

THE COMMERCIAL LAW ASSOCIATION OF AUSTRALIA LTD

JUNE JUDGES SERIES

***THE NEW REGIME OF PRACTICE IN THE EQUITY DIVISION OF THE
SUPREME COURT OF NEW SOUTH WALES***

JUSTICE P A BERGIN

21 JUNE 2013

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Introduction

- 1 In 1885 Edward Bray identified the various objects of document disclosure, as they had been identified in the case law as being:

to supply evidence or to prevent expense and delay in procuring it; to save expense and trouble; to prevent a long enquiry and to determine the action as expeditiously as possible; ... [and] to...save expenses...¹

- 2 In the Preface to Sichel and Chance's 1883 treatise on discovery, the authors suggested that discovery could aptly be characterised as being "in a state of darkness and confusion".²

- 3 A fundamental tension underlies the process of discovery in commercial litigation. On one hand, discovery has long been an integral component of litigation. Effectively managed, discovery promotes the administration of justice by enabling parties to have access to documents held by the other party to the litigation relevant to the dispute. In some cases, discovery may even facilitate early settlement, thereby allowing parties to avoid potentially long and expensive litigation.

- 4 On the other hand, discovery has become one of the most cumbersome and costly elements of modern litigation. This trend runs contrary to the

“just, quick and cheap” resolution of disputes. The burgeoning cost of discovery represents a growing barrier to the accessibility of the courts, and may ultimately threaten public confidence in the justice system. Indeed, the modern realities of document review add a somewhat ironic quality to Bray’s early account of the rationale for discovery.

- 5 In the past two decades, the topic has been the subject of numerous inquiries in the common law world – including a recent report from the Australian Law Reform Commission (ALRC). Despite the extensive discussion of the issue, there is a notable absence of empirical evidence relating to the costs of discovery. This problem was confronted by the ALRC, whose first recommendation was to promote data collection on the topic.³ Nonetheless, the ALRC estimated that discovery in Federal Court proceedings accounts for approximately 20% of total litigation costs.⁴ Some isolated and anecdotal evidence places the amount significantly higher.⁵
- 6 Regardless of the exact figure, there is widespread concern that the current practice and cost of discovery is a considerable burden and is not sustainable. This position was advanced strongly by the former Chief Justice of the Supreme Court of NSW, the Honourable JJ Spigelman.⁶ The pursuit of an efficient justice system, that is able to retain the confidence and trust of the community, has been equally emphasised by Chief Justice Bathurst.⁷

Federal Jurisdiction

- 7 The ALRC Report, *Managing Discovery: Discovery of Documents in Federal Courts* (the Report), dated March 2011, was published in May 2011.

Discovery Plans

- 8 The Report includes a proposed amendment to the *Federal Court Rules* enabling parties to apply for a “discovery plan order” before the Court makes an order for a party to give discovery. If the Court makes a

discovery plan order “the parties must discuss in good faith and endeavour to agree upon a practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them”.⁸

- 9 The discovery plan mechanism relies on parties to conduct an expeditious and affordable document review. Practitioners will be guided by “a detailed set of best-practice guidelines on the formation and content of discovery plans” in the Federal Court’s Practice Notes,⁹ and will be able to attend court to resolve disagreements. The individual parties in each case bear the responsibility for minimising the financial and practical burden of discovery.

Judicial Case Management

- 10 Another suite of substantive proposals in the Report aims to strengthen the role of judicial officers in the discovery process. The ALRC recommended “a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings”,¹⁰ identifying a particular need for training in methods for discovering electronically-stored material.¹¹
- 11 The ALRC decided against making a recommendation that the *Federal Court of Australia Act 1976* (Cth) (the *Federal Court Act*) be amended to prescribe in detail the Court’s extensive and already existing case management powers in relation to discovery. Such a proposal was abandoned due to limited endorsement and a paucity of supporting evidence, despite the ALRC “[seeing] considerable potential benefit, and little harm” in the reform.¹²
- 12 The Report includes a recommendation that Registrars be trained and equipped to hear applications in relation to discovery, especially in large or complex proceedings.¹³ This proposal is targeted at alleviating the discovery-related workload of judges, rather than reducing the overall burden of discovery. A similar conclusion applies to the recommended amendments to the *Federal Court Act* and the *Federal Court Rules* to

enable the Court to refer discovery questions to a referee in limited circumstances as a ‘third best option’ – that is, when neither a judge nor a trained registrar are available.¹⁴

