experience—of the degrees to which discovery costs weigh against the overall expenses of litigation, the complexity of the issues in dispute, the stakes in the litigation and the value of the documents sought in the context of the litigation. The ALRC encourages responses to this questionnaire to provide particular examples or illustrations of cases which demonstrate the cost and value of discovery in litigation.

1.6 This questionnaire is not intended to be an empirical method of data collection. Responses it this questionnaire may serve as exploratory or qualitative research, rather than quantitative or empirical research. Therefore, the ALRC is not primarily concerned with the exact amount spent on discovery in particular proceedings. Similarly, the ALRC is not principally focused on the causes or components of discovery costs in particular cases. Rather, the ALRC seeks to contextualise discovery costs in terms of the nature of the proceedings in which documents are sought and the value of the documents in the context of the litigation. To this end, answers to the questions below should be based on practitioners' general impressions of the discovery process gained through practical experience.

1.7 The ALRC requests assistance to obtain this information in exploring the concerns driving this Inquiry and underlying the Terms of Reference—that discovery costs often exceed the value of the documents obtained, in terms of their use in the just and efficient disposal of the litigation—and generally to inform the broad direction of any reforms recommended in the ALRC's final report.

1.8 Unless participants request otherwise, the themes and impressions reflected in responses to this questionnaire may be referred to in discussion of the issues canvassed in the final report in this Inquiry. Participants may request that the ALRC keep responses to this questionnaire confidential. Alternatively, where a response to a question below includes a description of a particular proceeding, by way of an example or illustration, participants may choose to provide this information on a de-identified basis—with respect to the identities of the parties, practitioners and judicial officers involved. If a particular case is de-identified in a response to this questionnaire, the ALRC asks that responses give an indication of whether the parties were individuals, corporations or government agencies, and for which party you were acting.

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2 Australian Law Reform Commission, *Discovery in Federal Courts* (2010) ALRC CP 2, Question 3–2.

1.9 In order to ensure consideration for use in the final report, responses to this questionnaire must reach the ALRC by **Wednesday 19 January 2011**. Stakeholders who are using the online form to make a submission to this Inquiry (http://www.alrc.gov.au/content/discovery-federal-courts-online-submission-form) may provide their responses to this questionnaire there, as it is included at the end of the online submission form. Alternatively, responses to this questionnaire may be emailed to discovery@alrc.gov.au.

Representative sample of cases involving discovery

1.10 The ALRC is interested in a wide range of cases involving discovery in the federal courts—irrespective of the size or complexity of the proceeding or what is potentially at stake for the litigants. This includes large-scale discoveries in the context of high-stakes litigation, as well as small or mid-sized discoveries in straight-forward cases or moderately complex proceedings. While concerns about the disproportionality of discovery costs may be most evident in large and complex proceedings, the ALRC does not intend to limit this questionnaire to such cases or to practitioners acting only in these matters.

1.11 The focus of the ALRC's Inquiry is on the discovery of documents between parties to litigation before a federal court. This covers the disclosure or discovery of documents for inspection by one party to another party in civil proceedings before the High Court, Federal Court, Family Court or Federal Magistrates Court.

1.12 However, practitioners' experiences of discovery or disclosure in other jurisdictions—in other courts or tribunals, in Australia or overseas—may be comparable or may provide interesting contrast. For example, discovery of documents in a proceeding before a State Supreme Court could be comparable to the cost and scale of discovery in Federal Court proceedings. Where responses to this questionnaire are based on experiences of discovery other than in a federal court, this should be noted at an appropriate point.

1.13 At the same time, responses to this questionnaire should not rely on experiences with other information-gathering processes in litigation: such as subpoenas, interrogatories or 'preliminary' discovery under Order 15A rule 3 of the *Federal Court Rules*. The Terms of Reference for this Inquiry are only concerned with the discovery of documents between parties to civil litigation.

Definitions

Discovery costs

1.14 A number of the questions below refer to the cost of discovery or 'discovery costs'. This may include, for example, solicitors' fees for work done in formulating requests for discovery or responding to discovery requests, including time spent negotiating the categories of documents sought by way of discovery, reviewing potentially discoverable documents for disclosure and drafting a list of documents to serve on the party requesting discovery. The ALRC expects that practitioners would be familiar with such costs, and may have a fair impression of the amount of such costs in

a particular client's case—and therefore would expect responses to this questionnaire to take those costs into account.

1.15 Discovery costs might also include disbursements such as counsels' fees for appearing in court on discovery applications or other motions relating to discovery—such as seeking leave to issue a notice for discovery, or a hearing as to the validity of privilege claims made with respect to discoverable documents—as well as a litigation support service provider's fees for electronic discovery services. The ALRC does not necessarily expect responses to this questionnaire to account for such disbursements, given that this information might not be as readily available to practitioners.

