

Your Ref: Executive Director

Quote in reply: Direct Advocacy

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The Executive Director
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Dear Executive Director

DISCOVERY IN FEDERAL COURTS CONSULTATION PAPER

Thank you for providing us with the opportunity to make comments to the Discovery in Federal Courts Consultation Paper.

This response has been compiled with the assistance of the Queensland Law Society's Access to Justice and Pro Bono Law, Litigation Rules, ADR and Ethics Committees. The practitioners that comprise these Committees have a thorough understanding of the various issues impacting this area of law.

Members of the above committees have both contributed to, and had the benefit of reading, the submission regarding your Consultation Paper drafted by the LCA. The Society commends the work that went into that submission and wishes to endorse the submission in its entirety.

As a general observation, the Society believes that discovery plays a very important role in the administration of justice and in leading to the resolution of many proceedings without the need for expensive trials. The Society believes that many of the concerns raised regarding discovery stem from observations made of prominent 'mega-litigation', rather than from results of qualitative and quantitative studies. That is not to say that there is no room for improvement in the practice of discovery. The Society fully supports, and indeed provides, training in this respect.

The Society cautions against adopting any significant reforms without further studies of the issues arising in discovery, the underlying causes of those issues, a detailed process of consultation with all relevant stakeholders, and consideration of the potential for unintended consequences.

Further, the Society is concerned that insufficient regard has been had to the crucial role that documents play in litigation more generally. Documents are not simply obtained from a client for the purposes of discovery. The primary purpose of gathering documents from a client is to consider and advise on the client's position. Care must be taken to ensure that any reforms do not hamper the ability of a lawyer to properly advise the client.

The Society believes that a 'one size fits all' approach should not be adopted. The present legislative framework for discovery provides sufficient flexibility to address many of the concerns raised to the extent they may arise in any particular matters. In appropriate matters, there may be a need for stronger judicial management directed towards requiring parties to consider and agree, collectively and at an early stage, on the approach to discovery. Such an approach is likely to reduce the level of disputation at a later stage.

Similarly, the Society believes that changes to the regime governing ethical obligations of lawyers in relation discovery are not justified. The Society is unaware of any evidence pointing to systematic abuse of the discovery process.

As stated above, the role of discovery in leading towards the resolution of matters should not be overlooked. Accordingly the Society considers that care should be taken in seeking to impose alternatives to discovery. Specifically, in relation to pre-action protocols, there is a legitimate concern that these can lead to front-loading of costs. In addition, rather than being subject to active judicial management, pre-action processes tend to be subject to merely re-active control. Re-active control (such as costs orders) may be of little practical utility given that, by that stage, parties may effectively be locked into expensive and inefficient processes in relation to documents. The Society believes preventative measures are preferable.

The Society has some additional comments it would like to make in relation to specific sections of the paper, as follows:

2. Legal Framework for Discovery in Federal Courts

General Comments

As stated above, the Society considers that the legal framework for discovery in Federal Courts is capable of dealing with most issues likely to arise in the course of particular proceedings. For reasons already canvassed in the LCA's submissions, the Society does not believe that wholesale changes to the current legal framework are necessary or justified.

From the experience of members who have been using the 'directly relevant' test since 1994, the Society maintains that any changes to the tests of relevance will have little practical impact in reducing costs. Regardless of which test is adopted, a practitioner still needs to review all of the documents to make an assessment as to whether it is discoverable or not.

In the Society's view, the most significant issues that require addressing in relation to discovery are:

- The need for many clients to more effectively manage their records (so as to facilitate the early and efficient identification and gathering of potentially relevant records).
- The need for parties, their lawyers, and the courts to give greater consideration to the process of gathering (as distinct from reviewing) documents.

- The need for parties, their lawyers, and the courts to have a better understanding of available technologies that can assist in more cost effective gathering and reviewing practices.
- The need for stronger judicial management and, in particular, of requiring parties to fully consider approaches to discovery within the existing legal framework (ie CM6).
- The continuing distinction between electronic discovery and traditional discovery. This tends to lend support to parties adopting less efficient 'traditional' practices in inappropriate situations. The Society believes this distinction is inapplicable in most matters given the proliferation of electronic communications.

3. Discovery Practice and Procedure in Federal Courts

General Comments

As stated above, the Society believes that the distinction between electronic and traditional discovery may be unhelpful. For example, in the Society's view there is no reason why CM6 should not apply to matters where there are a reasonable number of documents likely to be discovered (regardless of whether discovery is intended to be given in electronic format).

