

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
‘A DIFFERENT JUDICIAL PERSPECTIVE ON DISCOVERY’
8TH INFORMATION GOVERNANCE AND EDISCOVERY SUMMIT
SWISSHOTEL SYDNEY
18 JUNE 2014*

1. It is not a new phenomenon for judges to talk and write about discovery. In fact judging by the number of papers and presentations given by Australian judicial officers on the topic, it wouldn't be unreasonable to assume that discovery is one of our favourite subjects. Unfortunately, it's probably fair to say that discovery is an area of the law that judges typically love to hate.

2. As a judge, there are at least two reasons why talking about discovery is not straightforward. First, there is perhaps a tendency to sound as if you are about to deliver a dressing-down to the profession. Let me put you at ease; I have no intention of delivering a lecture today. The second difficulty, and I include Justice Hammerschlag and Judge Peck in this, is that members of the judiciary have already said so much about discovery. In this sense I've probably been unwise selecting '*A different judicial perspective*' as my topic.

* I express thanks to my Research Director, Haydn Flack, for his assistance in the preparation of this paper.

3. In the time I have before you break for lunch, I want to pick up on one of the themes that I understand was addressed during yesterday afternoon's '*Discovery dilemma*' panel discussion. Hopefully without showing any of the symptoms of frustration that often materialise in judges at the very mention of discovery, I want to pose the simple question: is it all worthwhile? Considering the nature of business and the practice of litigation today, has the process of discovery passed its use-by date? In one sense this isn't a different perspective on discovery; you talked about it just yesterday and I'm sure you reached your own conclusions. However, in another sense, it is a view that is rarely considered among the proposals to improve discovery.

4. You know better than most about the difficulties that technology can present. Currently, attention seems to be largely focussed on traditional electronic documents and use of communication tools like email. However, social media and more emerging technologies will no doubt present as yet unimagined challenges. All the while technology is becoming further embedded in business practice and the volume of data continues to balloon. I know there is little need to recite figures to practitioners like you who confront the difficulties of discovery everyday. However, for those like me who remember receiving small briefs tied with red tape, the numbers are staggering. In fact red tape is probably now considered a collector's item.

5. Reference is often made to the estimate that 90% of business information is now stored electronically.¹ I would have thought the figure was now much higher, particularly as the world is expected to generate 1.3 zettabytes of data by 2015.² Having said that, I don't pretend to fully comprehend the size of a zettabyte. Only last month a report indicated that each day more than 1.8 billion photos are shared online, and there are around 800 million swipes per day on Tinder.³ I must confess that while I'm reasonably familiar with Twitter – you can follow the Court at '*NSW S-u-p C-t*' – I am blissfully ignorant about Tinder. Although I assume it isn't possible to upload judgment summaries on what sounds like an electronic dating app.
6. We are all familiar with the concerns expressed about the scale of discovery today; to the disproportionate costs that can be involved and the effect this can have on the administration of justice. Emphasis is often placed on instances of so-called mega-litigation, and I understand you had John Emmerig's perspectives on the need for further reform in this area yesterday. However, there is perhaps a tendency for our attention to be focussed on a small number of extraordinary cases, like those involving

¹ See, for example, C Cavallaro "How to manage your e-discovery", *Inhouse Counsel* (August 2013) 169.

² B Plumber, "How big can the internet get: Exabytes? Zottabytes?", *The Washington Post* (30 May 2012) available at http://www.washingtonpost.com/blogs/wonkblog/post/how-big-can-the-internet-get/2012/05/30/gJQAu9OH2U_blog.html.

³ M Koziol, "Mary Meeker's 2014 Internet Trends report is a must read", *Sydney Morning Herald* (29 May 2014) referring to M Meeker, "Internet Trends 2014 – Code Conference" (28 May 2014) available at www.kpcb.com/internet-trends.

data warehouses holding millions of documents,⁴ or the much-discussed C7 proceedings where the database held nearly 600,000 pages.⁵

7. Beyond the sheer number of documents in some proceedings, courts, and of course the parties involved, have increasingly had to address technical questions about discovery. You are no doubt familiar with case law in recent years dealing with issues of de-duplication and legal process outsourcing,⁶ as well as the practical need for judges to assess a limited sample of documents where a significant number are challenged for one reason or another.⁷ This shows that in some cases it is not simply the scale of discovery causing problems. Instead, issues are arising from the very steps practitioners are taking to mitigate the burden of discovery.

8. In the face of these concerns it is important to bear in mind that one of the original functions of discovery was to *avoid* expense.⁸ Despite this, complaints about discovery aren't new. For instance, in an article from 1896 in Melbourne's *The Argus* newspaper, the author lamented that

⁴ *Betfair Pty Ltd v Racing New South Wales* [2010] FCA 603; (2010) 268 ALR 723 at [331] referred to in Australian Law Reform Commission, *Managing Discovery* (Report 115, 2011) at [2.47].