1.16 Similarly, discovery costs might include the cost of a client's management and employees engaged in responding to a request for discovery of documents. Again, this information might not be available to practitioners—and the ALRC does not necessarily expect that responses to this questionnaire will account for such costs.

1.17 For the purposes of this questionnaire, discovery costs are not intended to include costs that are consequential to the discovery process. The ALRC notes that the number of documents disclosed may have a multiplier effect on other litigation expenses. For example, legal fees and court costs may be incurred for the time taken at trial dealing with discovered documents during the examination of witnesses—particularly expert witnesses—and in counsels' submissions. While the costs that may be associated with discovery are not necessarily limited to those incurred in the production of documents by the discovering party, and the review by the other side, such costs are the focus of this questionnaire.

1.18 Other terms and concepts incorporated into particular questions below are discussed under each question.

Questions

Jurisdiction

Question 1–1 In which jurisdiction(s) is your experience of discovery of documents in civil litigation largely based? Please also specify, for example, the particular courts and registries.

1.19 To understand the costs of discovery and the role played by discovered documents in litigation, it is important to place the discovery process within the context of the jurisdiction in which the litigation is conducted. The rules for discovery of documents may vary between jurisdictions, and so too may the approach to case management employed in different jurisdictions.

1.20 During initial consultations in this Inquiry, the ALRC heard that different registries of the same court can adopt different approaches when applying the same rules for discovery of documents, and may also take different approaches to case management in general. Responses to this question might help to identify the

exigencies of a particular court registry as reflected in practitioners' experience of the discovery process.

1.21 Practitioners may have experience in conducting litigation across a number of jurisdictions, in different courts and tribunals and in different States or Territories or countries. Responses to this question might cover a number of jurisdictions. Otherwise, participants may prefer to respond based on the jurisdiction in which they are currently practicing, or the jurisdiction in which a significant amount of your experience with discovery has been gained.

1.22 As noted above, the ALRC's Inquiry is primarily concerned with the discovery of documents in civil proceedings before a federal court: namely, the High Court, the Federal Court, the Family Court or the Federal Magistrates Court. However, cases in other jurisdictions—including State or Territory courts, Australian tribunals or foreign jurisdictions—may be used as the basis for responding to this questionnaire.

Type of proceeding

Question 1–2 In what kinds of litigation or types of proceedings is your experience of discovery largely based? Please also specify, for example, any particular court list, such as the Fast Track.

1.23 The cost and proportionality of the discovery process may be better understood in the context of the type of proceeding in which discovery is made. The nature of the proceeding may have some bearing on the range and complexity of the issues in dispute, which in turn may affect the ambit and conduct of the discovery process.

1.24 Practitioners may have experience in litigating a broad range of matters. However, participants should respond to this question based on the kinds of litigation in which a significant amount of your experience with discovery has been gained. Otherwise, participants may prefer to respond based on the types of proceeding in which they are currently acting.

1.25 During initial consultations in this Inquiry, the ALRC heard that concerns about the costs of discovery are most likely to arise in the following kinds of proceedings. Where appropriate, please describe your experience with relevant types of litigation in these terms:

- corporations law;[3]
- trade practice law;[4]
- intellectual property law;[5]

3 For example, misconduct by company officers under Chapter 2D of the *Corporations Act 2001* (Cth), corporate management under Chapter 2F of that Act, and insolvency under Chapter 5 of that Act.

4 For example, restrictive trade practice under Part IV of the *Trade Practices Act 1974* (Cth) and consumer protection under Part V of that Act.

- class actions;[6]
- engineering or construction law;
- product liability;
- insurance litigation;
- taxation law; or
- financial cases in family law matters.

Discovery costs relative to total litigation expense

Question 1–3 In your experience, what proportion of the total litigation expense for your clients do discovery costs generally represent? Where possible, please provide examples or illustrations of discovery costs relative to the total cost of litigation.

1.26 The ALRC wishes to explore the cost of discovery as a portion of the total expense of litigation, and to examine concerns that discovery costs represent one of the largest components of total litigation costs.

1.27 The total litigation costs might include, for example, solicitors' fees, barristers' fees, court fees, litigation support service provider fees, experts' fees, witness expenses and other costs and disbursements. Expenses incurred in appeals or in related proceedings heard separately should not be considered in responses to this question.

