The Rise of Documents and the Disappearance of Witnesses
The Honourable Justice Peter Applegarth[1]

In most substantial civil cases, too many documents are collected, copied, scanned, reviewed, discovered and put into a "trial bundle". This comes at a great cost, and it impedes access to justice.

As to the mysterious creature known as the "agreed trial bundle", one of my colleagues once remarked that in most cases the only thing that the parties agree about is that it is a bundle. The "trial bundle" is often assembled by people who have never seen a trial, let alone run one. As a result, large parts of it are not mentioned by any witness or lawyer at the trial. Still, we call it the "trial bundle", and mystery surrounds which parts of it the trial judge is expected to read.

The rise of the trial bundle is an example of the ascendancy of documents, including large volumes of irrelevant or marginally relevant documents, over the spoken word in the resolution of civil litigation.

The dominance of documents in many categories of civil litigation, and the cost of "doing discovery" in the conventional way, have caused judges, law reform commissions and others to identify a major problem in our civil justice system. The proverbial galah in the local pet shop could probably tell you that there is a problem with the way we deal with documents in most civil cases. Finding satisfactory solutions is much harder. The deceptively simple solution is to conceive the problem as one about the way we "do discovery", tinker with civil procedure rules about discovery and encourage greater case management by judges.

I want to suggest that:

1. this is not a just a problem about discovery: it is a problem about how parties and courts deal with documents **at all stages of civil proceedings**, from the time the statement of claim is served through to the last day of the trial.
2. tinkering with rules about discovery makes little difference to entrenched practices: for example narrowing rules so that discovery is only available if documents are "directly relevant" has made little practical difference to the volume of documents that are disclosed. If anything, greater volumes of documents are discovered than before. Practices develop and continue almost despite the rules.
3. intensive case management comes at a cost to parties and to the public: it uses a finite public resource, namely judicial resources.
4. the excessive dependence on document management profits certain individuals and suppliers of services, such as IT professionals, and we should not look to people who profit from the present system to lead the charge in changing it.
5. apart from creating a costly barrier against access to justice, and making cases settle on grounds unrelated to their merits, current practices pose a health hazard to lawyers and paralegals who toil at the bottom of the document pyramid.
6. the increasing dependence on document management has become so entrenched, that a new generation of "trial lawyers" (or more accurately "litigators") rarely see trials and have not developed skills in speaking to potential witnesses and obtaining their testimony
7. reform depends both on changes to practices in relation to documents and on obtaining the oral evidence of crucial witnesses sooner.

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[1] Paper presented to the Australian Lawyers Alliance National Conference, 20 October 2011.

The last point brings me the topic of disappearing witnesses. By that, I mean that the culture of major litigation has changed in recent decades, so that ascertaining what potential witnesses will say at trial is less of a priority than it used to be. The management and review of documents has assumed greater importance. There has been a loss of the "orality" that once characterised our civil justice system.

By disappearing witnesses, I do not mean that witnesses have "disappeared" in the nasty sense of what happens to progressive activists under military juntas. Witnesses have disappeared in the sense that many cases settle under the weight of documents before an opposing party has had a real chance to hear what the other party's crucial witnesses have to say. If, however, we hear from these witnesses we hear from them far too late. So perhaps this paper should be re-titled "Disappearing and Delayed Witnesses".

Speaking to crucial witnesses sooner makes sense, and it may save costs. Our legal culture has shifted from one in which witness statements in the witness' own words are obtained soon after proceedings commence. The aftermath of recent decades of trial on affidavits is that witness statements are prepared too late and, I suspect, are often only started in earnest when mediation has been unsuccessful and a court directs witness summaries or witness statements to be provided shortly before trial. Our litigation culture needs to change so that lawyers speak to crucial witnesses sooner rather than later.

Not all crucial witnesses will be willing to speak, and this raises the issue of **compulsory pre-trial oral examination.**

The Better Resolution of Litigation Group was established in September 2009, and is convened by the Senior Judge Administrator of the Supreme Court of Queensland, Justice Byrne. It includes judges, barristers, solicitors, academics, court officers and public servants. As the name suggests, the group was formed because the Court seeks to improve practices in order to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."[2] For our first meeting Justice Byrne invited each of the group's members briefly to identify matters that we should consider. I had recently read parts of Lord Justice Jackson's Preliminary Report, in which he wrote:

> "Devising rules to bring about the **early** resolution of cases which are **destined to settle** is one of the biggest challenges of civil procedure. This is the quest for the philosophers' stone".[3]

I have a contemporaneous note of what I said at the meeting. It reads:

> "Two things get in the way of the early resolution of cases which are destined to settle: when documents are **read** by the lawyers who run the case; and when we **hear** from witnesses".