Costs Orders

- 13 The Report also includes a recommendation that amendments to the *Federal Court Act* be made that would prescribe certain orders that the Court may make in relation to the costs of discovery – including orders specifying the maximum amount that may be recovered for giving discovery.¹⁵ The Court already has a broad discretion to make orders relating to costs,¹⁶ which extends to orders concerning the cost of discovery. Nonetheless, the ALRC decided that it was more desirable to specifically list these orders in the legislation to ensure consistency and certainty in judicial practice.¹⁷
- 14 The ALRC further proposed that the Federal Court Practice Notes should stipulate that the Court expects practitioners to ensure that they comply with their duty to conduct discovery in accordance with the overarching purpose of the civil procedure legislation – that is, to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.¹⁸ Moreover, it is suggested in the Report that “the Practice Notes should also outline how the court, when awarding costs, may take into account a failure to comply with the duty”.¹⁹ This and other measures proposed by the ALRC aim to foster professional and ethical discovery practices across the profession.²⁰

Pre-trial oral examinations

- 15 A further proposal in the Report involves amending the *Federal Court Act* to expressly provide that the Court may order pre-trial oral examination about discovery.²¹ It is intended that these examinations would help narrow the issues in dispute and even promote settlement. However, it is acknowledged that pre-trial examinations may themselves be costly. Furthermore, the ALRC was reluctant to support broad measures that would introduce a more general use of pre-trial oral depositions, as is the

case in the USA. Accordingly, the ALRC was cautious to limit the proposal to “pre-trial oral examination *for discovery in specific cases*”.²² Further amendments were proposed to expressly provide for the limited circumstances in which a judge may order such an examination.²³

Disclosure of documents before discovery

- 16 Other recommendations in the Report deal with circumstances in which parties may be required to disclose key documents prior to discovery. This section of the Report refers to recent reforms to civil procedure in Victoria. In 2008, the Victorian Law Reform Commission (VLRC) published a comprehensive review of the civil justice system in that state (the VLRC Report).²⁴ One recommendation in the VLRC Report was that litigants should be under an overarching obligation to disclose all documents that are critical to the resolution of the dispute to the other parties to the proceedings at the earliest reasonable time.²⁵ This proposal was enacted in s 26 of the *Civil Procedure Act 2010* (Vic).
- 17 Despite acknowledging that “the production of significantly probative documents for inspection by the parties in the early stages of proceedings is broadly consistent with the principle of efficiency”,²⁶ the ALRC rejected proposals to introduce a similar provision in the federal jurisdiction. The “preferred approach is for inspection of [critical] documents to occur prior to discovery on a case-by-case basis under existing procedures”.²⁷ This conclusion was based on concerns about the rigid application of pre-discovery disclosure rules and a fear of satellite litigation. However the ALRC suggested that the operation of the Victorian provision should be monitored to assess whether it should be adopted into the federal jurisdiction.²⁸
- 18 On 1 August 2011, in conjunction with the commencement of the *Federal Court Rules 2011*, Chief Justice Keane (as his Honour then was) revoked all Federal Court Practice Notes and issued new Practice Notes for the Federal Court of Australia. Case Management Practice Note 5 (CM 5) deals with discovery. CM 5 does not make direct reference to the ALRC

Report however it provides that the Federal Court will not order discovery “as a matter of course”, but only if it is necessary to determine the issues in the proceedings. Where discovery is sought, the Court will expect practitioners to respond to a range of questions – such as whether discovery is necessary and whether the intended purposes of discovery can be achieved by a cheaper means. When deciding whether to make an order for discovery the Court will have regard to several issues, including “the resources and circumstances of the parties, the likely benefit of discovery and the likely cost of discovery and whether that cost is proportionate to the nature and complexity of the proceeding”. These measures are implemented “with a view to eliminating or reducing the burden of discovery”.