The Society otherwise believes that the current procedures are sufficiently flexible to be able to address most concerns arising from discovery.

Some specific additional comments

Question 3–2 In general, does the amount of money spent on the discovery process in proceedings before the Federal Court generate:

- (a) too much information;***
- (b) too little information; or***
- (c) about the right amount of information***

to facilitate the just and efficient disposal of the litigation?

Where possible, please provide examples or illustrations of the costs of discovery relative to the information needs of the case.

Care needs to be taken in considering what is included in 'discovery costs', and in then seeking to ascribe a value to those costs based on what is ultimately relied upon at a trial. As mentioned earlier, records are obtained and used for purposes other than discovery. They can help a party identify, and then assess, the relative strengths and weaknesses of its case and that of its opponent. The issues in a matter often change, and become more refined, as time progresses. Documents obtained through discovery and otherwise can assist in this process but may be of no relevance to the issues as finally refined. Their value should not however be lightly discounted. Given that discovery tends to occur at a relatively early stage of a matter, it should come as no surprise that the documents discovered an early stage may not necessarily coincide with the issues to be determined at a trial.

The real issue appears to be where parties are unnecessarily seeking to tender large numbers of documents in a trial. This is less an issue relating to discovery but more an issue concerning trial practice and judicial management.

The Society does recognise that the ever increasing volume of electronic data being encountered has the potential to increase costs in the gathering and review of records for discovery. However there are

existing practices and procedures that can be adopted by parties, perhaps with stronger encouragement from courts, that can address this.

Question 3–3 *Are there any particular approaches to the discovery of electronically-stored information that help to save time and cost in the process? Do any particular approaches cause inefficiencies or waste?*

The Society endorses the submissions of the LCA in this regard, but wishes to reinforce that many of the suggested approaches are equally applicable to discovery of 'hard copy' documents.

Question 3–4 *Has discovery by categories of documents, or particular issues in dispute, reduced the burden of discovery in proceedings before the Federal Court? If not, what has prevented the parties, their lawyers and the court from cost-effectively limiting the scope of discovery?*

Present case law appears to require parties to ensure that any agreed categories remain subject to the relevance tests in the Federal Court Rules. This may be unduly restrictive in some circumstances. It is noted that the rule 138 of the *Supreme Court Civil Rules 2006* (SA) permits parties to enter into a 'document disclosure agreement' under which they agree to dispense with or regulate the extent of disclosure and how it is made. The Society considers that such a provision requires further consideration, given the potential scope it gives to parties to reach agreement that might have cost benefits.

Further, the Society believes that a provision such as rule 221 of the *Uniform Civil Procedure Rules 1999* (Qld) which effectively prohibits the discovery of documents going only to damages (unless requested), may go some way to reducing the number of documents discovered in a number of matters.

Question 3–5 *Has the creation of discovery plans and use of pre-discovery conferences helped to ensure proportionality in the discovery of electronically-stored information in Federal Court proceedings? If not, what has prevented the court, the parties and their lawyers from establishing practical and cost effective discovery plans in advance of the search for electronic documents?*

In particular, are the expectations stated in Practice Note CM 6 for parties to exchange their best preliminary estimate of the cost associated with discovery, and to agree on a timetable for discovery, generally being met in practice?

The Society supports CM6 and its encouragement of discovery plans, completion of a pre-discovery conference checklist, and attendance at a pre-discovery conference. The Society also supports the requirement for parties to obtain, and disclose, estimates of the costs associated with discovery. Unfortunately it appears to the Society that CM6 is not being routinely followed in practice.

The Society believes further investigation into the apparent lack of use of CM6 is warranted. It may be because parties are not compelled to comply with the practice note. Rather, CM6 only applies if the parties seek an order that discovery occur electronically (or that the hearing be conducted electronically).

It is the Society's understanding that, despite the lack of formal compliance with CM6, parties are nevertheless undertaking electronic disclosure. It appears that this is being done by informal agreement under which the parties agree on document management protocols but are not conferring in relation to the searches to be conducted and the likely costs.

The Society believes consideration should be given to making compliance with CM6 mandatory for all matters or at least those matters in which discovery of more than, say, 200 documents is likely (unless otherwise ordered). Further, the Society does not believe consideration of CM6 should be limited to electronic discovery.

