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

Prepared by Monash Law Students' Society 'Just Leadership' Program Participants

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TABLE OF CONTENTS

1. INTRODUCTION

1.1 This submission is made in response to the Report of the Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

1.2 The submission is also concerned with the current Australian Law Reform Commission Inquiry into the Discovery of Documents in Federal Courts. On 10 May 2010, the Attorney-General requested that the ALRC investigate, *inter alia*, law reform options to improve the efficacy of discovery proceedings. The Attorney-General identified the issue of disproportionate costs, which are significantly attributable to extensive discovery proceedings, as a matter of particular concern.

1.3 In accordance with the Inquiry's Terms of Reference, this submission will examine the existing federal court discovery model and explore alternative models in both Australian and international jurisdictions. Furthermore, the submission will respond to certain recommendations made in Chapter 8 of the *Access to Justice* Report.

2. THE MONASH LSS JUST LEADERSHIP PROGRAM

2.1 The Monash Law Students' Society Just Leadership Program is a collective of law students committed to promoting awareness of social justice issues amongst the student body. Furthermore, the program participants are proponents of improved access to informal and formal justice mechanisms for the disadvantaged of society.

2.2 The Just Leadership Program concurs with the Taskforce that 'difficulties in obtaining access to justice reinforce poverty and exclusion'.[1] Excessive court costs, coupled with the potential award of an adverse costs order, present a significant deterrent for marginalised members of the community who may wish to bring legal proceedings. Just Leadership acknowledges the importance of improving current federal court procedures in order to facilitate the speedy resolution of disputes at a proportionate cost, which will in turn promote wider access to justice in federal courts.

2.3 As future legal practitioners, participants of the Just Leadership Program welcomed the opportunity to gain a deeper understanding of current practices that impact the community's access to federal court proceedings. We believe that it is important for law students to engage critically with their future profession. Moreover, we believe that we have an important responsibility to advocate for a fair and accessible legal system.

[1] Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009), 2.

3. THE ANTECEDENTS AND PURPOSE OF DISCOVERY

3.1 The practice of discovering documents originated in Equity and is aimed at facilitating a fair trial.[2] Discovery proceedings 'ensure that the parties ha[ve] full access to all relevant material whether in their hands or their opponents (sic)'.[3] Consequently cases are decided on their merits as opposed to being determined by ambush at trial.[4] As Donaldson MR observed in *Davies v Eli Lilly & Co*:

> (Litigation) is not a war or even a game. It is designed to do real justice between opposing parties, and, if the court does not have all the relevant information, it cannot achieve this object.[5]

Discovery, which is supervised by the court, assists the presiding judge in 'ascertaining the true facts of the matter.'[6] Discovery also facilitates thorough cross-examination and can expose inconsistencies in witness accounts.[7]

3.2 When discovery is conducted appropriately, it can 'enable litigation to be conducted efficiently, expeditiously and reasonably inexpensively'.[8] The provision of relevant documents prior to trial enables each party to evaluate the merits of its own case.[9] Consequently a plaintiff can determine whether or not to proceed to, or continue with, a hearing or whether to settle a matter.[10] If this evaluation occurs early in proceedings, time and money will be saved. Furthermore, discovery improves preparation and may reduce or limit the issues in dispute, again promoting efficiency.[11]

3.3 However, the discovery process is vulnerable to abuse by parties who seek to co-opt the process as a litigation strategy. Traditional discovery processes, which were once popular and viewed as a means of improving the trial process and eliminating surprise tactics, have increasingly become the device of vexatious litigants seeking to delay the administration of justice and burden opposing parties with onerous costs. Discovery may be subverted by parties who deliberately overwhelm their opponents with mounds of documents, designed to delay proceedings and obscure real issues.[12] This constitutes a significant financial burden upon the parties, as the more expansive the discovery process, the more costly it becomes. This is also a significant impediment to access to justice for disadvantaged litigants.

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[2] S D Simpson, D L Bailey and E K Evans, *Discovery and Interrogatories* (Butterworths, 2nd ed, 1990).
[3] *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164, [365] per Lander J.
[4] Ibid, [366] per Lander J.
[5] *Davies v Eli Lilly & Co* [1987] 1 All ER 801, 804 per Donaldson MR.
[6] Kylie Downes SC, 'In defence of disclosure: why it is a necessity, not a nuisance' (2010) 30(5) *Proctor* 35, 35.
[7] Ibid, 36.
[8] *Brookfield v Yevad*, above n 3, [365] per Lander J.
[9] Simpson et al, above n 2, 2.
[10] Ibid.
[11] Ibid.
[12] Ibid.

3.4 Finally, the nature of the adversarial process is an inherent disincentive to simplified discovery proceedings. As Davies J notes, the preoccupation with winning spurs counsel to leave:

> …no stone unturned, for if you leave one unturned and your opponent does not you may lose the case and your client may sue you. Together these features encourage the contesting of too many issues, the discovery of too many documents and a huge amount of duplicated work by opposing lawyers.[13]

4. DISCOVERY IN THE FEDERAL COURT

4.1 Order 15 of the Federal Court Rules governs discovery in the Federal Court. As noted by the Report, discovery in the Federal Court is not automatic.[14] Leave of the Court is required to commence discovery[15] and the Court retains discretion to limit discovery proceedings in order to prevent unnecessary document procurement.[16] Parties must justify the purposes for which discovery is being conducted, in addition to satisfying the Court that such purposes cannot be achieved by less expensive means.[17] Finally, the parties must convince the Court that in all the circumstances discovery is necessary.[18]

4.2 Despite the above measures, instances of 'meta-litigation' are increasing. Meta-litigation occurs where a substantial and burdensome amount of documentation is tendered during the trial process. Sackville J observed extra-judicially that 'even the now customary technique of limiting discovery to defined categories of documents does not necessarily lessen the burden of discovery.'[19] Complex commercial litigation may still yield thousands of documents despite the best efforts of the court to harness discovery proceedings.