⁵ *Seven Network Limited v News Limited* [2007] FCA 1062; (2007) ATPR (Digest) 42-274 at [15] discussed in The Hon R Sackville, "Mega-litigation: Towards a New Approach", Supreme Court of New South Wales Annual Conference (17–19 August 2007).

⁶ See, for example, *West African Gas Pipeline Company Limited v Willbros Global Holdings Inc* [2012] EWHC 396; [2012] 141 ConLR 151.

⁷ See, for example, *Traderight (NSW) Pty Ltd v Bank of Queensland Limited (No 16)* [2013] NSWSC 418, in which Ball J examined a sample of 26 documents from a list of 1061 over which privilege was claimed.

⁸ See E Bray, *The Principles and Practice of Discovery* (Reeves and Turner, 1885) at 1-2 citing *Finch v Finch* (1752) 2 Ves Sen 491, *Grumbrecht v Parry* [1804] 32 WR 204 and *Chadwick v Chadwick* (1852) 22 LJ Ch 329, 330. For a general history of discovery see *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 643-646 (Young J) and Australian Law Reform Commission, *Managing Discovery* (Report 115, 2011) at [2.11]-[2.12].

‘The complaints made of the present state of the law are not of to-day or yesterday; for years past the commercial world has muttered curses both loud and deep against the delays and expenditure which, it is alleged, render a resort to a legal tribunal either ruinous or impossible.’⁹

The author noted the view that discovery should only be allowed where it appeared ‘necessary for the fair trial of the cause or the saving of costs.’

9. This complaint, perhaps in different language, would not be out of place in current discussions regarding discovery. However, it is difficult to imagine the curses that might be muttered by practitioners from that period if they could see discovery today. Dickens’ famous comment about the Court of Chancery in *Bleak House*, ‘Suffer any wrong that can be done you, rather than come here!’,¹⁰ would presumably change to, ‘suffer all wrongs that could conceivably be done to you rather than give discovery’. As Justice Perram observed in *Australian Rugby Union v Canterbury*, the near ubiquity of electronically stored information has transformed discovery away from anything vaguely analogous to issues faced by Chancery lawyers.¹¹

10. Despite this, in my view, the state of discovery cannot be attributed entirely to the exponential growth in electronic materials over the past decades. To an extent, the nature of claims being brought has also played a role. Take,

⁹ “The Law’s Delays: some suggestions as to cause and cure”, *The Argus* (23 September 1896) at 6. See also “Legal procedure in England”, *South Australian Weekly Chronicle* (7 January 1882) at 5.

¹⁰ C Dickens, *Bleak House* (Penguin English Library, 2012), 5.

¹¹ *Australian Rugby Union Ltd v Canterbury International (Australia) Pty Ltd (No 1)* [2012] FCA 497 at [5]. Although Perram J also refers to positive changes that have resulted from the quantity of ‘significant communications’ that now take place in a permanent format which previously may not have been recorded.

for instance, tort law. Through the latter part of the twentieth century there was a dramatic expansion in the scope of negligence claims and also the damages recoverable. Former Chief Justice Spigelman memorably described this progression as the 'imperial march of negligence'.¹² The watershed was obviously Lord Atkin's conception of the neighbour principle in *Donoghue v Stevenson*.¹³ Since then we have witnessed the advent of damages for pure economic loss¹⁴ and the refashioned test for foreseeable risk in *Wagon Mound (No 2)*;¹⁵ these are just two examples. Changes such as the liberalisation of torts necessarily affect the claims that are brought.

11. There are countless developments in terms of both case law and legislation that have indirectly influenced the scope of discovery. The introduction of what was the *Trade Practice Act 1974* provided a renewed avenue for competitors and consumers to seek recourse regarding corporate behaviour. More recently we have seen specific procedures to facilitate class actions, the implementation of continuous disclosure obligations and the growth of litigation funding. I am not suggesting these types of changes are undesirable or that they have caused a flood of new claims.¹⁶ However, developments in respect of the claims that can be brought and changes to the litigation process itself will inevitably impact on the use of discovery.

¹² Hon JJ Spigelman AC, "Negligence: The Last Outpost of the Welfare State", *Address to the Judicial Conference of Australia: Colloquium 2002* (Launceston, 27 April 2002); also used by Justice K M Hayne, "Lessons from the rear-view mirror" (2002) 22 *Australian Bar Review* 99, 101.

¹³ [1932] AC 562 at 580.

¹⁴ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556.

¹⁵ *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617.

¹⁶ For instance the notion of a 'crisis' or 'litigation explosion' was firmly rejected in Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (Report 89, 2000) at [1.48].

