THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Sir

Discovery in Federal Courts Consultation Paper

I am writing to you at the request of the Law Society's Litigation Law & Practice Committee (Committee).

The Committee has the responsibility of considering and dealing with any matters relating to litigation and advising the Council of the Law Society on all issues relevant to this area of practice. The members of the Committee include senior litigation practitioners and experts. Many of them advise clients of the litigation and cost implications within the court system.

Legal Framework for Discovery

The Committee submits that discovery is essential to litigation to clarify the issues in dispute and to identify facts and evidence to assist the Court to determine the appropriate outcome. The Committee supports the general approach taken in the Consultation Paper that "*discovery is a legitimate and valuable mechanism that aides the transparency of litigation in the Federal Court and facilitates an informed analysis by the parties of the strengths and weaknesses of their respective cases*".

While discovery has a long history in common law systems and it is accepted that the process of discovery is central to the fact finding and decision making processes in litigation, the Committee submits that the process of discovery originated in an era in which there were far fewer documents which might be relevant to the facts in issue in a particular case. As a result, practice and procedure has changed in light of the advent of technology and the need to discover documents in electronic form.

In contemporary practice the Courts and commercial litigants have struggled from time to time to balance the competing interests of "*quick and cheap*" resolution of civil litigation, with the need to identify and discover electronically stored information most relevant to the issues in dispute, to ensure that the determination is also "*just*".

The Committee agrees with the views in the Consultation Paper that the conduct of the discovery process gives rise to volatile tension between the competing interests set out above.

Commentary from the Courts in large, complex litigation, for instance, in the "*C7*" case, is symptomatic of the challenges faced not only by the Court but by commercial parties and their solicitors in complying with the discovery obligations of any substantial trading concern in the information age.

The Committee agrees that the existence of a vast mass of electronic documents presents an acute dilemma for the civil justice system. As pointed out by Lord Jackson in his *Review of Civil Litigation Costs* in the UK:

"on the one hand, full disclosure of all electronic material may be of even greater assistance to the Court in arriving at the truth than old style discovery of documents. On the other hand, the process of retrieving, reviewing and disclosing electronic material can be prodigiously expensive."

The rapid changes in technology also present a challenge for the Court rules and procedures in relation to discovery which in some jurisdictions have lagged behind.

The expense associated with retrieving electronic records includes the cost of information technology experts, the providers of litigation support systems (often not associated with law firms) and other providers of document storage systems devoted to holding vast repositories of documents gathered in discovery for the duration of the litigation. These expenses can constitute a large proportion of the costs associated with producing documents on discovery and are additional to the costs payable to the lawyers in reviewing the potentially discoverable material. The costs to the litigant include the time spent in gathering documents which is time diverted from the objects of the litigant's business.

The costs associated with discovery are particularly high in complex, multiparty commercial litigation. Litigants are often large organisations with multiple, decentralised offices and document storage systems. In addition, they often have numerous staff and vast collections of electronic records in many storage repositories and formats, such as computer servers, personal computers, laptops, as well as hard copy records.

Although, the Court Rules allow the Courts to make directions for litigants to take an "*efficient*" and "*proportionate*" approach to the conduct of civil litigation, this is rarely accepted as a justification for unilateral decisions by parties to narrow the search and recovery of potentially relevant material.

The Committee notes the comments of Finkelstein and Sackville JJ that only a small percentage of documents searched and reviewed are actually tendered in the Court. This is not, in the Committee's view, an indication of the success or otherwise of the discovery process but is indicative of the effort required to by the search, retrieval and review processes in multiparty, complex, document-intensive litigation in order for parties to comply with their discovery obligations.

The starting point for any discovery exercise today is a vast collection of documents stored in a myriad of places and formats. It should not be that litigants are confronted by a large number of electronic and paper documents nor is it surprising that only a small proportion of documents will ultimately be useful to the Court in making its determination.

The Committee agrees with the comments in the Consultation Paper at paragraph 2.63 that the percentage of discovered documents that are not subsequently relied upon at trial may create a misleading perception that discovery rules are only successful when a substantial proportion of documents discovered are tendered in evidence. In the context of certain proceedings, it is possible that a single document may turn out to be crucial to the determination of the issues in dispute. However, that fact does not obviate the parties' obligations under the current rules of Court, to search, retrieve and review a large collection or a number of large collections of documents.