Outsourcing Discovery

- 19 Electronic discovery – or e-discovery – represents one of the greatest expenses in commercial litigation. A 2008 survey estimated that over US\$2.7 billion was spent on electronic data discovery in the US in 2007. This figure was up 43 per cent from the previous year. The survey also predicted that the e-discovery bill would grow by 21 per cent in 2008 and a further 15 per cent in 2009.²⁹

- 20 The extensive cost of e-discovery predominantly results from the sheer quantity of electronic material that is being discovered. In addition, there is a wide range of costs associated with e-discovery. These costs fall into three categories: data collection costs, data processing costs and the costs related to reviewing the data.³⁰

- 21 In a 1988 survey of over 1000 US state and federal judges, over 90 per cent of respondents felt that excessive litigation costs were caused by practitioners opting to “turn over every stone rather than make cost-benefit analyses of what’s useful”.³¹ The state of discovery in commercial litigation has evoked emotive responses from various commentators. The process of discovery has been described as “life threatening”,³² while one American practitioner has proposed a “tort of discovery abuse”.³³

- 22 A more systematic, yet controversial, approach to reducing the exorbitant costs of litigation has emerged in the USA in recent years. This approach involves outsourcing document review to jurisdictions with lower wages, notably India. This strategy, known as legal process outsourcing (or LPO), has become increasingly prevalent in the USA since the economic recession hit in 2008.
- 23 Tusker Group, a Texas-based supplier of LPO, estimates that US law firms spend around US\$30 billion on document review every year.³⁴ Extensive discovery costs, which are passed on to clients, pose a serious threat to the financial viability of businesses facing litigation – particularly in times of crisis. As a viable alternative, Tusker Group claim that its staff in India is able to review documents for roughly 10 per cent of the rate that would be charged by a domestic lawyer.³⁵
- 24 In addition to India, other popular LPO destinations include The Philippines, South Africa and China.³⁶ A range of factors contributes to the desirability of LPO locations, including time zone and the prevalence of English. In some situations, firms may even wish to draw on the foreign language expertise of staff in LPO destinations. For instance, China is becoming an increasingly popular LPO destination, partly due the extensive amount of Chinese-language electronic material in complex litigation. However, the main factor determining demand for LPO is the wage levels in these destinations.
- 25 There is currently limited evidence of a similar outsourcing practice being employed by litigators in Australian jurisdictions. However, there are indications that a trend may be emerging. In October 2011, Mallesons Stephen Jaques (now King & Wood Mallesons) signed a preferred supplier agreement with Integreon, a global leader in LPO.³⁷ Mallesons intend to reduce clients' costs by up to 50 per cent by outsourcing “low-level work” to Integreon’s 200 plus legally trained staff in India.³⁸

- 26 In recent times Corrs Chambers Westgarth revealed that it will be offering its clients the option of offshore document review, after signing preferred supplier agreements with Integreon and Exigent, another LPO provider, which is located in South Africa and Perth.³⁹ The arrangements make Corrs the fourth major Australian law firm to commit to LPO, with Ashurst having signed with Exigent and Baker & McKenzie committed to Integreon as a preferred supplier. In addition, Clayton Utz reportedly uses outsourcing for certain matters, while Minter Ellison was conducting trials in 2012.⁴⁰
- 27 More generally, in a consultation with the ALRC the Office of the Legal Services Commissioner (NSW) (OLSC) suggested that outsourcing of legal services was becoming more widespread, an issue that the OLSC would be looking into more closely in the future.⁴¹
- 28 One interesting consequence of LPO in the USA has been its effect on litigation in which there is an obvious structural imbalance between the parties. A key concern regarding high discovery costs is that they function in effect as a 'barrier to entry' to the litigation process. While larger companies may be able to more easily foot the discovery bill in order to pursue or defend claims in court, this barrier has a potential to afflict small entities, for which extensive legal fees may render it undesirable to pursue claims, or place immense pressure to settle when a claim is made against them.
- 29 An oft-mentioned case study from the US is a trade secret claim by Austin-based software company, Bluecurrent, against the technology behemoth, Dell Inc. Bluecurrent's attorneys, DiNovo Price Ellwanger & Hardy LLP, hired Tusker Group to sift through over 700 million pages of information taken from the parties' computers. Consequently, Bluecurrent spent between one-fifth and one-tenth of what discovery would have cost, had domestic attorneys been deployed.⁴² The result in the case was that the parties settled for an undisclosed amount. The clear implication – at least from DiNovo and Tusker's various publicity documents – is that Bluecurrent would never have been able to put itself in a position to broker

a settlement with Dell had it not been for the significantly reduced costs of document review.