12. Discovery has also been affected by a gradual shift to increasingly examine internal corporate activities, as well as multi-faceted claims and matters with numerous parties. C7, which I have referred to, involved 20 respondents, 1028 pages of pleadings, and causes of action including anti-competitive conduct, misleading or deceptive conduct and breach of duty of confidence. The Multiplex class action regarding construction of Wembley Stadium included claims for breach of continuous disclosure and misleading or deceptive conduct. Multiplex initially sought security of \$24 million for discovery based on a review of 3.5 million documents. That was revised down to \$6 million for an estimated 250,000 documents.¹⁷ More recently, while settlement was approved in the GPT class action, issues arose in relation to discovery costs.¹⁸ These types of cases illustrate it is not simply growth in electronic material that can fuel discovery; it is also the causes of action, the number of parties and the desire to access internal materials.
13. I mentioned earlier that judges seem to talk and write about discovery with great regularity. What is arguably comparable to the level of discovery-related judicial grumbling is the number of reports that have considered the ways in which discovery could be improved.¹⁹ Such inquiries have resulted

¹⁷ *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1044; (2007) 64 ASCR 53 at [15]. In *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176 at [3], Finkelstein J indicated that 19,000 documents had been discovered by the respondents.

¹⁸ See *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626 at [46]-[48].

¹⁹ Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) pp 340-353; Australian Law Reform Commission, *Managing Discovery* (Report 115, 2011); Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) Chapter 37; Victorian Law Reform Commission, *Civil*

in a range of reforms being implemented across Australian jurisdictions. As you know, changes have included narrowing the scope of discovery away from *Peruvian Guano*,²⁰ using categories as a targeted alternative to general discovery, and requiring parties to obtain leave of the court.

14. You've already had the benefit of Judge Peck's insights in relation to some of the approaches to discovery in the United States. Instead, I want to take a transatlantic crossing and examine the recent civil justice reforms in England and Wales that were introduced following Lord Justice Jackson's *Review of Civil Litigation Costs*.²¹ No doubt a great deal can be learnt from the reforms and the case law since they were implemented in April last year.
15. The Jackson Review is the most significant inquiry into the civil justice system since Lord Woolf's report into *Access to Justice*.²² To describe it as broad reaching does it a disservice; Lord Jackson ultimately made 109 recommendations and the Final Report extends to more than 500 pages. Discovery, or disclosure as it is referred to in England and Wales, was a significant focus of the Review. In the Preliminary Report, Lord Jackson described disclosure as one of the principal drivers of costs; in his words 'the existence of a vast mass of electronic documents presents an acute

Justice Review (Report 14, 2008) pp 537-553; and R Finkelstein, *Discovery Reform: Options and Implementation* (2008) are a few recent examples.

²⁰ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.

²¹ Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009).

²² Lord Woolf, *Access to Justice* (HMSO, 1996). For a detailed analysis of the Jackson Review see S Sime and D French, *Blackstone's Guide to the Civil Justice Reforms 2013* (Oxford University Press, 2013).

dilemma for the civil justice system.²³ The reforms to disclosure, and also more broadly to case and costs management, have considerably altered the practice of obtaining disclosure and the costing of that process. For those who are unfamiliar, it is worth briefly explaining some aspects of the regime.

16. The central reform to disclosure is the amendment of rule 31.5 of the Civil Procedure Rules to introduce what Lord Jackson describes as a 'menu' of discovery options.²⁴ At the case management conference the court selects the option it considers necessary to deal with the case justly, having regard to the need to limit disclosure, and also the overriding objective which I will explain shortly.²⁵ The menu is obviously intended to restrict discovery. While standard disclosure is still available on the menu, it sits alongside other options including the ability of the court to order that disclosure be dispensed with. The menu is somewhat similar to the system of 'tailored discovery' that commenced in the New Zealand High Court in early 2012.²⁶
17. In terms of procedure, the rules require each party to file and serve a disclosure report not less than 14 days before the first case management conference. This report is meant to describe the documents that may be relevant to the matters in issue, their location and, if they are electronic, how they are stored. Importantly, the parties are required to give an estimate of

²³ Lord Justice Jackson, *Review of Civil Litigation Costs* (Preliminary Report, May 2009) Ch 40 at [1.1].

²⁴ Civil Procedure Rules 1998 (UK), r 31.5. The original recommendation was for a new r 31.5A: see Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) Ch 37 at [3.11], [4.1], while the 'menu' option is discussed in Ch 37 at [1.2] and [3.11].

²⁵ Civil Procedure Rules 1998 (UK), r 31.5(7).

²⁶ See High Court Rules (NZ) r 8.6-8.10 introduced by the High Court Amendment Rules (No 2) 2011 (NZ).

all the costs that could be involved in giving standard disclosure.²⁷ In addition, at least one week before the conference the parties must discuss and ideally agree to a proposal regarding the scope of disclosure.²⁸

18. Rule 31.5 dovetails neatly with Practice Direction 31B, which commenced in late 2010 and addresses the disclosure of electronic documents.²⁹ It sets out general principles to be kept in mind regarding e-disclosure, including the need to minimise cost, that technology should be used to efficiently manage documents and that disclosure of irrelevant material can place an excessive burden on the receiving party. Of particular note is the Electronic Document Questionnaire contained in Direction 31B. Parties can elect to exchange the questionnaire to inform each other about the scope of disclosure and their preferred format.