4.3 This submission will firstly examine Order 15A of the Federal Court Rules, which governs the use of preliminary discovery and will recommend the introduction of pre-paid preliminary discovery as well as a narrower application of O15A. The second part of this submission will appraise technological innovations in discovery, which have facilitated the production and storage of millions of documents cheaply and easily, but which have arguably compounded the difficulty of discovery. The third part of this submission will investigate the fast-track system and will conclude that care must be taken to ensure rights of plaintiffs are not diminished. The fourth part of this submission

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[13] G L Davies, 'Justice Reform: A Personal Perspective' (1996) 15 *Australian Bar Review* 109, 110-111.
[14] Access to Justice Taskforce, Attorney-General's Department, above n 1, 105. See also Practice Note Case Management 5, Part 1(a), 'Discovery', which states that the Court 'will not order general discovery as a matter of course'.
[15] Federal Court Rules Order 15, Rule 1.
[16] Ibid, O15 r 3.
[17] Federal Court, Practice Note Case Management 5, Part 1(c)(i) and (ii).
[18] Ibid, Part 1(c)(i).
[19] Ronald Sackville AO, 'Mega-lit: Tangible consequences flow from complex case management' (2010) 48(5) *Law Society Journal* 47, 54.

will examine the practice of discovery by oral examination, popular in Canadian jurisdictions and allowed for in the Northern Territory and Victorian Supreme Court Rules, and will be evaluated as an alternative to current Federal Court practices. This part will conclude that an expansion of oral discovery into the federal sphere would not be appropriate. Finally, we will explore the model of discovery that is used in international arbitration.

5. ORDER 15A: PRELIMINARY DISCOVERY

5.1 The Terms of Reference for the Discovery Inquiry requested an examination of the practice and management of discovery. This next section will examine Order 15A, which governs the use of preliminary discovery in the federal court system.

5.2 The aim of preliminary discovery is to neutralise the potential injustice a person may suffer when they have been wronged, but do not have sufficient information to commence proceedings against another party.[20] Order 15A of the Federal Court Rules[21] enables applicants to discover information fundamental to their cause of action, or to identify the appropriate respondent, prior to the commencement of proceedings. Consequently preliminary discovery facilitates improved access to justice as it enables applicants to determine whether they have sufficient evidence to establish a successful cause of action.

5.3 However, the intended purpose of Order 15A can also be subverted. Order 15A may be used improperly as a delay tactic, to increase another party's litigation costs, and, most prominently, to facilitate fishing expeditions,[22] which potentially establishes a private right to investigation. Applicants may sift through the records of any person to identify any wrongdoings of that person.[23] Rules 3 and 6 in particular have the scope to compromise the proper administration of justice and will be explored further.

Order 15A Rule 3: Discovery to Identify a Respondent

5.4 Rule 3 allows an applicant to discover information from a third party that will help them ascertain the identity or whereabouts of a prospective respondent and can be said to facilitate 'identity discovery.'[24]

5.5 Rule 3(1) imposes a three limb test, which the applicant must satisfy in order to successfully apply for a preliminary discovery order.[25] Firstly, the applicant must make

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[20] Nic Suzor, 'Privacy v Intellectual Property litigation: preliminary third party discovery on the Internet' (2004) 25 *Australian Bar Review* 227, 227 – 264.
[21] Federal Court Rules, Order 15A.
[22] *Paxus Services Ltd v People Bank Pty Ltd* (1990) 99 ALR 728, 733.
[23] Suzor above n 20, 243 - 244.
[24] Ibid, at 248.

all reasonable enquiries to ascertain the description of the prospective respondent.[26] Secondly, the applicant must be unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding in the Federal Court against that person.[27] Thirdly, the applicant is required to establish that there is a real possibility that the relevant person from whom they require discovery will have, has had, or is likely to have had, knowledge or documents to assist in ascertaining the identity of a potential respondent.[28]

5.6 Order 15A does not require the applicant to have a prima facie case in order to commence preliminary discovery.[29] Although r 3(1) imposes an onus on the applicant to objectively demonstrate that the third party from whom they seek discovery has documents or information about the unidentified respondent, the provision does not require the applicant to objectively justify their belief that they possess a cause of action. Consequently, an applicant's desire to undertake discovery may be founded on nothing more than mere conjecture that a certain unidentified person is involved in a wrong. Rule 3 is therefore vulnerable to abuse by those seeking to conduct a speculative 'fishing' exercise.

5.7 As Bray has pointed out, 'a bill of discovery must be filed in aid of some proceedings either contemplated or intended, and there must be allegations to that effect: a court of equity did not compel discovery for the mere gratification of curiosity.'[30]

Recommendation 1:

5.8 We submit that the Court should not apply Rule 3 leniently, but rather should rigorously examine the applicant's belief that there does exist a valid cause of action against the yet to be determined respondent. An applicant should be required to demonstrate more than just suspicion to warrant an order for preliminary discovery under r 3. Although we acknowledge that the purpose of r 3 is to promote access to justice by making it easier for plaintiffs to acquire information crucial to a potential cause of action, r 3 should not facilitate unwarranted proceedings founded in speculation.

Order 15A Rule 6: Discovery from Prospective Respondent

5.9 Rule 6 allows an applicant to obtain discovery from a prospective respondent so as to make a decision as to whether or not to commence proceedings. The purpose of r 6 is to allow an applicant to establish whether the elements of a cause of action are made out and

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[25] Ben Kremer and Rebecca Davies, 'Preliminary discovery in the Federal Court: Order 15A of the Federal Court Rules' (2004) 24 *Australian Bar Review* 235, 240.
[26] Federal Court Rules, O15A r 3.
[27] Ibid.
[28] Ibid.
[29] Kremer and Davies, above n 25, 242.
[30] E Bray, *The Principles and Practice of Discovery* (Reeves and Turner, 1885) 611, cited in Kremer and Davies, ibid, 242.

to plead sufficient particulars to support a claim.[31] Like r 3, the wording of r 6 also permits a wide construction.

5.10 The applicant must establish three elements to be granted leave under this section.[32] Firstly, there must be reasonable cause to believe that the applicant has a right to obtain relief from a person.[33] This is an objective requirement,[34] which although not requiring the applicant to establish a prima facie case, does require the applicant to prove the existence of something more than a mere suspicion.[35] Secondly, the applicant must, after making all reasonable enquiries, still have insufficient information to commence proceedings in order to obtain relief. This is of significant distinction to the general law, which required the relevant party to have done *every* reasonable thing to obtain that information before an order will be considered.[36] Finally, there must be reasonable cause to believe that the potential respondent has or has had documents relevant to the question of whether the applicant has the right to obtain relief.[37] An applicant is likely to be entitled to discovery in order to determine possible defences, evaluate the strength of such defences and discern the extent of the breach and estimate damages.[38]

5.11 Similarly to r 3, r 6 confers a vast amount of discretion on a judge in granting the right of an applicant to obtain information discovery. The current system does not explicitly force litigants to justify their discovery requests, nor does it constrain trial judges to reject requests that are not justified by litigants.[39] Furthermore, the rules permit wide construction by the presiding judge, risking the inconsistent application of the threshold requirements.