While complex, multiparty, document-intensive litigation, such as the "C7" case, highlight the problems posed by the increasing quantity of electronic documents and information generated in contemporary trade and commerce and the growing capacity of electronic document storage and management systems, the Committee warns against establishing matters of policy underlying discovery based on anecdotal evidence or particular case examples. While some case examples are useful as shown in the Consultation Paper to identify potential issues or perceive problems, they need to be supported on a wider basis in order to inform policy development. As set out below, the Committee supports the collection of empirical data (despite the difficulties referred to in the Consultation Paper in collecting such information) in order to base future considerations regarding the improvement of the discovery process.

The Committee agrees with the comments expressed in the Consultation Paper at 3.77 that the conduct of the discovery process, especially where extensive electronic material is involved, gives rise to volatile tension between the parties to litigation. In particular, the Committee agrees with the following comment "*expansive searches are more likely to uncover greater amounts of relevant information offering some assistance to the requesting party's case but carry a substantial cost burden for the party giving discovery. Reasonable or proportionate searches are more affordable for the discovering party but will inevitably by-pass unknown quantities of potential relevant material sought by the requesting party.*"

Discovery Practice and Procedure

The Committee considers that the proposals for a pre-discovery conference and the exchange of information in advance of that conference in an effort to limit the scope of discovery are useful.

The Committee considers that the pre-discovery conference could be a productive opportunity for the Court to apply considerations which will have a real effect on the scope of discovery and the costs associated with the exercise, such considerations encompassing reasonableness and proportionality, in the sense of the cost benefit of particular steps and searches being taken.

The proposals put forward below for consideration are aimed at maximising the potential for a pre-discovery conference to save time and costs by assisting the Court in making decisions regarding reasonable and proportional searches early in the proceedings and prior to discovery commencing.

The Committee considers that while practice and procedure in the Courts could be improved to deal with the challenge, the Court already has wide powers for the management of cases and the discovery exercise presented in each case.

It is the experience of practitioners that the Courts can be reluctant to make early decisions which have the effect of limiting discovery or making determinations regarding reasonable and proportionate searches. Orders compelling searches of back-up tapes and disaster recovery systems are particular examples in point as these exercises can be particularly expensive and potentially fruitless.

The Committee notes the comments made in *BT (Australasia) Pty Limited v New South Wales & Telstra* in which Justice Sackville found that Telstra failed to comply fully with its discovery obligations in relation to electronic documents, in a number of respects including:

"first.... Telstra neither disclosed the existence of back-up tapes, nor took any steps to restore those tapes with a view to ascertaining whether and how discoverable electronic material could be identified and presented in usable form. I accept and appreciate that the purpose of making and retaining the back-up was essentially disaster recovery, rather than archival. Nonetheless, and subsequent events have demonstrated, it is feasible, albeit difficult and expensive, for the tapes to be restored and a review process set in place to indentify discoverable material."

It is interesting to note that, on the one hand, the Courts have made comments from time to time regarding the disproportionate "value" of discovery and have cited in support the comparatively small subset of documents produced by discovery which are ultimately tendered in Court, and on the other hand, have in the experience of practitioners been reluctant to limit discovery so as to obviate the need for parties to restore defunct computer systems or search back up tapes.

The proposals put forward below are designed to ensure that the issues in relation to the proceedings are crystallised at an early stage and are dependant on the closure of pleadings prior to embarking on a pre-discovery conference. It is acknowledged that in complex civil litigation, there will be a number of amendments to pleadings, including after the discovery exercise, as a theory of the case often evolves and emerges during the course of discovery. Nevertheless, the Committee supports the introduction of procedures to assist in the early distillation of the issues.

Issues addressed in the Submission

The Committee response to the following proposals contained in the Consultation Paper:

Proposals 3 – 1 (pre-discovery conferences), 3 -2 (narrative of factual issues), 3 – 3 (initial witness list) and 3 – 4 (discovery plan)

The Committee supports the proposals referred to above and submits that the parties should be given sufficient time prior to the proposed conference to enable them to adequately prepare and that proper regard be had for the fact that at an early stage in the proceedings issues may be evolving and that in this context crystallisation of the issues may only arise in the context of the completion of the discovery process and evidence.

In light of the comments made above, the Committee puts forward the following proposal in order to ensure that the pre-discovery conference is as productive as possible.

Committee Proposal 1

Prior to the pre-discovery conference, the parties should exchange a "search protocol" document which identifies the possible repositories of discoverable documents in the possession, custody and control of each party both from a hard copy and soft copy perspective. Such a protocol document would:

(a) Identify each and every database which may contain relevant discoverable material; and

(b) Record detailed information regarding the level of effort in terms of time and cost that would be required in order to retrieve, review and produce discoverable material from each of those identified document repositories.