19. While I don't want to dwell for too long on the detail, there are two broader changes to the Civil Procedure Rules that I should mention. Cost budgeting is one aspect that has received a great deal of attention. All parties except self-represented litigants must file and exchange a costs budget.³⁰ The budget is in a particular form and provides an estimate of costs and

²⁷ Civil Procedure Rules 1998 (UK), r 31.5(3).

²⁸ Civil Procedure Rules 1998 (UK), r 31.5(5).

²⁹ Practice Direction 31B, *Disclosure of Electronic Documents*, available at http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31/pd_part31b

³⁰ Civil Procedure Rules 1998 (UK), r 3.13. For a detailed explanation of the new rules in relation to costs management see Mr Justice Ramsay, "Costs management: a necessary part of the management of litigation", *Sixteenth Lecture in the Implementation Programme* (Law Society Conference, 29 May 2012). Note, however, that r 3.12 has been amended by Civil Procedure (Amendment No. 4) Rules 2014, which came into force on 22 April 2014, to further limit the application of Section II of the Civil Procedure Rules.

disbursements for all stages of litigation, including disclosure.³¹ While budgets can be revised, the process is meant to keep costs in check. The result is that where a court has made a costs management order, it will not depart from the last approved or agreed budget when assessing costs on the standard basis unless there is a good reason to do so.³² A further sting in the tail is that unless the court orders otherwise, any party that fails to file a budget will be treated as having filed a budget *only* for court fees.³³

20. The final aspect of the reforms that I want to mention is the overriding objective in rule 1.1, which states that the purpose of the Rules is to enable courts 'to deal with cases justly and at proportionate cost.' Where a party fails to comply with a rule, practice direction or court order, the relevant sanction has effect unless that party applies for relief.³⁴ Under rule 3.9, when reviewing applications for relief the court must consider all the circumstances, including that litigation be conducted efficiently and at proportionate cost, and that rules be complied with. The reforms emphasise the need for parties and the courts to keep efficiency and cost firmly in mind.

21. There is little doubt that the Jackson reforms are intended to fundamentally reshape civil litigation. The changes to disclosure and the introduction of budgeting have created a structured regime that encourages courts to tailor

³¹ See Practice Direction 3E, *Costs Management* and Precedent H, both available at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/practice-direction-3e-costs-management>

³² Civil Procedure Rules 1998 (UK), r 3.18.

³³ Civil Procedure Rules 1998 (UK), r 3.14.

³⁴ Civil Procedure Rules 1998 (UK), r 3.8.

disclosure to the proceedings, and also for the parties to carefully consider the cost of discovery prior to embarking down that path. The question is whether these rigorous case and cost management procedures, with strict penalties for non-compliance, provide a useful guide for responding to the challenges presented by discovery. In light of this question, it is helpful to consider the growing body of case law addressing the reforms.

22. While it doesn't directly concern disclosure, unquestionably the most significant post-Jackson decision is that of the Court of Appeal in *Mitchell v News Group Newspapers*.³⁵ You may have heard of *Mitchell*, which has received so much attention that it could almost be considered as influential as the reforms themselves.³⁶ For those who are unfamiliar, the decision concerned Andrew Mitchell, the former Chief Whip of the Conservative Party, in an event widely known as 'plebgate'. *The Sun* reported that Mitchell shouted at police officers stationed outside Downing Street, calling them, you guessed it, plebs (among other things that cannot be repeated in polite company). Mr Mitchell brought an action for defamation.

23. At the time, the proceedings were governed by a costs management pilot scheme which required the parties to file their costs budget not less than 7 days before the relevant hearing date. However, Mitchell's budget was not filed until the afternoon before the case management hearing. The Master

³⁵ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; 1 WLR 795.

³⁶ See, for example, S Sime, "Sanctions after Mitchell" (2014) 33(2) *Civil Justice Quarterly* 133, 155, where the author describes *Mitchell* as the most important decision in civil procedure since *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

ordered that Mitchell be treated as having filed a budget comprising only of the relevant court fees and, later, refused to grant relief from the sanction.

24. The Court of Appeal dismissed Mr Mitchell's appeals, finding his solicitors' non-compliance was not trivial and there was no good excuse for it. In doing so, the Court offered clear guidance about the post-Jackson environment, including the need to consider the interests of all court users when managing individual cases.³⁷ They said that overlooking a deadline because of overwork is unlikely to be a good reason. Rules, practice directions and orders must be complied with if the reforms are to have any lasting effect.³⁸ The Court gave the following directive to practitioners:

'We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long...

*'...we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect that satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past.'*³⁹

³⁷ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; 1 WLR 795 at [39].

³⁸ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; 1 WLR 795 at [41].

³⁹ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; 1 WLR 795 at [46], [60].