Over the last two years we have developed and trialled new practices in relation to how we deal with documents in cases requiring supervision, and a new, simple Practice Direction in relation to Documents & Civil Litigation is imminent after a process of consultation with the profession. I

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[2] The objective of our civil procedure rules: *Uniform Civil Procedure Rules* 1999 (Qld), r 5.

[3] The Right Hon. Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, 2 vols (May 2009), 2: 452 (emphasis added).

want to spend some time on explaining those developments. Then I want to turn to the more controversial topic of pre-trial oral examination of witnesses.

The two things are linked. If we **heard** from witnesses sooner, we would not be so dependent on document management and review to work out what happened and what people will **actually say** at trial under cross examination (as distinct from what witness statements written by lawyers say they will say).

Under our present system, when do we hear from witnesses to be called by the opposing party? Maybe at a mediation, when they say their piece, and we get an impression. Usually we hear from the other side's witnesses into a trial when either the wheels fall off in the first stage of cross-examination, or when the witness scores a century before lunch. The case suddenly settles.

I recall as counsel attending mediations where, on occasions, lawyers on the other side resisted their clients answering questions and would say "I'm not having you cross-examine my client." The fact that we only **hear** from many witnesses far too late raises the issue of developing procedures and practices for pre-trial oral examination.

My essential point is that improving civil litigation is not just about changing rules. It is about changing a litigation culture that has developed over a long period.

The changing culture of litigation

Before addressing how we might improve our current practices, it may be useful to look in the rear view mirror to see how we have got to this point. I want to make some general observations about how litigation has changed in my professional lifetime. This is not because there is any hope of returning to those practices, even if we wanted to. The point is to highlight some differences between the manner in which litigation used to be conducted, and how it is conducted now. The focus has shifted away from hearing witnesses. This is partly the result of the rise and success of mediation, and also the way we "do discovery". It also has something to do with the rise during the 1990s of trial on affidavit, and the widespread use of witness statements and witness summaries. It also has a lot to do with the demise of the simple civil trial in which younger lawyers gained trial experience, and came to learn how trials were won or lost.

Insurance companies ran and defended "crash and bash" cases in the Magistrates' Court. Articled clerks would proof witnesses, instruct junior barristers and learn how trials were conducted. The relative simplicity of litigation meant that junior barristers could gain experience in the District Court running cases about the sale of goods and their merchantable quality. Expert witnesses in those cases did not provide elaborate reports. The expert witnesses often were not professional witnesses. Most civil cases matched Hobbes' description of the life of man in the state of war: "nasty, brutish and short".

A witness statement in those days was very different to what it has become. In those days it tended to be the witness' statement. It often was typed by the witness, or a solicitor's office would type up the witness' handwritten statement. After disclosure was obtained the witness' statement would be supplemented by comments on the other side's documents that the witness had not seen before. The witness' statement contained warts and all. It tended to be in the witness' own words. It was prepared for the eyes of the lawyers who might think about calling the witness, and it contained the good with the bad.

The practice of having trials on affidavit grew in the 1980s and the 1990s. They became the default-setting in the Federal Court, and became commonplace in commercial cases in the Supreme Court. The practice of requiring evidence in chief to be on affidavit has been largely abandoned by Commercial List and Supervised Case List judges of the Supreme Court of Queensland over the last 10 years. Instead, directions are made for witness summaries. In some cases directions for certain evidence to be on affidavit serves the useful purposes of enabling non-contentious evidence to be placed before the court simply, and of avoiding unnecessarily lengthy evidence in chief. However, the rise of trial by affidavit as the default position in the 1990s has had a lingering effect. Generations of lawyers have become accustomed to thinking about witness statements as something that the opposing side will see either in their entirety, in a summary form, or in the form of an affidavit. A witness statement ceased to be a document prepared by the witness in the witness' own words, warts and all, typically for the eyes of only one side's lawyers. It became the document that was to present the witness' evidence at its highest, typically written by a lawyer, often in the lawyer's own words.

The rise of mediation, and the high percentage of cases that settled at mediation, meant that witness statements often were not prepared until after the matter had gone to mediation. My impression is that in many cases the witness statement is almost the last thing that is done, and it is often not done unless and until the case has not settled at mediation. That may be a cost-effective process, given the cost of lawyers preparing and polishing witness statements to within an inch of their life.

The rise of mediation has had an effect on the types of case that typically go to trial in the Supreme Court. When I was a Judge's Associate in the early 1980s there would often be half-day or one-day quantum cases in which the judge would deliver an ex tempore judgment. Barristers and solicitors gained trial experience in short and relatively simple cases. Despite the huge rise in the population of Queensland, particularly South-East Queensland, since then, the number of Supreme Court judges is roughly comparable. The small increase in the number of judges does not reflect the massive increase in our population, let alone the increased complexity of both the substantive and procedural law. The end result is that those matters that go to trial tend to be more complex and, on average, to last longer.