5.12 It has been suggested that because the rule is not automatic and parties must make a case for the discovery of documents to the judge, the rule is not open to abuse.[40] Whilst judges usually exercise their discretion cautiously,[41] it is nonetheless difficult to limit discovery of this kind when the rules are as broad as they currently stand. In any event, the rules do nothing to discourage requests from applicants looking to elicit documentation. Lord Reid has acknowledged that preliminary information discovery orders are indeed open to "fishing requests".[42]

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[31] *Smithkline Beecham plc v Alphapharm Pty Ltd* [2001] FCA 1898, 1 per Finkelstein J.
[32] *St George Bank v Rabo Australia* [2004] FCA 1360, 3 and 26, per Hely J.
[33] Federal Court Rules, O15A r 6(a).
[34] *St George Bank*, above n 32, 26.
[35] Ibid.
[36] *Norwich Pharmacal v Commissioners of Customs and Excise* [1973] 2 All ER 943.
[37] Federal Court Rules, O15A r 6(c).
[38] *St George Bank*, above n 32, 26.
[39] Middleton J, 'The attainment of justice – with particular emphasis on the federal Court' (Speech delivered at the Annual North Queensland Law Association Conference, 30-31 May 2008).
[40] Attorney General's Department, above n 1, 105.
[41] See eg. *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] FCA 1920 (Unreported, Finkelstein J, 17 December 2008). One party sought to discover more than 250,000 documents, to which Justice Finkelstein replied "not in my court."
[42] *Norwich Pharmacal*, above n 36, 948.

5.13 One prominent example of a broad interpretation of O15A rr 3, 6 and 12, was the case of *Sony Music Entertainment (Australia) Limited v University of Tasmania*.[43] Sony sought preliminary discovery of the electronic contents of the respondent universities' computer network systems. Sony had reasonable cause to believe that the networks had been used to perpetrate a variety of copyright infringements, including the unauthorised reproduction and distribution of MP3 sound recordings.[44]

5.14 The respondent universities, comprising the Universities of Tasmania, Sydney and Melbourne, opposed the application on the grounds that the discovery order requested by the applicant went beyond the scope of permitted discoverable documents under the Rules.[45] Pursuant to r 3, documents must relate to the description of the alleged wrongdoer to enable the applicant to ascertain the identity of, and consequently bring proceedings against, that person. However, the applicant proposed to procure vast quantities of documents, the majority of which would not assist with the identification of the parties responsible for infringement. Furthermore, the respondents were concerned that discovery would yield confidential or privileged information.[46] The applicant countered that the more limited retrieval methodology proposed by the Universities would be inadequate to determine the wrongdoers' identity.

5.15 Tamberlin J found that O15A is 'beneficial in character'.[47] His Honour proceeded to cite *Paxus Services Ltd v People Bank Pty Ltd*,[48] in which Burchett J determined that O15A should be read widely and that any discretion to limit its application should be retained by the Court.[49] Tamberlin J expanded upon the authorities, ultimately concluding that 'some degree of "fishing" may be appropriate'[50] in the conduct of preliminary discovery. In considering competing policy interests, his Honour acknowledged the importance of protecting the privacy of network users, whose personal information would be disclosed during discovery. However, his Honour ultimately accorded more importance to the advancement of the public interest as a consequence of ordering 'full and proper disclosure by way of preliminary discovery in order to ensure that an informed decision can be made as to whether to commence proceedings and against whom they should be brought'.[51]

5.16 However, an expansive application of rr 3 and 6, as occurred in *Sony*, will inevitably yield mountains of (often irrelevant) documentation, which increases the cost and duration of discovery. Consequently this may obstruct the Federal Court's aim of providing just, proportionate and timely resolution of proceedings. It is submitted that the public interest value of full discovery must be balanced against the significant financial burden that extensive discovery imposes on the individual parties to a case.

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[43] [2003] FCA 532.
[44] Ibid, [27] per Tamberlin J.
[45] Ibid, [2] per Tamberlin J.
[46] Ibid, [62] per Tamberlin J.
[47] Ibid, [55] per Tamberlin J.
[48] (1990) 20 IPR 79.
[49] Ibid, 85 per Burchett J.
[50] *Sony v University of Tasmania*, above n 43, [57] per Tamberlin J.
[51] Ibid, [65].

Recommendation 1

5.17 Judges should be wary of construing Order 15A too broadly. A narrow construction of O15A that limits the scope of the categories of discoverable documents may be more appropriate having regard to the circumstances of the case. Constrained preliminary discovery will facilitate improved access to justice through the control of the prohibitive costs of the discovery process, and discourage the potential fishing of information a party may perform. It will also protect against the significant invasion of a potentially innocent person's privacy, which may occur when a preliminary discovery application is successful, when proceedings are not yet even on foot. While information discovery is important as it may allow a party to assess whether they have a legitimate claim, and therefore, reduce the likelihood of speculative suits,[52] O15A in its present state does not facilitate this due to the minimal and ambiguous requirements an applicant needs to satisfy, and the trend for broader judicial discretion under the rules.[53]

Recommendation 2

5.18 *Prepaid preliminary discovery:* Although parties are expected to provide discovery cost estimates, these have had little effect in ensuring that preliminary discovery requests remain 'realistic, necessary and proportionate.'[54] The introduction of a prepaid scheme, whereby a party pays the costs of discovery up front to a maximum limit set by a judge,[55] may help to maintain proportionate preliminary discovery. This would mean that once those funds are used, preliminary discovery would not be granted again except in exceptional cases. Additionally, this pre-paid discovery would be borne by the applicant and not be taken into account by the judge in determining costs at the conclusion of the proceeding.

5.19 This measure would force the applicant to be more selective in spending resources in the preliminary stages of litigation, thus reducing the potential of a party to engage in speculative discovery. Additionally, making the applicant bear the cost will promote access to justice, as a respondent will not feel pressured into settling for fear of the huge costs burden they may face if they are unsuccessful, despite possession of a good defence. It would also aid in eliminating resource or power imbalances between the parties. The major difficulty faced by this type of reform is that it would be difficult for a judge to assess a sensible cost cap on the preliminary discovery. This could be addressed if the judge was required to further 'case manage' preliminary proceedings.