25. The Court's message was certainly received clearly by the profession. The robust interpretation of the new rules in *Mitchell* continues to reverberate; parties are required to strictly comply with deadlines and apply for relief from sanctions where they fall short. This applies with equal force to disclosure. One recent example that stands out regarding disclosure is *Lakatamia Shipping v Nobu Su*.⁴⁰ In that case an order was made that unless standard disclosure was given by a certain date, the defence would be struck out. As the order didn't specify a time, under the relevant court guide the latest time for compliance was 4.30pm on the afternoon in question.
26. You can probably imagine what happened. The defendants' solicitors were working to a 5pm deadline and offered to exchange lists by email at 4.45pm. The claimant's solicitors replied shortly after, indicating there was an argument that the defendants were out of time. The defendants' solicitors provided their list at 5.16pm, only 46 minutes after the deadline, and on the following Monday filed an application for relief from sanctions. The application, which incidentally was opposed, resulted in a 41-paragraph judgment that unsurprisingly found the non-compliance was trivial.
27. There are of course a large number of decisions considering the Jackson reforms, particularly since *Mitchell*. A notable theme, like *Lakatamia*, is the number of applications seeking relief from sanctions for an array of

⁴⁰ *Lakatamia Shipping Company Ltd v Nobu Su Ltd* [2014] EWHC 275 (Comm); [2014] 2 Costs L.R. 307.

procedural breaches including the failure to comply with disclosure orders.⁴¹

What is also evident are instances of judges expressing dissatisfaction at parties for either failing to reach agreement in a manner that would formerly have been a matter of course, or for unnecessarily opposing an application.

28. I can point to a few examples. Justice Leggatt, in a case of *Summit Navigation*, strongly criticised the defendants for seeking to rely on *Mitchell* to gain a tactical advantage regarding a short delay.⁴² He endorsed the description of *Mitchell* as a ‘game changer’, but stressed the need for litigants to understand ‘how the rules of the game have changed, and how they have not.’⁴³ The defendants’ actions caused the effect that *Mitchell* was intended to stamp out. Similarly, a case of *Wain* concerned whether a party could rely on a costs budget that was filed one day late.⁴⁴ The judge referred to concerns expressed about parties having to make a ‘*Mitchell* point’, or having to apply for relief for a breach later found to be trivial.⁴⁵

29. The final decision I want to mention is the recent Court of Appeal judgment in *Chartwell Estate Agents*.⁴⁶ The Court upheld the decision below granting relief from sanctions. In doing so, Lord Justice Davis noted that ‘enforcing compliance is not an end in itself’, and when considering applications for

⁴¹ See, for example, *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 210 (Comm); [2014] 2 Costs L.R. 279 and *McTear v Englehard* [2014] EWHC 722 (Ch) in relation to disclosure.

⁴² *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA* [2014] EWHC 398 (Comm); [2014] 2 Costs L.R. 367.

⁴³ *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA* [2014] EWHC 398 (Comm); [2014] 2 Costs L.R. 367 at [1].

⁴⁴ *Wain v Gloucestershire CC* [2014] EWHC 1274 (TCC).

⁴⁵ *Wain v Gloucestershire CC* [2014] EWHC 1274 (TCC) at [12].

⁴⁶ *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506.

relief, the sole objective is not to display ‘judicial musculature’.⁴⁷ He also indicated that one of the aims of Jackson was to avoid satellite litigation, which he said, to date, seems to have been promoted rather than avoided.⁴⁸

30. Obviously these challenges regarding the amended Civil Procedure Rules – and particularly rule 3.9 concerning applications for relief from sanctions – have consequences well beyond disclosure. However, the specific rules governing disclosure are interrelated with the broader changes to case and cost management. What is evident across the reform package is a move to entrench the significance of proportionality and the need for compliance.

31. As Lord Jackson has recently emphasised, an adjustment period is needed for judges and practitioners, and it is too early to reach a balanced conclusion about the reforms.⁴⁹ There certainly seems to be concern among the profession about the effect the changes are having on costs and the likely consequences for access to justice.⁵⁰ For instance, more than half the practitioners who responded to a recent survey thought the reforms, including the rules on disclosure, would increase costs in the long term, whereas less than 20% thought they would result in costs decreasing.⁵¹

⁴⁷ *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506 at [62].

⁴⁸ *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506 at [61]. Davis LJ hoped that this unfortunate by-product of r 3.9 of the Civil Procedure Rules would be temporary.

⁴⁹ Lord Justice Jackson, *Paper for the Civil Justice Council Conference* (21 March 2014) at [10.8].

⁵⁰ See J Baxter, *Litigation Trends – Jackson a Year on: Assessing the Costs* (New Law Journal in partnership with the London Solicitors’ Litigation Association, 3 April 2014) available at <http://www.newlawjournal.co.uk/nlj/content/litigation-trends-survey-jackson-year>.

⁵¹ *Ibid* at 6.