Proposal 3-1 Following an application for a discovery order, an initial case management conference (called a 'pre-discovery conference') should be set down, at a time and place specified by the court, to define the core issues in dispute in relation to which documents might be discovered. At the pre-discovery conference, the parties should be required to:

- (a) outline the facts and issues that appear to be in dispute;***
- (b) identify which of these issues are the most critical to the proceedings; and***
- (c) identify the particular documents, or outline the specific categories of documents, which a party seeks to discover and that are reasonably believed to exist in the possession, custody or power of another party.***

The Society generally supports this proposal. The principles of CM6, and the pre-discovery conference checklist, appear sufficiently flexible to permit this approach (subject to applying to all discovery rather than just electronic discovery), although further clarification may assist parties.

The timing of such a conference is important. If it is too early, the issues are unlikely to have been sufficiently defined. If it is too late, the parties may well have undertaken significant document collection.

Proposal 3-2 Prior to the pre-discovery conference proposed in Proposal 3-1, the party seeking discovery should be required to file and serve a written statement containing a narrative of the factual issues that appear to be in dispute. The party should also be required to include in this statement any legal issues that appear to be in dispute. The party should be required to state these issues in order of importance in the proceedings, according to the party's understanding of the case. With respect to any of the issues included in this statement and concerning which the party seeks discovery of documents, the party should be required to describe each particular document or specific category of document that is reasonably believed to exist in the possession, custody or power of another party.

The Society supports the early identification of issues, however has some concerns regarding the impact of such statements on costs and their relationship with pleadings. The Society believes more consideration should be given to whether the rules of pleading are operating satisfactorily.

Any proposals in relation to the exchange of such summaries need to recognise that it is not always a simple task of identifying the real issues at an early stage. Not only do issues define the scope of discovery, but discovery can also assist in defining the issues.

There is therefore a tension between requiring parties to identify the issues early and requiring them not to undertake significant searches for documents until those issues have been defined.

Accordingly the Society believes that parties should not be prevented from undertaking some searches for records prior to a pre-discovery conference, provided those searches are reasonable and 'proportionate', and that the records obtained are dealt with in a manner that will not hinder their future management in the proceedings (ie if they are consistent with standard or default Document Management protocols).

Proposal 3–3 *Prior to the pre-discovery conference proposed in Proposal 3–1, the parties should be required to file and serve an initial witness list with the names of each witness the party intends to call at trial and a brief summary of the expected testimony of each witness. Unless it is otherwise obvious, each party’s witness list should also state the relevance of the evidence of each witness.*

The Society shares the LCA’s concerns regarding this proposal.

It is also concerned at the impracticality of producing such lists at an early stage of proceedings (particular for defendants). It may in fact require significantly more work, and potentially greater documentary evidence gathering, thus defeating the objectives of reducing costs associated with discovery.

The Society believes that parties should focus on the types of documents (and their custodians) to be searched bearing in mind the likely issues in the proceedings. There may therefore be a need for parties to identify names of likely custodians, and perhaps to exchange these names. CM6 would appear flexible enough to permit parties to confer and agree on searches to be undertaken that refer to specific people, without requiring them to incur the costs of summarising the expected testimony of witnesses.

Question 3–6 *Should parties be required to produce to each other and the court key documents early in proceedings before the Federal Court? If so, how could such a procedural requirement effectively be imposed?*

The Society sees value in such a proposal in appropriate cases.

The Society notes that from July 2010 the Queensland Supreme Court Supervised Case List has been encouraging parties to seek directions that provide for the early exchange of ‘critical documents’ (being a limited number of documents that are likely to be tendered at any trial and are likely to have a decisive effect on the resolution of the matter).¹ The Society understands that such directions are routinely being sought and obtained.

Further, the Society believes consideration should be given to the recommendations concerning discovery contained in the Final Report of the American College of Trial Lawyers, 11 March 2009. In particular, at page 7, it is recommended that ‘shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party’s claims, counterclaims or defences. The Society sees value in such a process (noting that the types of documents required to be produced reflect O 15 r 2(3)(a) of the *Federal Court Rules*). It is unlikely to be problematic or onerous for the producing party, given such documents would have been gathered for the purposes of preparing that party’s case. It would assist the opposite party to plead in response. It may also facilitate earlier resolution. Finally, and more relevantly for present purposes, it may assist parties to better identify the types of documents (and their custodians) required for further discovery (if any is required).