- 30 Concerns have been raised about LPO. At a basic level, there seems to be a lack of clarity as to what outsourcing discovery actually involves. From the limited information available, it seems that the work that would be outsourced is predominantly the work that is currently performed by junior lawyers, paralegals and employees specifically contracted to work on large-scale discoveries.
- 31 Low-level discovery work generally requires only “a shallow understanding of the matters in dispute”,⁴³ and is often mechanical and repetitive. Nevertheless, these roles demand a solid understanding of Australian law and practitioners’ obligations, particularly those relating to sensitive information. Furthermore, anecdotal evidence suggests that a “carefully designed” internal induction is generally conducted before junior lawyers are allowed to start work on large-scale discoveries.⁴⁴
- 32 An initial concern is therefore the practical difficulties involved with having a senior Australian practitioner prepare, supervise and control staff conducting document review in another country. India’s stringent rules restricting the opportunities for Australian lawyers to advise locally on Australian laws may compound this concern. Australian practitioners were not allowed either to advise on Australian laws on a “fly in, fly out” basis, or work as a consultant on Australian laws in India.⁴⁵ A further concern is the need to maintain “professional and ethical responsibilities”.⁴⁶ Discovery almost invariably encompasses access to sensitive material. By extending the loop of document review to foreign jurisdictions and firms with relatively unknown confidentiality policies, there is a fear that information may be misused.
- 33 In his 1840 text, *Points on the Law of Discovery*, James Wigram cited Lord Eldon’s observations in a case where documents were produced “to satisfy curiosity”. However, “some persons got hold of them, and the

consequence was, that the corporation lost 7000 pounds a year".⁴⁷ The author concluded by emphasising "the necessity of placing under strict regulation the jurisdiction exercised by Courts of equity in compelling discovery".⁴⁸ This necessity is felt even more acutely 173 years later.

34 Corrs is attempting to address various concerns with LPO by managing its outsourcing agreements through a panel structure, which it announced in February 2012. Corrs advised that it expected that its new outsourcing panel will help avoid conflicts and manage client concerns about confidential documents, as well as ensure 24-hours outsourcing coverage through a network of global providers.⁴⁹

35 As I said six years ago: "the profession needs to find ways not only of doing the same work at cheaper rates but also finding more innovative ways of doing the work differently".⁵⁰ When viewed through this lens, it is clear that outsourcing only targets part of the problem and is at best a temporary solution. Firms choosing to outsource discovery work may find themselves continuously searching for new, more affordable jurisdictions in order to stem the steady increase in litigation costs that would result from the gradual growth of wages in developing countries. A more permanent solution to this problem requires a conceptual shift in the way litigation is structured.

Supreme Court of New South Wales

36 Practice Note SC Eq 3 governs case management procedures for the Commercial List and the Technology & Construction List. The Practice Note was re-issued in 2007 to address the technological developments that were shaping the landscape for discovery in modern litigation, particularly in the United States of America. The Practice Note sought to address the growing mass of electronic material that fell within the ambit of potential disclosure directing that discovery was to be made electronically, with finer details to be determined consensually by the parties.

37 While its aim was to increase the efficiency of discovery, it had an unintended consequence: practitioners began conducting discovery electronically for *all* documents, rather than simply electronically stored documents. This led to the added cost burden of scanning and storing documents that already existed in hard copy.

38 In order to address this problem, the Practice Note was re-issued in 2009. Paragraph 28 was expanded to include the following caveat:

Discoverable documents and information that are not stored electronically should only be discovered electronically if it is more cost effective to do so.

39 Practice Note SC Gen 7 Use of Technology makes similar attempts to harness technological developments in support of more efficient document review procedures.⁵¹ That Practice Note provides that where parties have discoverable information that is electronically stored, “efficiency dictates that any discovery and production of such information be given electronically to avoid the need to convert it to a paper format”. However it also provides that where the parties have over 500 documents that are not electronically stored, “as a general rule the Court will expect the parties to consider the use of technology to discover and inspect such documents along with any [electronically stored information]”. Experience in the Commercial List suggests that it may be less efficient to convert documents into electronic format.