32. It may well be that concerns about some of the reforms will recede with time. I must also emphasise that the post-*Mitchell* decisions I have referred to are only from the first few months of this year. What is broadly evident in this period is that courts are endeavouring to clarify the state of play for the profession. *Summit* and *Chartwell*, for instance, both restate *Mitchell* before emphasising the need for parties and their representatives to cooperate with one another, and reiterating the importance of avoiding satellite litigation.⁵²
33. In a decision from April this year, Lord Justice Jackson himself offered further guidance regarding the issue of relief from sanctions. He stated that it was not a part of his recommendations that parties should refrain from agreeing to reasonable time extensions that don't disrupt the proceedings.⁵³ Presumably to reduce the number of applications for time extensions, the Civil Procedure Rules were amended from 5 June to allow parties to agree to an extension of up to 28 days, provided a hearing date is not put at risk.⁵⁴
34. These issues are not necessarily indicative of any fundamental problems with the reforms; rather, they reflect the fact that changes of this magnitude will inevitably require some degree of finetuning. What remains to be seen is whether the new regime will bring about the significant change in litigation culture that was intended. Will, for example, costs budgets and disclosure reports meaningfully affect the scale and process of disclosure?

⁵² *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA* [2014] EWHC 398 (Comm); [2014] 2 Costs L.R. 367 at [53]; *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506 at [61].

⁵³ *Hallam Estates Ltd v Teresa Baker* [2014] EWCA Civ 661 at [29]-[30].

⁵⁴ Civil Procedure (Amendment No. 5) Rules 2014 amending r 3.8.

35. We aren't in a position where that question can be definitively answered. However, in my view, some preliminary observations can be made. First, it can almost certainly be accepted that the new procedures affecting disclosure will increase the workload of both practitioners and the judiciary. This was squarely addressed in the review; for instance, the Final Report outlined responses to budgeting including the Council of Circuit Judges' forceful attack that, 'Judicial productivity would be likely to fall as fast as morale if we are required to do this work.'⁵⁵ Lord Jackson also recognised that costs management would place a further burden on court resources.⁵⁶ Furthermore, the cases I have mentioned along with anecdotal evidence suggest that budgeting is imposing a time and cost burden on parties, both in terms of budget preparation and disputes about them in court.⁵⁷
36. Whether the additional burden on the judiciary and profession is worthwhile will depend on the extent of the benefits. Put simply, there will be little point preparing a budget or disclosure report if the courts inadequately or inconsistently engage with the material. It would be unfortunate if this became an exercise of going through the motions. The procedure requires that courts actively consider whether budgets are proportionate and, according to several pilot schemes, reviewing budgets was taking judges

⁵⁵ Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) Ch 40 at [6.2]. Lord Jackson undertakes a careful analysis of whether changes to costs management are desirable: see [7.1]ff.

⁵⁶ Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) Ch 40 at [7.1].

⁵⁷ See J Peysner, "Impact of the Jackson reforms: some emerging themes", *Report prepared for the Civil Justice Council Cost Forum* (21 March 2014) at 21ff.

between 15 and 30 minutes.⁵⁸ I for one remain to be convinced that judges can be sufficiently informed, particularly in a short period of time, to enable them to assess what costs are proportionate in a complex piece of litigation.

37. What is of some concern is the extent to which the reforms seem to have brought about satellite litigation. Applications about a failure to meet a deadline by a matter of minutes are a gross waste of time and resources for both the parties and the court. It is significant that decisions such as *Chartwell* have openly acknowledged that satellite disputes have been a by-product of the reforms. This is troubling when combined with anecdotal evidence about the number of applications being made to either seek relief from sanctions or obtain time extensions.⁵⁹ It is to be hoped that any increase in these types of collateral disputes will be short-lived, and further amendments to the rules along with decisions marking the disapproval of the court will prevent the practice from becoming entrenched.

38. A further concern, somewhat related to an increase in satellite litigation, is the extent of cooperation between practitioners. This issue is evident in Judge Grant's reference in *Wain* to parties worrying about having to make a *Mitchell* point or having to apply for relief.⁶⁰ It is essential that parties, and even more so their representatives, cooperate so that disputes are

⁵⁸ Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) Ch 40 at [2.10].

⁵⁹ J Peysner, "Impact of the Jackson reforms: some emerging themes", *Report prepared for the Civil Justice Council Cost Forum* (21 March 2014) at 21, 27-29 in which comments from practitioners include that *Mitchell* has 'flooded the courts with applications even though the whole point behind it was to try and ... improve ... the administration of justice'.

⁶⁰ *Wain v Gloucestershire CC* [2014] EWHC 1274 (TCC) at [12].

determined efficiently, cost-effectively and with civility.⁶¹ It is difficult to overstate the need for cooperation. As Chief Justice Allsop, when President of the Court of Appeal, explained in *Baulderstone Hornibrook Engineering*:

*'...cooperation can now be taken as an essential aspect of modern civil procedure in the running of any civil litigation including hard fought commercial cases.'*⁶²

Litigation today requires practitioners, and especially those representing acrimonious parties, to cooperate in order to facilitate the just, quick and cheap resolution of proceedings. It is essential this continue, that courts encourage it, and that rules governing civil procedure assist parties to cooperate to the extent possible. This is particularly so for discovery.