Such indicative costing would include not only the legal costs, but third party information technology costs which may be incurred in restoring obsolete computer programs for the purposes of retrieving material for the purposes of discovery.

The purpose of the document would be to identify where the discoverable material is stored, what needs to be done in order to retrieve the records including restoring old technology etc, and the effort in terms of cost and time that would be required to make reasonable searches.

A proper search protocol should present information to the Court which will enable the Court to make determinations that reduce costs by ensuring that the parties are only required to undertake reasonable and proportionate searches having regard to a cost/benefit analysis.

In the Committee's view, such a search protocol may actually reduce the scope of searches required to be undertaken by the parties and thereby reduce the costs of discovery.

The Committee's view is that a search protocol in combination with a pre-discovery conference would ensure that the issue of discovery is tackled early where there is a real prospect of reducing costs and making real savings in terms of the discovery exercise.

Proposal 3 – 5 (broad discretion)

The Committee submits that the Federal Court presently has the power to effectively manage the discovery process. The Committee considers that education and increased awareness would improve the exercise of the discretion. This matter is dealt with below.

Proposal 3 – 6 (judicial education)

Subject to the comments below, the Committee supports the proposal that the Federal Court should develop and maintain a continual judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings.

Committee Proposal 2

The Committee considers that the Court should be provided with specialist technical training to give it a basic understanding of the information technology issues to increase its level of awareness of the complexity of data storage and retrieval and particularly the issues in relation to the restoration of computer systems.

While the Committee agrees that information systems can make the work of discovery easier such as through the use of keyword searches of electronic repositories of records, it would lead to error to assume that the use of these systems is universal in reducing the work of searching for relevant discoverable material or cutting down on the vast quantities of documents which might be thrown up by such keyword searches.

As a practical matter such keyword searches can often take many days to run particularly over large repositories of documents and can return vast numbers of results all of which need to be reviewed by a party and its solicitors to determine whether the material is discoverable. These issues have a significant cost implication. Basic information of this nature should be available to the Court to ensure that the complexities of technology and the costs of using such technology are taken into account when considering the scope of discovery.

Notwithstanding the above, the Committee considers that in light of the rapidly evolving nature of improvements in the field of technology, it is not entirely feasible to expect the Court to have a deep understanding of computer systems or issues associated with the retrieval of data and the costs associated with searching and retrieving such data. Accordingly, the Committee considers that in order to improve the effectiveness of the pre-discovery conference, the following proposal should be considered.

The Committee proposes that the Court retain an information technology registrar to assist the Court to determine important questions in relation to the reasonability and proportionality of searches and retrieval particularly in the context of the tension between the "quick and cheap" resolution of litigation and the need to identify and discover electronically stored information most relevant to the issues in dispute to ensure that the determination is also "just". The information technology registrar would assist the Court in determining questions such as forensic value of search and retrieval efforts having regard to the discovery obligations of the parties and the cost and time involved in such efforts.

Funding should be granted to retain an information technology registrar with combined information technology and legal qualifications whose technical expertise can be called upon by the Court to assist it in assessing the positions of the parties as disclosed in the search protocol proposed above.

The specialist registrar would review the search protocols of the parties in anticipation of the pre-discovery conference and assist the Court during the pre-discovery conference to assess the proposals that are put forward by the parties in their search protocols. The purpose of the specialist registrar would be to give practical and technical advice to the Court in order to assist in the assessment of the discovery exercise and in the determination that will need to be made in relation to reasonable and proportionate searches in order for the parties to comply with their discovery obligations.

Proposal 3 - 7 (data collection)

The Committee supports proposal 3 - 7 and considers that the collection of empirical data is essential to the accurate assessment of the discovery process.

Proposal 4 – 2 (legal costs)

The Committee does not support a proposal which would require the legal profession to cap or limit legal costs associated with discovery. The Committee considers that provided the legal costs of discovery are reasonable there is no reason why the ordinary rules should not apply to the recovery of those legal costs. The existing regulation of the legal profession is adequate to deal with any established overcharging by the legal profession.

Proposal 5 -2 (pre-trial oral examination)

The Committee does not support the proposal of pre-trial oral examination. The Committee considers that the introduction of pre-trial oral examination is likely to add complexity and costs to the litigation process increase the time and costs spent on litigation in Federal Courts.

The Committee notes that the Consultation Paper at paragraph 5 – 93 acknowledges that there is scant empirical evidence that the use of depositions in the United States is effective in the aim of narrowing of the issues in dispute to facilitate settlement.

Conclusion

The Committee appreciates the opportunity to comment on the Consultation Paper.

Yours sincerely

Stuart Westgarth
President