Question 3–7 *Are existing procedures under O 15 rr 10 and 13 of the Federal Court Rules (Cth) adequate to obtain production of key documents to the court or a party? How could these procedures be utilised more effectively?*

The Society does not believe O 15 r 10 contains adequate provision to obtain production of ‘key documents’ of the nature discussed above. O 15 r 13 could be utilised to enable the Court to obtain

¹ http://www.courts.qld.gov.au/About_the_Courts/Note-to-profession-supervised-case-list.pdf

production of such key documents, however it would require Court intervention (and additional cost) before those documents could be produced to the other party.

Proposal 3–4 In any proceeding before the Federal Court in which the court has directed that discovery be given of documents in an electronic format, the following procedural steps should be required:

(a) the parties and their legal representatives to meet and confer for the purposes of discussing a practical and cost-effective discovery plan in relation to electronically-stored information;

(b) the parties jointly to file in court a written report outlining the matters on which the parties agree in relation to the discovery of electronic documents and a summary of any matters on which they disagree; and

(c) the court to determine any areas of disagreement between the parties and to make any adjustments to the proposed discovery plan as required to satisfy the court that the proposed searches are reasonable and the proposed discovery is necessary.

If so satisfied, the court may make orders for discovery by approving the parties' discovery plan.

The Society supports these procedural steps being required in all matters in which discovery is to be given (not simply those matters in which discovery is to occur electronically). The Society recognises that this proposal reflects CM6, but in mandatory terms.

4. Ensuring Professional Integrity: Ethical Obligations and Discovery

General Comments

An effective discovery process is an essential component in a successful litigation and dispute resolution system, and for that reason care should be exercised in revising the discovery process. One of the most important functions served by discovery is the awareness it creates in a party that the party will be required to disclose documents, and in all probability have those documents placed before a court at trial.

The Society believes that the vast majority of its members act ethically in relation to discovery and the conduct of litigation generally. It also believes that there is no basis for requiring professional conduct rules to be amended to deal specifically with discovery.

The Society does however support the development of guidelines, and the provision of training, to lawyers regarding ethical obligations and practical approaches with respect to discovery.

The Society believes that there are adequate structures in place to deal with any instances of misconduct that may arise in the course of discovery. The focus however should be on adopting processes that prevent any disputes or issues arising. In this regard, the Society believes concerns could be significantly alleviated if Courts actively encouraged the early conferral and agreement between the parties in relation to discovery and, in particular, its likely cost.

5. Alternatives to Discovery

General Comments

It is the Society's view that discovery can play an important part in leading to the early resolution of proceedings. If it is properly managed, discovery should not result in disproportionate cost.

As stated previously, the Society believes care needs to be taken when considering pre-action protocols. The experience of members is that they can add an additional layer of cost and result in further delay. As recognised by the ALRC, they may also lead to satellite litigation.

The Society would also oppose any reforms directed at making such protocols mandatory for all matters. At least in the case of commercial disputes, the parties may have engaged in an unsuccessful contractual dispute resolution process.

Pre-action protocols are generally directed towards encouraging parties to consider early resolution of a dispute. A common requirement is the early disclosure of information, including documents. In that sense, pre-action protocols are not really alternatives to discovery.

If such protocols are required, they should not result in parties having to undertake significant, unregulated, searches for records in order to comply. The costs of complying could defeat the objectives of the process. The manner in which records are managed should also be consistent with approaches that might be adopted if the matter proceeds to Court.

Overall Summary

In the Society's view, the Federal Courts have a strong legal framework for appropriately regulating the practice of discovery. It appears however that, at least in some matters, more effort may be required of parties, their lawyers, and the Courts to take advantage of that framework to achieve more cost-effective outcomes.

The Society therefore welcomes the ALRC's inquiry and its Consultation Paper, and trusts that it will help to highlight some of the issues and lead to improvements.

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Thank you again for the opportunity to make comments to the Discovery in Federal Courts Consultation Paper.

If we can be of any further assistance to you in relation to this Inquiry, please do not hesitate to contact Ms Binny de Saram, Policy Solicitor, on (07) 3842 5885 or b.desaram@qls.com.au or Ms Louise Pennisi, Policy Solicitor, on (07) 3842 5872 or l.pennisi@qls.com.au.

Yours faithfully

Bruce Doyle
President