6. THE IMPACT OF TECHNOLOGY ON DISCOVERY

6.1 The Discovery Inquiry's Terms of Reference request the further consideration of the impact of technology on discovery. As the Federal Court has noted, 'electronic documents, including email, form an increasing proportion of Documents in proceedings

[52] Nic Suzor, above n 20, 256.
[53] See e.g. *Sony Music Entertainment (Australia) Ltd v University of Tasmania* (2004) 129 FCR 472, 482 – 246.
[54] Middleton J, 'The attainment of justice – with particular emphasis on the federal Court' (Speech delivered at the Annual North Queensland Law Association Conference, 30-31 May 2008).
[55] Ibid.

before the Court.'[56] The Court acknowledges that electronically stored documents must be managed efficiently if the cost of discovery is to remain proportionate to the issues in dispute.[57] Computers can contain millions of documents. Determining which documents comply with a discovery order can be an onerous, expensive and time-consuming task.[58]

THE POSITIVE ASPECTS OF TECHNOLOGY

6.2 Electronic documents can provide valuable information not visible on the printed hard copy including details pertaining to the file's creation and modification, who has accessed or printed the document and the time and date of such use.[59] Conversely, paper discovery 'discloses only what the creator or author wishes you to view.'[60] The discovery of electronic files (e-discovery) can consequently provide litigants with a fuller evidentiary picture of the matters in dispute, in addition to assisting the identification of the appropriate parties to the dispute.

6.3 Furthermore, electronic devices are capable of amassing large quantities of data which parties may consider relevant to legal proceedings. Hence, electronic discovery facilitates the inspection of a greater pool of resources and consequently an improved chance of obtaining information significant to litigation. For example, in *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* there were a total of 11,460,689 emails for the relevant period, which spanned over four years.[61]

THE NEGATIVE ASPECTS

Meta-litigation

6.4 However, for the above reason, electronic discovery is largely responsible for the growing phenomenon of meta-litigation.[62] This occurs when a huge amount of documentation is tendered before the court. In the case of *Seven Network Limited v News Limited*, discovery produced an electronic database containing 85,653 (or 589,392 pages) of documents, with 12,849 documents eventually being admitted into evidence.[63] This transpired despite Sackville J rejecting the procurement of 'substantial categories of documents.'[64] The estimated cost of this litigation for the plaintiff amounted to $200 million dollars. Furthermore, at the time of final proceedings, the plaintiff's damages claim had been reduced to, at best, between $195 million and $212 million.[65]

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[56] Federal Court, Practice Note Case Management 6: Electronic Technology in Litigation, Part 5(a).
[57] Ibid, Part 5(b).
[58] Arun Raghu, 'Discovery in the digital domain: The acquisition and use of electronically stored information in court proceedings' (2008) 22(5) *Online Currents* 151, 163.
[59] Maureen Duffy, 'Managing electronic files in the discovery process' (2007) 9(9) *Internet Law Bulletin* 112, 113; Steve White, 'Discovery of Electronic Documents' (2006) *White SW Computer Law* <http://www.computerlaw.com.au/dokuwiki/doku.php?id=wcl:papers:discovery2> [at 2 September 2010].
[60] *BT Australasia v New South Wales* BC9807060; *NT Power Generation Pty Ltd v Power and Water Authority* [1999] FCA 1623.
[61] David McGrath, 'E-discovery war stories on home soil' (2009) 47(4) *Law Society Journal* 34.
[62] *Seven Network New Limited v News Limited*, [2007] FCA 1062, [2] per Sackville J.
[63] Ibid, [4] per Sackville J.
[64] Ibid, [15] per Sackville J.
[65] Ibid, [18] per Sackville J.

6.5 In that instance, Sackville J, the presiding judge, rightly declared such expenditure 'on a single piece of litigation... '[is] not only extraordinarily wasteful, but borders on the scandalous.'[66] He noted that 'much of the cost of conducting meta-litigation is generated by the discovery process.'[67] His Honour observed that the Court might attempt to reduce the burden of discovery by making limited orders for discovery or restricting discovery to certain categories of documents.[68] However, the decision of the parties to 'engage in a full blown forensic battle' may result 'in the best efforts of the court to limit the scope of dispute'[69] amounting to very little.

Prolonged proceedings:

6.6 E-discovery is a time-consuming undertaking, which often requires the appointment of additional personnel. In *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia*,[70] staff had to be appointed for the sole purpose of recovering emails. Subsequently, the recovered emails had to be assessed for relevance.[71] Evaluating the volumes of material discovered leads to delayed court proceedings. Furthermore, such large quantities of evidence generally necessitate long judgments and exhaust court time. For instance, Justice Sackville's judgment in *Seven Network* totalled 1120 pages.[72] The process of discovering vast quantities of soft data often imposes very large burdens, 'not only on the parties, but on the court system and, through that system, the community.'[73]

Technical complexity:

6.7 E-discovery involves using computer forensics in order to supply parties with information relevant to their cases. The required technical expertise surpasses the knowledge and skills of legal practitioners. Thus forensic scientists are commonly employed to assist in the discovery process.[74] The employment of experts substantially increases discovery costs and time.

Management difficulties:

6.8 The task of sorting through the labyrinth of data is particularly difficult given that many organisations do not have a well-managed system of storing electronic information. Accordingly, the claim in *Leighton Contractors* that 'the burden of discovering emails outweighed any likely probative value' is a reasonable concern.[75] Similarly, Justice Hollingworth in *GT Corporation Pty Ltd v Amare Safety Pty Ltd* criticised the discovery in the case before him, stating:

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[66] Ibid, [10] per Sackville J.
[67] Ibid, [21] per Sackville J.
[68] Ibid, [24] per Sackville J.
[69] Ibid, [25] per Sackville J.
[70] [2007] WASC 65.
[71] [2007] WASC 65 (22 March 2007) (*'Leighton Contractors'*); David McGrath, above n 61, 34.
[72] *Seven Network Limited v News Limited* [2007] FCA 1062, [11].
[73] Ibid, [2].
[74] See eg. *Sony Music Entertainment (Australia) Ltd v University of Tasmania*. [2003] FCA *532*.
[75] [2007] WASC 65 (22 March 2007); David McGrath, above n 61, 34.