1.28 As discussed above, solicitors' fees can form part of both discovery costs and the total litigation cost.

Discovery costs relative to range and complexity of issues in dispute

Question 1–4 How do the range and/or complexity of the issues in dispute in a proceeding affect the cost of discovery of documents? Where possible, please provide examples or illustrations of the cost of discovery relative to the range or complexity of the issues in dispute.

1.29 During initial consultations in this Inquiry, the ALRC heard that disputes involving a broad or complex range of issues—where the pleadings rely on numerous causes of action or defences, proceedings involving numerous claimants, respondents, cross-claimants and third parties, or cases based on complex factual or legal matrices—have the consequential effect of setting broad boundaries for the discovery of documents, and open up discovery to large volumes of documents. In turn, the large

5 For example: C*opyright Act 1968* (Cth), P*atents Act 1990* (Cth), T*rade Marks Act 1995* (Cth) or D*esigns Act 2003* (Cth)

6 For example, under Part IVA of the *Federal Court of Australia Act 1976* (Cth).

volume of documents discovered in such cases may have a multiplier effect on the costs of discovery.

1.30 This question examines the relationship between discovery costs and the complexity or breadth of the issues in dispute in a proceeding. This may include both issues of fact and law. Understanding the impact that the complexity and breadth of issues has on discovery costs may help to inform directions for reform of the discovery process. For example, the ALRC's Consultation Paper, *Discovery in Federal Courts*, suggests that reforms to ensure clearer articulation of the critical issues in dispute may help to reduce the burden of the discovery process.[7]

1.31 Where possible, please provide examples or illustrations of cases which demonstrate the relationship between discovery costs and the breadth or complexity of the issues in dispute. This might be, for example, cases of 'mega-litigation' where discovery costs were noticeably high. Other examples might include relatively straight-forward cases where the costs of discovery were greater than expected, and an explanation of the reasons for usually high discovery costs. Conversely, complex cases where discovery costs were minimised—and the strategies used to contain discovery—could usefully be described here by way of example.

1.32 The ALRC notes that the range of issues in dispute may narrow as the litigation progresses, or the focus on particular issues may concentrate over the course of proceedings. Similarly, the discovery process may itself facilitate the resolution or clarification of certain issues in dispute. However, in this question, the ALRC is interested in the range or complexity of the issues in dispute prior to or at the time of discovery, and its subsequent impact on the cost of the discovery process.

Discovery costs relative to stakes in the case

Question 1–5 How does the value of what is at stake for the parties in the proceeding affect the cost of discovery of documents? Where possible, please provide examples or illustrations of the cost of discovery relative to the value of what is at stake for the parties.

1.33 The ALRC seeks to explore commentaries which suggest that high discovery costs are more likely to occur in cases with high stakes, and to examine concerns that the costs of discovery can be disproportionate to the stakes in the litigation.

1.34 Where possible, please provide examples or illustrations of the relationship between discovery costs and the stakes of litigation. This may include examples of high value cases where the costs of discovery were also high. However, it might also include examples of small claims where the costs of discovery were disproportionately high—and an explanation of why discovery was disproportionate to the stakes in the litigation. Also of interest are examples of high stakes litigation where the costs of discovery were kept down, and the means of containing discovery costs in those cases.

7 Australian Law Reform Commission, *Discovery in Federal Courts* (2010) ALRC CP 2, [3.137].

1.35 The value of what is at stake for the parties might include an amount of money claimed by way of damages or the amount of damages awarded by way of judgment in a particular case, an amount paid in settlement of a dispute, or the perceived value of non-pecuniary relief such as injunctive or declaratory relief.

1.36 It might also include consequential matters at stake for the parties as a result of a finding of liability, for example, the potential for further litigation in other jurisdictions based on the precedent founded in an initial proceeding before a federal court. Other consequential matters at stake for the parties in litigation might include: damage to reputations, adverse publicity, potential loss of business or loss of livelihood and potential exposure to other penalties.

1.37 Responses to this question should not account for any amount of liability for costs, as the expense of litigation is examined in Question 1–3 above.

Use of discovered documents in defining issues in dispute

Question 1–6 In your experience, where the issues in dispute in a proceeding are narrowed or clarified after discovery, what proportion of discovered documents are typically used in resolving some of the issues in dispute, and generally to what extent are the issues in dispute in a proceeding narrowed through the discovery process?

Where possible, please provide examples or illustrations of the proportion of discovered documents used to resolve some of the issues in dispute in a proceeding and the impact that discovered documents had in resolving those issues, as well as an indication of the extent to which the issues in dispute were narrowed through the discovery process.