40 Both Practice Notes are based on an expectation that practitioners will pursue efficient plans for discovery, under the guidance of the Court. The expectation in SC Gen 7 is that parties will agree on a protocol for the production of electronically stored information early in proceedings. The Court will expect this protocol to deal with the conditions of electronic discovery, including the format of the electronic database used and the type and extent of material to be discovered. Where a protocol has not been developed, the parties should seek either consent orders or directions from the Court. Similarly in SC Eq 3 there is an expectation that

the practitioners will agree on extensive matters relating to electronic discovery “at an early stage of the proceedings”.⁵²

- 41 These Practice Notes also make direct references to the issue of cost minimisation. SC Gen 7 refers to parties agreeing on “the costs of providing access to hardware, software or other resources to enable inspection of original electronic material” in cases where electronic discovery is provided in certain formats.⁵³ SC Eq 3 provides that “the Court may limit the amount of costs of discovery that are able to be recovered by any party” in order to ensure that “the most cost efficient method of discovery is adopted by the parties”.⁵⁴ It is far more desirable that discovery costs are controlled during litigation, than to be the subject of a capping order post the event.
- 42 The practice of the NSW Supreme Court in relation to discovery has been to emphasise the cooperative relationship between judges and practitioners in order to achieve the overarching aim of “just, quick and cheap” litigation. The Court has attempted to use technology in support of that overarching aim. However, it would be fair to conclude that technological developments have not reduced the burden and costs associated with discovery

The New Regime

- 43 The usual timetable for the preparation of a commercial cause for hearing is ‘pleadings’, followed by discovery and then the service of evidence. From the beginning of February 2012 until late March 2102 a new procedure was piloted in the Commercial List in which parties served their evidence immediately after pleadings closed. This was the first time that a practice had been adopted across a large body of cases, albeit that there had been instances of individual judges implementing a similar approach.⁵⁵

- 44 On 22 March 2012 Chief Justice Bathurst introduced the new regime by issuing Practice Note SC Eq 11 *Disclosure in the Equity Division* effective from 26 March 2012. The Practice Note provides:

Commencement

1. This Practice Note was issued on 22 March 2012 and commences on 26 March 2012.

Application

2. This Practice Note applies to all new and existing proceedings in the Equity Division, except in the Commercial Arbitration List.

Purpose

3. This Practice Note is for the guidance of practitioners in preparing cases for hearing in the Equity Division with the aim of achieving the just, quick and cheap resolution of the real issues in dispute in the proceedings.

Disclosure

4. The Court will not make an order for disclosure of documents (disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure.
5. There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings.
6. Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out;

the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings;
the classes of documents in respect of which disclosure is sought; and
the likely cost of such disclosure.

Costs

7. The Court may impose a limit on the amount of recoverable costs in respect of disclosure.

- 45 This change is consistent with the principle that discovery should never be used as a fishing exercise, to uncover documentary support for an as yet unsubstantiated claim. When a plaintiff commences proceedings, it is expected that they have some evidentiary basis for their claims against the defendant. In the vast majority of cases, there is no compelling reason why this evidence should not be presented at the earliest reasonable stage of

the proceedings. Wide-ranging document review inevitably produces disagreements between parties and interlocutory applications about the nature and extent of production. The requirement to present evidence early will focus the parties on the substantive issues and circumvent the cumbersome procedural disputes that flow from unrestrained discovery.

- 46 There will inevitably be cases where it is preferable for parties to produce specified information before evidence is presented. For instance, discovery may be necessary where the plaintiff is aware of certain crucial documents that are beyond its reach, or in situations where a party is suspected of concealing information. The Court has the flexibility to determine discovery obligations on a case-by-case basis.
- 47 The new regime does not remove or prevent discovery in the litigation process. However, in order to preserve the critical role of discovery, it is necessary to reconsider the structure of modern litigation – and ensure that production is only pursued to the extent that it serves the identifiable ends of a “just, quick and cheap” litigation process.
- 48 The new regime has been described as follows⁵⁶:

Under the new regime, the plaintiffs would serve their evidence, including documents upon which they rely, in relation to their cases in chief. The defendants would then serve their evidence, including documents upon which they rely, in their respective cases. If at that time it appears necessary for disclosure of particular documents additional to those that had been relied upon by any of the parties, a consensual regime might be put in place or an application for disclosure of particular documents, or categories of documents, might be made.