> [t]he enormous electronic discovery was not presented in a way [accessible to readers]… I have no doubt that the manner in which Amare's electronic discovery was provided, together with the complete lack of any index, has contributed significantly to the [case's] problems.[76]

As McGrath has noted, this lack of management impedes the very objective of discovery as 'poorly managed e-discovery practices [can lead] to adverse outcomes, consequently denying the very justice that the discovery process is intended to facilitate.' [77]

Recommendation:

6.9 Technological developments have rendered the discovery process more complicated, timely and expensive. These undesirable consequences of e-discovery have the grave potential to curtail access to justice.[78] The Federal Court's practice directions to practitioners (Case Management Practice Notes), which require parties to prepare discoverable documents according to the Document Management Protocols, addresses some of the difficulties of e-discovery.[79] Litigants must now present discovered documents in an ordered and searchable electronic format.[80] However, we submit that ultimately, greater active case management is needed to improve efficiency and restrict unnecessary discovery. Parties in the adversarial system are less likely to work cooperatively to limit discovery. Consequently, the presiding judge, as an impartial and objective adjudicator, is best placed to equitably and efficiently monitor and restrict discovery proceedings, having regard to the individual circumstances of the case.

6.10 In identifying some of the difficulties that arise for jurists presiding over meta-litigation matters, Sackville J notes that often judges have:

> …insufficient advance knowledge of the facts and issues in the case, to impose effective constraints on the parties, even if he or she diligently reads the available material. Knowledge that might have enabled the judge to limit the scope of the litigation often comes too late.[81]

Providing the judge with greater information on the details of the case early in the litigation should be a component of case management. This will allow better oversight and a greater potential to limit the submission of voluminous and onerous electronic documentation.

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[76] [2007] VSC 123 (25 May 2007), [36].
[77] David McGrath, above n 61.
[78] David McGrath, 'New framework for use of electronic documents in the Federal Court' (2009) *Law Society Journal* 30, 32.
[79] Federal Court, Practice Note Case Management 6.
[80] Ibid.
[81] *Seven Network Limited*, above n 62 [26] per Sackville J.

7. THE FAST TRACK SYSTEM

7.1 Recommendation 8.7 in the Report states:

The Attorney General, acknowledging the positive contribution to efficiency and proportionality made by the Federal Court's Fast Track, should encourage the Federal Court to identify further scope for parties to use the Fast Track, or specific Fast Track processes.

7.2 The broad scope of Order 15 of the Federal Court Rules,[82] governing discovery proceedings in the Federal Court, has the capacity to permit protracted document procurement. Recent cases such as *Seven Network Ltd v News Ltd* evidence this.

7.3 Ontario, Canada, provides an interesting example of a limitation of discovery. On January 1, 2010, simplified procedures were put in place so that written discovery is now disallowed where the total of the amount claimed, or the fair market value of any real or personal property involved, is less than $CAN100, 000.[83] Discovery by oral examination is still permitted, but the duration is confined to two hours or less.[84]

7.4 Similarly, the limited scope of discovery within the Fast Track system has proved an effective mechanism for containing costs. The narrow confines of Case Management Practice Note 8, Part 7.1,[85] which govern the fast track system, significantly inhibit the types of documents that parties are required to produce. Unlike general discovery orders, discovery in the Fast Track system is confined to documents on which a party intends to rely and/or documents that have a significant probative value adverse to a party's case.[86] Consequently, discovery in the Fast Track system is better able to avoid the disproportionate discovery costs and delays that have arisen under the general, more expansive discovery rules.

7.5 As per the Taskforce's recommendation, the expanded use of the Fast Track system can be achieved in either of two ways; by expanding the list of the types of matters that can be heard via Fast Track Directions,[87] or by the application of the specific Fast Track limited discovery provisions to cases that are not heard within the Fast Track system.

7.6 However, whilst the limited discovery provisions of the Fast Track system have the potential to address the current time and cost issues, any plan to implement them more broadly must involve a thorough analysis of any potential negative outcomes. The statistics concerning cases heard in the Victorian registry of the Federal Court during the Fast Track trial period have shown high settlement rates and efficient resolution.[88] However, the Report did not include a detailed explanation and analysis of the

[82] Federal Court Rules Order 15.
[83] Court of Justice Act, Rules of Civil Procedure, R.R.O. 1990, Regulation 194 Rule 76.04 (1)
[84] Court of Justice Act, Rules of Civil Procedure, R.R.O. 1990, Regulation 194 Rule 76.04 (2)
[85] Federal Court of Australia, Practice Note Case Management 8, 7.1.
[86] Ibid.
[87] Federal Court of Australia, Practice Note Case Management 8, Part 2.1.
[88] Access to Justice Taskforce, Attorney-General's Department, above n 1, 110.

complexity of the discovery matters in those cases. Consequently, it is difficult to determine the success of the Fast Track discovery provisions without further information about the kinds of disputes heard within the Fast Track system.

7.7 The "good faith proportionate search" requirement of the Fast Track discovery provisions is one aspect in particular that warrants ALRC scrutiny.[89] The concerns raised by the Law Institute Victoria regarding this particular requirement are pertinent, and such concerns are enhanced if the provisions become applied in a wider range of matters.[90] In their submission to Justice Finkelstein of the Federal Court, regarding the implementation of the Fast Track system, the LIV suggested that this requirement might result in further dispute between parties over whether a search effort was indeed 'proportionate'. The result of this would be further delays in litigation.[91] As such, the LIV suggested that this particular requirement should be removed from the Fast Track discovery provisions.[92]

7.8 Under this provision, a wholly subjective test is used to determine the validity of a Fast Track discovery effort, and consequently this subjectivity leaves scope for proceedings to be delayed by concerns about the honesty of a party's search efforts.

7.9 Indeed, where it is up to the parties to subjectively make a decision about the proportionality of their search efforts, history has shown that parties will naturally take a minimal view of what is required to satisfy such a provision.[93] Accordingly, parties may fail to disclose documents that are relevant, and the possibility of resultant lengthy interlocutory applications may undermine the efficiency of the Fast Track system.

7.10 There is also cause to argue that the limited discovery provisions of the Fast Track system could be a major deterrent for potential litigants in certain matters currently heard before the Federal Court. Consequently, such litigants will opt to initiate proceedings in the regular system, where the costs of discovery and the length of proceedings can quickly escalate, or will withhold from launching civil proceedings altogether. The Fast Track system is intended to facilitate improved access to justice for civil litigants. Nonetheless, the same narrow discovery provisions that are intended to increase fairness and accessibility may actually deter litigants in certain types of matters where discovery is often critical to the outcome of the case.