39. This brings my discussion full circle. The ever-increasing body of electronic material that can be caught the litigation process will only continue to expand with further technological developments. Considering this, it seems fair to ask, does discovery remain worthwhile? I understand that Justice Hammerschlag addressed in detail the effect of Practice Note 11,⁶³ which simply directs that the Court will not make an order for disclosure prior to the parties serving their evidence, unless there are exceptional circumstances.

⁶¹ See *Hawkesbury District Health Service Ltd v Chaker* [2010] NSWCA 320 at [2].

⁶² *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2008] NSWCA 243 at [160]. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 88 ALJR 76 at [67], the duty to return inadvertently disclosed material was described as an example of professional obligations 'supporting the objectives of the proper administration of justice'.

⁶³ Practice Note SC Eq 11, available at

http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/180b8c6777403534ca2579c9000c11a4?OpenDocument

40. To put it bluntly, there were howls of rage from some members of the profession when Practice Note 11 was announced. However, from what I have heard (and subject to what Justice Hammerschlag said yesterday), the response following its introduction has been generally positive. In my view, this is similar to what occurred when limits were placed on interrogatories to make them available only by an order of the court, and only where the court was satisfied they were necessary.⁶⁴ This always reminds me of when, as a very junior barrister, I was instructed to draft interrogatories in a negligence matter. Despite thinking the exercise was unnecessary, I put together a few questions that seemed vaguely useful. When I showed them to my leader, he exploded with rage. Apparently they were grossly inadequate and I was instructed to follow his template that contained some 200 odd questions.
41. What is obvious is that very different approaches have been taken in an attempt to rein in the same perceived problem. In the Equity Division of the Supreme Court a broad restriction has been placed on discovery, whereas in England and Wales a rigorous budgeting system is combined with disclosure orders tailored to the specific circumstances of the proceedings. It remains to be seen if either or both of the approaches will be successful.
42. What should be undertaken is a rigorous analysis of the responses to discovery being adopted in different jurisdictions. The need for this seems

⁶⁴ Uniform Civil Procedure Rules 2005 (NSW) r 22.1.

particularly great when reviews recommend a smorgasbord of reforms. Take, for instance, the Productivity Commission's recent Draft Report into Access to Justice Arrangements. It proposes implementing tailored discovery, limiting discovery to direct relevance, imposing leave requirements and targeted costs orders, and, notably, introducing budgeting based on the system in England and Wales.⁶⁵ The Commission's analysis of cost budgets covers only a few paragraphs. Perhaps understandably it is limited to the mechanics of budgets; there is no mention of implementation, let alone *Mitchell*. However, considering what I have said, and if there is to be a formal review of the Jackson reforms in the coming years, it would be unfortunate if changes were introduced here without careful consideration.

43. Ultimately, it remains to be seen if Practice Note 11 lessens the burden of discovery and whether it contains sufficient protections to ensure that proper discovery is available where it is needed. The great difficulty is that discovery, especially with the growth in electronic materials, requires that a balance be struck between conducting litigation with 'cards face up on the table',⁶⁶ and the costs that process can involve. I was particularly struck by a comment in relation to the issue of sanctions post-*Mitchell*; the litigator said simply that one problem is that 'as the system becomes more efficient it becomes less fair and as it becomes more fair it becomes less efficient.'⁶⁷

⁶⁵ Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 340-353, 412-413.

⁶⁶ *Davies v Eli Lilly & Co* [1987] 1 WLR 428; [1987] 1 All ER 801 at 804.

⁶⁷ J Peysner, "Impact of the Jackson reforms: some emerging themes", *Report prepared for the Civil Justice Council Cost Forum* (21 March 2014) at 27.

44. I would add there is sometimes a tendency to discuss discovery reforms with reference to a bare cost/benefit analysis, in the sense that further valuable information should not be outweighed by the cost of locating it.⁶⁸ I have some reservations about such an approach. There obviously remains a philosophical question about the extent to which the adversarial system succeeds in – or more fundamentally is intended to – arrive at the truth.⁶⁹ However, the utility of discovery in facilitating ‘cards face up’ litigation cannot be measured by simply weighing the documents produced against the cost of that process. Fairness and justice must also be considered.
45. Despite this, it is fair to ask who should bear the cost of discovery? Particularly, as I have mentioned, in complex or multi-faceted claims where a plaintiff may seek to examine a broad array of the respondent’s materials. One interesting response is to shift the cost burden. For instance, amendments in Victoria that commenced last month allow the court to make orders in respect of discovery costs, including payment in advance by one party of some or all of the estimated discovery costs.⁷⁰ While there are good reasons why there shouldn’t be a general presumption that the

⁶⁸ See, for example, Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 340, 343.