1.38 During initial consultations in this Inquiry, the ALRC heard that discovery can be a useful process in encouraging the settlement of a dispute but also, where settlement is not achieved, parties often abandon certain issues in dispute after discovery is given. For example, in tax matters, the Taxation Commissioner may be content, on the basis of discovered documents, that a particular transaction will not attract the general anti-avoidance provisions of the tax law—whereas a lack of understanding about that transaction prior to discovery may have driven disputes over the issue. In such cases, the time taken at trial to determine the dispute would be reduced, in part as a result of discovery.

1.39 The ALRC seeks to gauge practitioners' impressions of the utility of discovered documents in narrowing the issues in dispute. This includes practitioners' views on the typical yield of discovery—in terms of the relevant information produced—and views on the probative value of discovered documents for the purposes of encouraging admissions of facts or resolving some of the issues in dispute.

1.40 Examples provided in response to this question might describe cases where a large number of subordinate or collateral facts in issue were agreed on the basis of a large proportion of discovered documents, as well as cases where a small number of

the main issues in dispute were resolved on the basis of a small proportion of discovered documents.

Use of discovered documents in settlement of disputes

Question 1–7 In your experience, where cases settle after discovery, what proportion of discovered documents are usually relied upon during settlement negotiations or other alternative dispute resolution processes, and generally to what extent are those documents influential in the settlement of disputes?

Where possible, please provide examples or illustrations of the proportion of discovered documents relied upon in an alternative dispute resolution process and the impact that discovered documents had on the settlement of the dispute, as well as an indication of the proportion of discovered documents that were not used in the settlement of the dispute.

1.41 As discussed below, there are concerns about the minimal use of discovered documents during the final court hearing of disputes. However, the ALRC was told during initial consultations that most cases will not proceed to trial—instead, disputes are generally settled prior to judgment, but not until after discovery.

1.42 The ALRC seeks to gauge practitioners' impressions of the utility of discovered documents in the settlement of disputes. This includes practitioners' views on the typical yield of discovery—in terms of the relevant information produced—and views on the probative value of discovered documents for the purposes of settlement negotiations or other alternative dispute resolution processes.

1.43 Examples provided in response to this question might include cases where a large proportion of discovered documents were relied upon to assess the quantum of damages and to negotiate a settlement amount. Other examples might highlight cases that settled on a commercial basis with little regard for discovered documents or other evidence. For example, the potential for adverse publicity for a party may be a greater influence on settlement negotiations than discovered documents, in some cases.

Use of discovered documents in judicial determination of proceedings

Question 1–8 In your experience, where cases proceed to judgment after discovery, what proportion of discovered documents are typically brought before the court for the determination of a dispute, and generally to what extent are those documents determinative in the court's judgment?

Where possible, please provide examples or illustrations of the proportion of discovered documents admitted into evidence in a proceeding and the impact that discovered documents had on the court's judgment, as well as an indication of the proportion of discovered documents that were not relied upon at trial in the proceeding.

1.44 Some judges have expressed concerns about the minimal use of discovered documents at trial, when voluminous documents are discovered and trolley loads of documents are brought to court, but only a small number of documents are relied upon by parties during the trial and fewer still are actually relevant to the court's determination of the dispute. For example, Justice Finkelstein has pointed out that in *Seven Network Limited v News Limited*[8] only 15% of the millions of pages of documents that were searched and reviewed were put before the court and only about 15% of those documents ultimately went into evidence.[9] In other words, the overall yield of discovery (in terms of the admitted evidence produced) was well below 5% of the documents discovered.

1.45 However, the percentage of discovered documents that are not subsequently relied upon at trial may create a misleading perception that discovery is only successful when a substantial proportion of discovered documents are tendered in evidence. In the context of certain proceedings, it is possible that a single document obtained through discovery may turn out to be crucial to the determination of the dispute.

1.46 The ALRC seeks to gauge practitioners' impressions of the utility of discovered documents in the judicial determination of proceedings. This includes practitioners' views on the typical yield of discovery—in terms of the admitted evidence typically produced—and views overall on the probative value of discovered documents admitted into evidence.

1.47 Examples provided in response to this question might include cases where large volumes of discovered documents were included in a tender bundle or court book, but only a few of those documents were relied upon by the parties at trial or considered by the court in its judgment of the dispute. However, such examples might also highlight cases where the court's decision in the proceeding hinged on those few discovered documents that were admitted into evidence. Other examples might illustrate trials that carefully examined a few specific discovered documents thought to be crucial to a party's case but were found by the court to be largely irrelevant to the real issues.

Other comments

Please provide any other comments you wish to make in relation to the proportionality of discovery costs—in terms of the cost of discovery in the context of the proceeding, and the utility of discovered documents in the disposal of the litigation.

8 *Seven Network Limited v News Limited* [2007] 1062.

9 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [7].