7.11 In their recent submission to the ALRC in response to the Report of the Access to Justice Taskforce, Maurice Blackburn Lawyers offered a valuable insight from the perspective of plaintiffs in class-action litigation. Maurice Blackburn appreciates the importance that the discovery process plays in the ability for class-action plaintiff litigants to mount a genuine and legitimate case against defendant corporations, as the production of documents in such cases can address the information imbalance that exists between the two parties.[94] Without such discovery, such litigation would inevitably fail. It was for this

[89] Practice Note Case Management 8, 7.2(a) & 7.2(b).
[90] Law Institute of Victoria, Submission to Justice Finkelstein of the Federal Court, 31 January 2007.
[91] Ibid, 6-8
[92] Ibid, 8.
[93] Ibid, 6.
[94] Maurice Blackburn submission, 6.

reason that Maurice Blackburn was strongly opposed to any proposals that would limit discovery across the board.

7.12 Whilst in most cases there are only a few documents that are highly relevant to the outcome of the litigation, this should not be the basis for overlooking the importance of the production of relevant documents in cases where the discovery process is crucial. Class-action litigation is one example of such litigation. Indeed, the recent Canadian amendments allowing for simplified procedures do not apply to class-action cases.[95] If the ALRC is to consider the application of the limited discovery provisions of the Fast Track system in a wider range of matters, it must take into account the types of litigation that can be affected by limited discovery and all potential consequences of such change.

Recommendation:

7.13 The ALRC must ensure that the limited discovery provisions of the Fast Track system are only applied in those forms of civil litigation that will benefit from them. As such, before adopting any approach to implement the limited provisions on a broader scale, the ALRC must properly research and distinguish between those types of civil litigation that will benefit from the provisions and those types that require a full and more expansive discovery process.

8. ORAL DISCOVERY

8.1 The Terms of Reference for the Discovery Inquiry called for an outline of ways to limit the overuse of discovery and the effectiveness of different types of discovery orders. This section of the submission examines the case for introducing oral discovery as an alternative regime to traditional written discoveries. The section will examine the advantages and disadvantages of expanding oral discovery procedures to the federal sphere.

8.2 Currently two Australian jurisdictions, Victoria and the Northern Territory, dispose of rules allowing for oral discovery. However, the practice is little used and it is therefore difficult to ascertain the advantages and disadvantages of the model. Reference will therefore primarily be made to Ontario, Canada, a jurisdiction that uses oral discovery as the primary means of pre-trial document discovery. This section will conclude that the advantages of oral discovery are limited, and implementation at a federal level should not be recommended.

8.3 In Victoria oral discovery can be effected in place of written interrogatories pursuant to Order 31 of the Supreme Court (General Civil Procedure) Rules 2005. Parties must consent to this process in writing and must file the consent with the court.[96] An examiner is to be appointed by the parties to oversee the process, and this person must determine the time and location of the examination and is able to administer oaths and receive

[95] Court of Justice Act, Rules of Civil Procedure, R.R.O. 1990, Regulation 194 Rule 76.01 (1).
[96] Supreme Court (General Civil Procedure) Rules 2005, r. 31.04.

affirmations.[97] Legal representation is allowed, and the same rules that ordinarily pertain to written interrogatories apply to the oral process.[98] Costs will be costs in the proceeding, unless the Court orders otherwise.[99]

8.4 In the Northern Territory, Order 31 of the Supreme Court Rules governs oral discovery. These rules allow for oral examination on oath of the other party where written interrogatories may be served.[100] This oral examination requires the consent of both parties[101] unless a court order applies. Where one of the parties refuses to submit to oral examination, the other party may apply to the court to make an order that oral discovery take place.[102] To make an order for oral discovery, the court must be satisfied that it is likely that oral examination will be less costly to the parties than preparing and answering written interrogatories, or that there is some other advantage to the parties that warrants the making of the order.[103] An examiner must be appointed to oversee the hearing[104] and the costs are to be costs in the proceedings.[105]

8.5 The advantages of discovery by oral examination are more immediately clear than the disadvantages. It may offer faster proceedings as parties can address questions immediately instead of having to write back requesting further and better particulars. Where a particular confusion arises in relation to an answer given, a party may directly question the response and clarify the issue for both sides. It offers an advantage in that it allows for greater follow-up questioning than written interrogatories. This in turn may reduce the time taken to explain document discovery issues and secure timely responses, and consequently ease the costs of the discovery process. Furthermore, the capacity to answer questions immediately may mean that applications to the Court for further and better particulars would decrease.[106]

8.6 Furthermore, discovery by oral examination can be effective in allowing a party to judge the credibility of a witness. Justice Mark Weinberg of the Federal Court of Australia has argued for the supplementation of narrative pleadings with carefully limited oral discovery.[107] He argues that this questioning provides the basis to keep documentary discovery within rational bounds.[108] He further argues that the opportunity to ask direct questions, early on in the proceedings, presents a chance to promote earlier settlement. This opportunity to ask direct questions might promote improved document discovery.

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[97] Supreme Court (General Civil Procedure) Rules 2005, r. 31.06; r. 31.09.
[98] Ibid r. 31.11.
[99] Ibid r. 31.14.
[100] Rule 31.02(1).
[101] Rule 31.03.
[102] Rule 31.03(8).
[103] Rule 31.03(9).
[104] Rule 31.06(1).
[105] Rule 31.12.
[106] A Bates, 'Should Discovery by Oral Examination be adopted in Queensland?,' 16 *Queensland Lawyer* 92 (1995) 94.
[107] Justice Mark Weinberg, National Judicial College of Australia Conference on the Australian Justice System in 2020 Sydney, The Australian Justice System – what is right and what is wrong with it? Saturday 25 October 2008.
[108] Ibid.

8.7 Experience in Victoria suggests that interrogatories are falling out of favour, given the opportunity for prolix answers to avoid answering the questions posed.[109] This back-and-forth wastes time and increases the costs involved in the discovery process. Discovery by oral examination might redress the situation as targeted questioning could remove or decrease disingenuous behaviour.

8.8 Yet in Victoria at least, oral discovery is 'rarely, if ever, conducted because the court does not often permit (it) and because the process requires the consent of the examinee.'[110] Experience in the Northern Territory suggests similar practice.[111] With such a limited occurrence of oral discovery, it might be difficult to suggest an expansion of these procedures to the federal sphere through the use of comparative processes in Victoria and the Northern Territory. It might be more helpful to explore practice in Ontario, Canada, where discovery by oral examination is the preferred approach.