The ambit of that disclosure is confined to the real issues between the parties as defined by not only the pleadings, but also the evidence. This process will require the proofing of witnesses at a very early stage of the litigation with the need for forensic judgments to be made as to the existence of admissible evidence in support of the respective claims. This will of course require the client and/or witnesses to provide the relevant documents to the lawyers in support of the particular claims in their evidence. However it is envisaged that the process will engender a far more disciplined analysis of the need for disclosure by reference to

those real issues, compared to the carte blanche gathering in of every document the respective clients have generated in their lengthy relationship for "review" by teams of lawyers and students in the absence of any knowledge of the proposed evidence.

- 49 In applications under Practice Note SC Eq 11 to show "exceptional circumstances", it is necessary to demonstrate the necessity to obtain documents to fairly prepare a case for trial. That is, that the party is unable to serve its evidence without certain documents.⁵⁷ One case where the requirement of exceptional circumstances may be met is where information necessary for a party's case is solely within the knowledge of the party from whom disclosure is sought.⁵⁸ As has also been observed⁵⁹:

It would subvert the intended operation of the Practice Note if parties could avoid its operation by adopting the expedient of serving a Notice to Produce, rather than seeking an order for disclosure.

Conclusion

- 50 There is no doubt that this new regime requires diligence and co-operation between judges and the profession. It requires judges to continue to their role as active case managers. In *Goldsmith v Sandilands*,⁶⁰ Gleeson CJ observed:

It sometimes happens, in the course of litigation, that counsel will start a hare. The response of the opposing counsel may be to pursue it. One of the duties of a trial judge is to control the proceedings, to exclude irrelevancy, and to maintain proper limits upon the extent to which the parties and their lawyers will be permitted to raise and investigate matters that are only of marginal significance.⁶¹

The issue of discovery starts many such hares. Judges must ensure that, wherever possible, the parties do not expend unnecessary resources chasing them.

- 51 There is great temptation – and perhaps even comfort – in delaying the presentation of evidence until after an extensive document review process has been conducted. However, that delay is unsustainable. In the majority

of cases, it leads only to additional costs for clients and a waste of public resources. It is often said that the legal profession does not take well to change. However, the manner in which the profession has embraced the new regime has been heartening.

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- ¹ Edward Bray, *The Principles and Practice of Discovery* (Reeves and Turner, 1885) at 2.
- ² W S Sichel and W C Chance, *The Law Relating to Interrogatories, Production, Inspection of Documents and Discovery* (Stevens and Sons, 1883) at v, quoting *The Macgregor Laird* (1865) LR 1 A & E 307 at 307 per Dr Lushington.
- ³ Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts* (2011, Report 115) at 75, recommendation 3-1.
- ⁴ *Ibid* at 78 [3.55].
- ⁵ For instance, *Seven News Limited v News Limited* [2007] FCA 1062, [13]-[14] (Sackville J); J J Spigelman, 'Access to Justice and Access to Lawyers' (2007) 29 *Australian Bar Review* 136.
- ⁶ For instance, Spigelman (2007).
- ⁷ T F Bathurst, "Community Participation in Criminal Justice", Opening of Law Term Dinner, 30 January 2012 (although His Honour focused attention here on the criminal justice system).
- ⁸ ALRC Report 115, above n4 at 8, recommendation 6-4.
- ⁹ *Ibid* at 8, recommendation 6-6.
- ¹⁰ *Ibid* at 9, recommendation 7-1.
- ¹¹ *Ibid* at 8 [7.2].
- ¹² *Ibid* at 8 [7.1].
- ¹³ *Ibid* at 9, recommendation 8-1.
- ¹⁴ *Ibid* at 9, recommendation 8-3.
- ¹⁵ *Ibid* at 9, recommendation 9-2.
- ¹⁶ *Federal Court of Australia Act 1976* (Cth), s 43.
- ¹⁷ Consistent with the reform principles outlined in Chapter 2 of the Report, ALRC Report 115, above n4.
- ¹⁸ *Federal Court of Australia Act 1976* (Cth), s 37M.
- ¹⁹ ALRC Report 115, above n4 at 9, recommendation 9-1 (which is strangely the same as Recommendation 9-4).
- ²⁰ The Report also suggested that legal professional associations address discovery in commentary to professional conduct rules and recommended continuing education for practitioners regarding discovery (Recommendations 12-1 and 12-2).
- ²¹ ALRC Report 115, above n4, recommendation 10-1.
- ²² ALRC Report 115, above n4 at [10.125] (emphasis changed).
- ²³ ALRC Report 115, above n4, recommendation 10-2.
- ²⁴ Victorian Law Reform Commission, *Civil Justice Review*, Final Report (May 2008).
- ²⁵ *Ibid*, at 17, recommendation 16.3.
- ²⁶ ALRC Report 115, above n4 at [5.60].
- ²⁷ ALRC Report 115, above n4 [5.2].
- ²⁸ ALRC Report 115, above n4, recommendation 5-1.
- ²⁹ <http://www.sochaconsulting.com/2008survey.php>
- ³⁰ Allison Stanfield, *Computer Forensics, Electronic Discovery & Electronic Evidence* (LexisNexis Butterworths, 2009) at 191.
- ³¹ Warren Freedman, *The Tort of Discovery Abuse* (Quorum Books, 1989) at 114.
- ³² Geoffrey Gibson, *The Cancer in Litigation* (Blake Dawson Waldron, 1997) at 15.
- ³³ Warren Freedman, *The Tort of Discovery Abuse* (Quorum Books, 1989).
- ³⁴ Carol J Williams, "Boom time for law firms", *Los Angeles Times*, 30 October 2008 at 1.
- ³⁵ Carol J Williams, "Boom time for law firms", *Los Angeles Times*, 30 October 2008 at 1.

