Submission

Inquiry into Discovery of Documents in Federal Courts

To: Australian Law Reform Commission

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The Law Society of Western Australia's submission to the Australian Law Reform Commission on its Consultation Paper dated November 2010

Introduction

Generally speaking, the Federal Court of Australia has always been several steps ahead of other Courts when it comes to its practice and procedures. This is particularly so when it comes to discovery of documents.

The Society considers that discovery in the Federal Court is in excellent shape, striking a just and practical balance between the importance of parties disclosing to the other parties documents on the one hand, and the increasing burden on the parties and the Courts, by way of time and costs, in doing so having regard to the fact that, particularly over the last decade, the number of documents that a party may have to discover adopting nothing more than the *Peruvian Guano* test has significantly increased due to changes in the substantive law and technology.

With these observations firmly in mind, the Society sets out below its submissions with respect to each of the proposals contained in the Consultation Paper.

Before doing so, however, there are 3 questions posed in the Consultation Paper which the Society wishes to comment upon, namely questions 2-2, 2-5 and 2-6.[1]

Questions 2-2, 2-3, 2-5 and 2-6

The Society opposes any steps that seek to prescribe a limitation on the discovery of documents that is designed to apply in every case (such as that suggested in question 2-6). This is because the success of the Federal Court regime regarding discovery is that it is approached on the basis that each case is unique and that it is inappropriate to fix a limiting criteria that will apply in every case. The Society believes that the requirement for leave of the court does effectively regulate the use of discovery in civil proceedings in the Federal Court (question 2-2).

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[1] Rather than reproduce the questions and proposals herein, the list of questions and proposals set out in the Consultation Paper is attached to this submission for ease of reference.

The *Peruvian Guano* test is generally recognised as a test which, in this day and age, needs some limitation. However, the appropriate limitation ought be determined on a case by case basis, not by reference to some limiting criteria that will apply in every case (such as that suggested in question 2-6). The categories of documents required to be disclosed under the Federal Court Rules are not so broad (question 2-5) and any limitation on the categories will, again, have the potential of working an injustice in particular cases where a broader range of documents ought be discovered. The Society firmly believes that the *Peruvian Guano* test ought remain but tempered from case to case as the court sees fit in the interests of justice having regard to the issues in and circumstances of that case.

Proposal 2-1

The Society agrees with this proposal.

Proposal 3-1

The Society is keen to avoid the entrenchment of additional conferences as a matter of course. Ordinarily the matters contemplated in this proposal would be dealt with at a directions hearing after the parties have conferred. The court would only become involved in the matter in the absence of agreement between the parties. It would seem unnecessary to entrench a requirement of this nature which would apply in all cases. Accordingly, such a "conference" (which is simply another word for a directions hearing) should only occur only if required after the parties have conferred.

Proposal 3-2

As noted above, before a court is required to adjudicate upon any dispute between the parties with respect to the scope of discovery, there must be (as the federal Court presently requires) full conferral between the parties. A party should not be required to go to the expense of preparing any documents until there has been a conferral and the extent of any dispute about discovery has been identified. Whatever then needs to be prepared for a hearing of the matter would then be limited to the areas of dispute.

Moreover, what is contemplated in this proposal would seem to be unduly onerous: any perceived benefit would be far outweighed by the costs of compliance. What ought to be prepared is an outline of submissions identifying the document/classes of documents in respect of which discovery is sought, indicating the issue (factual and/or legal) in respect of which it is said the documents are relevant, identifying how the documents are said to be relevant and stating why it is in the interests of justice that, in the particular case, the documents ought be discovered.

Proposal 3-3

The Society does not agree with this proposal. The Society does not agree that the identification of witnesses and the summarising of their expected testimony is a matter that will assist (greatly, if at all) issues of discovery. Again, any perceived benefit would be outweighed by the time and costs involved in the process. This is particularly so since the finalisation of the witnesses to be called at trial is only properly done after a party has had an opportunity to inspect the other side's discovered documents.

Even if there is a view that in certain cases what is proposed may assist the discovery process, the Society opposes the entrenchment of such a requirement as a "norm". If in a particular case such a proposal is considered appropriate, then the court would no doubt make the direction in that case. It is not a requirement that ought apply in default.

Proposal 3-4

The Society agrees with this proposal.

Proposal 3-5

The Society does not agree with this proposal. The Society has no difficulty with the court imposing sanctions in relation to inappropriate conduct throughout the course of litigation. However, that ought be (as it is) by the operation of a broad discretion applicable generally, rather than a specific and express power with respect to a particular aspect of the litigation process, namely discovery of documents (as distinct, for example, from pleadings, preparation of affidavits and witness statements, etc).

Proposal 3-6

The Society agrees with this proposal.

Proposal 3-7

The Society agrees with this proposal.

Proposals 4-1 and 4.3

The Law Society supports the development of commentary as a supplement to professional conduct rules generally. Such commentary would extend to, but not limited to, legal ethical obligations with respect to the discovery of documents (including electronic discovery).

Proposal 4-2

The Law Society does not agree with this proposal insofar as it proposes specific rules relating to charging costs for a specific part of the litigation process. There is simply no evidence to support a view that discovery, as opposed to other aspects of the litigation process, is more susceptible to overcharging. The Society therefore supports the legal profession legislation and/or professional conduct rules providing that a law practice can only charge costs which are reasonable (and in this regard refers to rule 18(3) of the *Legal Profession Conduct Rules 2010 (WA),* but that this not be linked to any particular activity.

Proposal 4-4

The Society agrees with this proposal.

Proposal 4-5

The Society agrees with this proposal.

Proposal 5-1

The Society does not agree with this proposal. The Society does not believe that imposing protocols (and therefore additional costs) on parties pre-action promotes access to justice.

Proposal 5-2

Generally speaking, the Society endorses the Law Council of Australia's final report in relation to *Possible Innovations in Case Management* referred to at page 185 of the Consultation Paper. The Society does not agree with this proposal insofar as it is suggested that it may be an alternative to the existing discovery process: see paragraph 5.78 of the Consultation Paper. Put simply, for all the reasons why interrogatories have been frowned upon by the courts and the ability to interrogate severely restricted, so too ought the ability to interrogate a party or third party orally prior to trial be limited and any suggestion of its use being liberated (let alone it becoming entrenched) ought be opposed. As is noted in the Consultation Paper itself, many courts (including the Federal Court) already have power to effectively authorise pre-trial examination prior to trial. The Society recognises that there may be cases where depositions prior to trial would be an effective case management tool. The point is, however, that machinery already exists in order to facilitate that process in such cases and they are best administered on a case-by-case basis by the Judge who has a an understanding of the particular case, as is currently the case. The fact that the tool already exists but is not widely used is perhaps indicative that the utility of pre-trial depositions is of limited utility.

Hylton Quail
PRESIDENT

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