8.9 In Canada, oral discovery is not permitted in Prince Edward Island, New Brunswick and Saskatchewan.[112] However, in Ontario, oral discovery remains popular and indeed a first-choice for many practitioners over written interrogatories.[113] In Ontario, oral discovery is administered under Rule 34 of the Rules of Civil Procedure 1990.[114] Unlike in Victoria and the Northern Territory, where a party has at first instance been served with written questions, and then answered these questions in a way that is evasive, unresponsive or otherwise unsatisfactory, the court may order that that party submit to oral examination.[115] During examination, the person being examined must answer any proper question relating to any matter in issue, and no objection may be made to a question on the ground that it constitutes cross-examination, unless the question is directed solely to the credibility of the witness.[116]

8.10 However, the experience in Ontario suggests that discovery by oral examination is a continuing practice more due to habit than the particular merits of oral discovery. The province, situated as it is on the American border, has adopted many traits from the American civil system, one of these being the propensity of oral depositions before trial. As of late, however, there has been a movement towards written interrogatories, especially for more complex litigation.

8.11 Costs associated with oral discovery not associated with written discoveries can include room rental expenses, in addition to the costs of preparing a transcript and the court

[109] Interview with John Waters, Melbourne, Partner in Dispute Resolution at Mallesons Stephen Jacques, 31 August 2010.
[110] Victorian Law Reform Commission, *Civil Justice Review Report* (2008) 387.
[111] Interview with Jude Lee, Telephone, Solicitor at Jude Lawyers, Northern Territory, 31 August 2010.
[112] Civil Justice Reform Project, Summary of Findings & Recommendations (2007) available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf> at September 26 2010.
[113] Interview with Patrick Schindler, Telephone, Patrick Schindler Barristers, 23 August 2010.
[114] Court of Justice Act, Rules of Civil Procedure, R.R.O. 1990, Regulation 194.
[115] Ibid Rule 35.04 (3).
[116] Ibid Rule 31.06 (1).

reporter's time.[117] Furthermore, the Canadian Attorney General's Civil Justice Reform Project report of 2007[118] observed that long examinations were cost burdensome and were caused by several factors, including lack or preparation or experience of counsel, irrelevant or repetitious questions and, in some cases, lawyer's billing targets.[119] Moreover, scheduling difficulties created time consuming discovery processes.[120] A current practising litigation lawyer in Ontario noted that 'fishing' expeditions often occur during oral examinations by counsel looking to elicit information. [121] In addition, time wasting can occur due to counsel asking irrelevant questions and several counsel from different parties asking the same questions of a witness.[122] With these factors in mind, the Ontario rules were recently changed on January 1 2010 to make a default time limit of seven hours for oral examination, regardless of the number of parties or other persons to be examined, except with leave of court or consent of the parties. [123]

8.12 In addition, The General Guidelines for the Discovery Process in Ontario 2005[124] made a number of observations concerning problems with oral discovery. This guideline recommended practitioners consider written questions and answers, as opposed to oral examinations, for some or all discovery examinations.[125] The Guidelines noted that written discovery may allow for:

- clearer, more succinct, and more informative answers than those given at oral discovery,
- additional time to consider and ask further questions,
- avoidance of scheduling delays and lengthy examinations associated with oral discovery,
- reduction of the number of undertakings on oral discovery and the need to follow up on responses to undertakings,
- avoidance of possible harassment and intimidation of an examined party and a more cost effective and efficient discovery process.[126]

8.13 Oral examination is particularly difficult in complex cases involving highly technical issues. A single representative of an organisation often cannot recall relevant issues from memory and is required to remit the matter to give an appropriate answer at a later time. It also poses difficulties where the required answers need to be obtained from a number of employees or representatives, and cannot be acquired from a single person. Giving consideration to these and other matters, on January 1 2010, the rules concerning discovery by oral examination in Ontario were amended so that in cases in which the

[117] David Harris, The Discovery Process available at <http://www.wrongful-dismissal.com/PDFs/The_Discovery_Process.pdf> at September 26 2010.
[118] Civil Justice Reform Project, Summary of Findings & Recommendations (2007) available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf> at September 26 2010.
[119] Ibid 58.
[120] Ibid 87.
[121] Interview with Patrick Schindler, Telephone, Patrick Schindler Barristers, 23 August 2010
[122] Ibid.
[123] Court of Justice Act, Rules of Civil Procedure, R.R.O. 1990, Regulation 194 Rule 31.05 (1)
[124] Discovery Best Practices, General Guidelines for the Discovery Process in Ontario, Ontario Bar Association, (2005).
[125] Ibid 8.
[126] Ibid 8.

contested amount is $CAN100, 000 or less, oral examinations for discovery shall not exceed two hours regardless of the number of people to be examined.[127]

Recommendation:

8.14 The Canadian experience leads us to the conclusion that an expansion of the use of discovery by oral examination to the federal sphere cannot be recommended. There are without doubt advantages to oral discovery, being that it may encourage an earlier settlement and it may allow for quicker and timelier follow-up questions. Yet these advantages do not compensate for the many disadvantages such as the lengthy examinations induced by unprepared or self-motivated counsel, difficulties in convening parties and, particularly for complex technical matters, the infeasibility of extracting information from memory, or the need to orally examine many people within an organisation.

8.15 The Ontario jurisdiction's legislative amendments aiming to limit the use of oral discovery manifests Ontario's dissatisfaction with the oral discovery system. This suggests that Australia would be unwise to implement oral discovery. If it were to be introduced at a federal level, the Canadian experience demonstrates that it should be confined to simple litigation matters with strict, narrow rules limiting abuse of time and permissible range of questioning.

8.16 Indeed, any proposal to expand discovery procedures would likely be met with doubt within the legal profession, given the current move away from interrogatories. The expense and time needed to implement procedures that would make the procedure effective would likely outweigh the benefits to litigants. Resources to increase access to justice in the document discovery phase of trial would therefore be better directed elsewhere than implementing oral discovery at the federal level.

9. INTERNATIONAL MODELS

9.1 In contrast to the Anglo-Saxon common law tradition of document discovery, which places great value on the production of all documents relevant to the litigation, many civil law jurisdictions do not possess this same emphasis and do not dispose of an equivalent document disclosure procedure. Instead, parties in litigation will submit only the documents on which they intend to rely in order to prove their case. In Germany, for example, whilst a mechanism does exist for the courts to order disclosure of documents, in practice this rarely occurs.[128] This is a result of two major differences between German civil litigation and Anglo-Saxon litigation in terms of discovery. The first is that the court, rather than the parties, is primarily responsible for gathering and sifting

[127] Court of Justice Act, Rules of Civil Procedure, R.R.O. 1990, Regulation 194 Rule 76.04 (2).