⁶⁹ See, for example, The Hon. D Ipp, “Reforms to the Adversarial Process in Civil Litigation – Part I” (1995) *Australian Law Journal* 705 at 712-716; R Finkelstein, “The Adversarial System and the Search for Truth” (2011) 37:1 *Monash University Law Review* 135; *Whitehorn v The Queen* (1983) 152 CLR 657, 682.

⁷⁰ *Civil Procedure Act 2010* (Vic) s 55(4)-(5) introduced by the *Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014* (Vic). See also *Federal Court of Australia Act 1976* (Cth) s 43(3)(h). Cost orders are addressed in Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) at 340-353, 349. Practice Note SC Eq 11 allows the court to impose a limit on the amount of recoverable costs in respect of disclosure.

requesting party pay discovery costs in advance,⁷¹ this option may well provide courts with a further tool to focus the use of discovery.

46. There are two further difficulties regarding discovery reforms that can be briefly stated. First, despite concerns about the scale of discovery and the challenge presented by electronic material, there seems to be little empirical data measuring the extent or cost burden of discovery.⁷² This is not to suggest discovery isn't a problem. However, it does present a challenge in terms of assessing the effectiveness (or simply the effect) of different reforms. For instance, where, like in the Productivity Commission's draft report, a range of reforms concerning discovery are proposed, the lack of empirical data makes it difficult to assess outcomes. How are we to determine the effect (if any) that pulling various reform levers is having?

47. The second and perhaps more straightforward concern is that regardless of the reforms that are introduced, practitioners will still need to be familiar with their client's documents. Regrettably, the growth in electronic materials and the complexity of some proceedings today are likely to continue to condemn young lawyers to hours of document review; although no doubt with the assistance of technology that you are discussing here.

⁷¹ See Australian Law Reform Commission, *Managing Discovery* (Report 115, 2011) at [9.33]-[9.35].

⁷² Australian Law Reform Commission, *Managing Discovery* (Report 115, 2011) at Ch 3 discussed the lack of accurate data and recommended further data collection. However, see, Department of Justice Victoria, *Reducing the Cost of Discovery - Regulatory Change Measurement Report* (January 2012).

48. Ultimately, further reforms must continue to address cost, but should also focus on minimising the possible use of discovery as a litigation tactic. This can involve over-disclosure, or simply pursuing ‘unduly technical and costly disputes about non-essential issues’, which the High Court warned against in the case of *Expense Reduction*.⁷³ In my view Practice Note 11 responds to both needs. Delaying discovery until after evidence has the advantage of limiting the likelihood of discovery-related satellite litigation, while allowing the issues in dispute and the need for discovery itself to be further clarified.
49. I would be interested to hear the conclusions you reached about the utility of discovery. For my part and to answer my own question – *is it worthwhile?* – I would say yes, but not in a form that would be recognisable to practitioners even a few years ago. This doesn’t make me anti-discovery; it is a tool that should be available where it is needed. However, in my view, and perhaps similar to interrogatories, the answer is not to further complicate discovery procedures, but rather to carefully limit availability. While it is important to ensure that discovery is only available with the court’s leave, shifting the time it occurs (and possibly also the cost) is more significant. In my view, the approach of Practice Note 11 shows one way that the litigation process can itself be used to crystallise the issues in dispute, which consequently narrows the field of documents that may need to be disclosed. After all, you cannot plead a case unless you have facts to support it. The need for

⁷³ *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 88 ALJR 76 at [57].

discovery can be much better assessed when the parties have put on evidence supporting the case which they have been able to plead.

50. Discovery remains an important component of our civil justice system. However, left unchecked it is not only *not* worthwhile, but positively useless. Can I remind you of Dickens' wonderful description in *Bleak House* of the conclusion of the case *Jarndyce v Jarndyce*:

'We asked a gentleman by us, if he knew what cause was on? He told us Jarndyce and Jarndyce. We asked him if he knew what was doing in it? He said, really no he did not, nobody ever did; but as well as he could make out, it was over. Over for the day? we asked him. No, he said; over for good...

Our suspense was short; for a break up soon took place in the crowd, and the people came streaming out looking flushed and hot, and bringing a quantity of bad air with them... We stood aside, watching for any countenance we knew; and presently great bundles of paper began to be carried out—bundles in bags, bundles too large to be got into any bags, immense masses of papers of all shapes and no shapes, which the bearers staggered under, and threw down for the time being... while they went back to bring out more. Even these clerks were laughing. We glanced at the papers, and seeing Jarndyce and Jarndyce everywhere, asked an official-looking person who was standing in the midst of them, whether the cause was over. "Yes," he said; "it was all up with it at last!"...

"Mr. Kenge," said Allan, appearing enlightened all in a moment. "Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?"

"Hem! I believe so," returned Mr. Kenge.⁷⁴

It may be that bundles of paper have been replaced by USBs, portable hard drives and data warehouses. Dickens' point, however, still remains good.

⁷⁴ C Dickens, *Bleak House* (Penguin English Library, 2012), 1038-1040.