³⁶ Shared Services and Outsourcing Network, *Industry Opinion*, May 2010, available at http://www.integreon.com/phpapp/wordpress/wp-content/uploads/2010/09/io4_may10_integreon.pdf.

³⁷ Mallesons Stephen Jacques, "Australian first: Mallesons signs legal outsourcing agreement with leading global provider, Integreon", Press Release, 27 October 2011 <<http://www.mallesons.com/publications/mediaReleases/2011/Mallesons-signs-legal-outsourcing-agreement/Pages/Australian-first-Mallesons-signs-legal-outsourcing-agreement-with-leading-global-provider-Integreon.aspx>> (Accessed: 19 June 2013).

³⁸ Chris Merritt, "Mallesons ready to send low-level work to India", *The Australian*, 28 October 2011 at 29.

³⁹ Samantha Bowers, "Corrs offers clients outsourcing option", *Australian Financial Review*, 10 February 2012.

⁴⁰ *Ibid.*

⁴¹ ALRC Report 115, above n4 at [12.56].

⁴² <http://dpelaw.com/2011/11/16/tusker-outsources-to-india-dinovo-price-assists-client-with-e-discovery-challenge/>

⁴³ Young Lawyers Submission to ALRC, [12.53].

⁴⁴ Large Law Firm Group Submission to ALRC, [12.53].

⁴⁵ Rachel Nickless, "Gale brings wind of change", *The Australian Financial Review*, 3 February 2012. However this was tested in the Madras High Court in 2012 with a ruling that foreign law firms could advise on international law and take part in international arbitrations while located in India. Bob Gogel "Madras court ruling backs case for legal process outsourcing". *The Australian* 20 April 2012.

⁴⁶ ALRC Report 115, above n4 at [12.59].

⁴⁷ James Wigram, *Points in the Law of Discovery* (A Maxwell, 2nd ed, 1840) at 3.

⁴⁸ *Ibid* at 5.

⁴⁹ Samantha Bowers, "Corrs offers clients outsourcing option", *Australian Financial Review*, 10 February 2012.

⁵⁰ P A Bergin, "Litigation and Globalisation", NSW Young Lawyers Litigation Seminar, 31 March 2007.

⁵¹ Practice Note SC Gen 7.

⁵² Practice Note SC Eq 3 at [29].

⁵³ Practice Note SC Gen 7 at [14].

⁵⁴ Practice Note SC Eq 3 at [32].

⁵⁵ Practice Note for cases placed in the Docket of Perram J.

⁵⁶ *Armstrong Strategic Management and Marketing Pty Limited v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [65]-[66].

⁵⁷ *Danihel v Manning* [2012] NSWSC 556 at [16].

⁵⁸ *Naiman Clarke Pty Limited v Tuccia* [2012] NSWSC 314 at [26].

⁵⁹ *The Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502 at [23]. Other examples of such applications include *Leighton International Limited v Hodges* [2012] NSWSC 458; *RSA (Moorvale Station) Pty Ltd v VDM CCE Pty Ltd* [2013] NSWSC 534.

⁶⁰ (2002) 76 ALJR 1024.

⁶¹ *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [1].