[128] Rolf Trittman & Boris Kasolowsky, 'Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings' (2008) 31 (1) *UNSW Law Journal* 330, 336.

evidence.[129] The second is that there is no distinction between pre-trial discovery and presenting this evidence in trial.[130] This difference is rooted in a cultural dissimilarity. In Germany document disclosure in civil litigation is regarded as an invasion of privacy, and thus is not acceptable outside the domain of criminal cases (where the broader public interest takes precedence over the personal right to privacy).[131] These narrower rules are not without critics and German laws were recently amended so that courts can order a party to disclose documents in their possession to which one of the parties has made reference.[132]

9.2 Given the differing legal heritage and procedure of common and civil law jurisdictions, it is perhaps more instructive to examine the approach taken in international arbitration. Cases originating in both civil and common law jurisdictions are heard in international arbitration matters. This has yielded a hybrid approach to document disclosure, which promotes a legal 'middle ground.' Although document disclosure does not form such a large part of the litigation process in international arbitration matters, there is nonetheless agreement as to its utility. Lawyers with English backgrounds have generally accepted that there is no place for Anglo-Saxon style document discovery, in which disclosure lists and inspection of documents feature prominently.[133] Conversely, lawyers from civil law backgrounds will generally accept requests for document disclosure as part of the international arbitration proceedings.[134]

9.3 The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration 2010 outline the procedure for the acquisition of documents relating to the trial. Parties are to submit to each other, and the Arbitral Tribunal, all documents on which it relies.[135] Additionally, either party may apply to the Arbitral Tribunal for a Request to Produce, which compels the opposing litigant to disclose relevant documents in their possession.[136] This request needs firstly to contain a description of the requested document, or of a narrow and specific requested category of documents that are reasonably believed to exist.[137] It must secondly contain a description of how the documents are relevant and material to the outcome of the case.[138] Finally it

[129] John H. Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, 825.
[130] Ibid 825.
[131] Christian Borris, 'The Reconciliation of Conflicts between Common-law and Civil-law Principles in the Arbitration Process' in Stefan Frommel and Barry Rider, *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (2nd ed, 1999) 1, 11.
[132] Zivilprozessordnung (ZPO) §142(1): The court may order one of the parties or a third party to disclose documents in their possession to which one of the parties has made reference.
[133] Trittman & Kasolowsky above n 96, 337.
[134] Gabrielle Kaufman-Kohler and Philippe Bärtsch, 'Discovery in International Arbitration: How Much is Too Much?' (2004) 1 *SchiedsVZ* 13, cited in Rolf Trittman & Boris Kasolowsky, 'Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings' (2008) 31 (1) *UNSW Law Journal* 330, 337.
[135] International Bar Association, International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (adopted 29 May 2010) Article 3 (1).
[136] Ibid Article 3 (2).
[137] IbidArticle 3(3) (a).
[138] Ibid Article 3(3) (b).

must contain a statement as to why the requesting party believes the documents to be in the possession of the opposing party and a declaration that they are not in the possession of the requesting party.[139]

9.4 These rules are considerably narrower than the discovery allowed for generally in the Australian Federal Court. They seek to ensure that only documents relevant and material to the case are tendered before the court. However, they do recognise the just principle of allowing a party to have access to documents they reasonably believe to be in the possession of an opposing party and which may affect the outcome of the case. They limit the acceptable use of document discovery but do acknowledge that access to documents in the possession of an opposing litigant can be vital to ensuring a just result in a trial. In this regard, they resemble the more limited discovery available in the Federal Court Fast Track system.

9.5 Furthermore, the International Chamber of Commerce, in its 2007 guidelines, refers parties in arbitration disputes to the IBA rules and notes that costs may be further reduced by parties agreeing to limit the number of requests, limiting requests to documents materially relevant, establishing reasonable time limits for the production of documents and using an agreed schedule of document production. These guidelines are instructive as to how Request to Produce legislation, such as that seen in the IBA Rules, can be restricted or made more efficient.

9.6 *Recommendation:* The International Arbitration Rules and the hybrid approach to discovery should be considered as an alternative to the current regime of document discovery. In particular, the mechanism whereby a Request to Produce needs to be tendered in order to gain access to opposing parties' documents may be informative to the reform of document disclosure procedures in Australia. This would need to be carefully examined to ensure a balance of the rights of litigants to access documents relevant to their cases, and the need to curtail excessive document disclosure.

10. CONCLUSION

10.1 Procedures of pre-trial discovery of documents, which had been viewed as an essential element in the elimination of surprise tactics and important in the interests of justice, have themselves been questioned due to the disproportionate costs in their administration. This submission has been concerned with examining issues that cause these cost and time burdens.

10.2 This submission has examined the impact of Order 15A of the Federal Court Rules governing preliminary discovery. We have concluded that orders by the Court under Order 15A of the Federal Court Rules should be strictly monitored so that speculative discovery does not take place to the detriment of an opposing party. In addition, we have examined the move towards e-discovery and noted the advantages as well as the

[139] International Bar Association, International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (29 May 2010) Article 3(3) (c).

disadvantages of such a move and the potential this has for speedier discovery processes. We have noted that, whilst e-discovery will have an important role to play, it is no less susceptible to abuse than traditional discovery processes and greater case management processes may be necessary to limit the potential for e-discovery to bring even more onerous numbers of documents before courts.

10.3 The fast-track system, as an alternative to discovery, has the potential benefits of removing much of the cost of litigation. However, care must be taken to ensure that potential litigants are not disadvantaged by the lack of opportunity to discover important documents. It is still important that parties are not able to conceal information and that litigants have access to documents that could affect the outcome of their cases. In addition, we examined procedures of discovery by oral examination, which is particularly important in Ontario, Canada. Whilst discovery by oral examination might appear initially attractive due to the capacity of a litigant to obtain quick answers, oral discovery has many problems. The move away from such procedures that is currently taking place in Canada would suggest that it is unwise to expand the oral discovery provisions in the Victorian and Northern Territory Supreme Court Rules to the Federal Court. We have lastly looked at discovery models in international arbitration and noted the limited role that discovery plays in litigation of this sort.

10.4 The need to ensure access to justice requires paying regard to the cost burden on both plaintiffs and defendants. Reforms to pre-trial discovery will play an important role in increasing access to justice and ensuring all members of society have admittance to the justice system if required.