Pleadings have become more complex. A raft of statutory causes of action are usually joined to traditional claims for breach of contract or negligence. Protracted fights occur over pleadings and particulars. Disclosure has become a massive task in most cases. When I began as a solicitor in commercial litigation the documents to be discovered in many cases would fit in a few cardboard boxes. Those days are gone, and they never will return.

These and other developments have led to litigation lawyers having a very different skill set and attitude to litigation than applied 20 or 30 years ago. They are accomplished in contests over pleadings and particulars. The professionalism with which they brief experts and assist in the generation of expert reports is striking. Gone are the days when an expert would be informally consulted, give their opinion in a conference with counsel and turn up at trial with little more than a CV in their hand. Litigators have become experts in the management of vast volumes of documents. They spend large amounts of time, and large amounts of clients' money, doing discovery. They tend, however, to spend less time speaking to witnesses, let alone hearing witnesses giving evidence at trial.

Even in an era in which the Supreme Court generally directs witness summaries, rather than witness statements or affidavits, the witness statement is the vehicle by which the party's case is put at its highest, with a large amount of legal polish.

In circumstances in which witness statements are often not the witness' own words, and tell only part of the story, there must be an understandable reluctance to settle cases without hearing from the witness. Of course, there is no property in a witness, and if a witness is willing to speak to a party's lawyers then the lawyers will get an impression about what they will say at trial. That is not always possible. In cases where the witness is an opposing party, one may get the chance to see the witness at a mediation. You may get the chance to see them, but will you get the chance to hear them? Many of us will have had the experience of not only seeing, but hearing from potential witnesses at a mediation, and for that to change our view about the case and its likely outcome. As litigators some of us also have had the experience of going to a mediation and having the other side's lawyers refuse to allow their client to speak in the open session, or to answer polite questions about their evidence. There may be sound tactical reasons for this approach. However, it is understandable that the other party will adopt the position that if someone is not prepared to tell their story in a without prejudice setting, they may not have much of a story to tell.

If parties do not get to hear from important potential witnesses at a mediation, then the first time they may get to hear them is when they are in the witness box, on day two or day twelve of a trial. By then, hundreds of thousands of additional dollars may have been spent in getting the case ready for trial and getting to that point of the trial. This prompts the question: is there a way by which we can get to hear critical witnesses earlier?

Parties are not the only critical witnesses. Independent witnesses may be just as important, and relied upon to a greater extent by courts in deciding the case.

I will end my trip down memory lane with this anecdote, which I hope illustrates the distance we have come in the way that many young litigators think about witnesses and their evidence. As a barrister in preparing for trial I noticed that the minutes of an important meeting included the name of someone in attendance who had not given a witness statement. He had an uncommon surname. I asked "What about x?" The solicitor said "He doesn't work for our client anymore." I said "Have you spoken to him?" Answer – "No". I pulled out the White Pages, found the name of the person and handed my telephone to the solicitor to ring him. There was a genuine look of fear on the young solicitor's face. He was being asked to cold-call a potential witness. It was obviously an unfamiliar experience, and a far less comfortable one than reviewing documents.

This anecdote is not meant to be "In our day we would have done things better." These days many aspects of litigation are done better and more professionally than ever. The point of the story is that the young lawyer would never have conducted a simple car crash case in a Magistrates' Court and absorbed the valuable lesson that courts often place reliance on the apparently reliable recollection of an independent witness in deciding which of the drivers (if any) is telling the truth. If you have never experienced a trial, you may not learn these lessons; you may spend too long chasing further and better particulars or further disclosure and neglect to seek out a crucial witness.

We have battalions of lawyers drafting witness statements, and many of these lawyers have rarely seen a witness in a witness box. The witness statements they draft, from which witness summaries are distilled, are written years after the events to which they relate. This is because the witness statement has become the document that puts the party's case at its highest, and often is prepared very late in the piece in preparation for trial after mediation has failed and ages have been occupied "doing disclosure".

Judges in the Queensland Supreme Court's Supervised Case List and in its Commercial List often direct parties to develop a basic trial plan at an early stage – to think about the witnesses they will need to call. Such a plan does not even require a brief summary of the expected testimony of witnesses. But it hopefully makes parties think about their case, and not defer thinking about witnesses until after disclosure is completed, at great expense.

Making parties think at an early stage about the identity of potential witnesses and, dare I say it, actually speak to them and get the gist of what they are likely to say, draws the predictable response that this involves "front loading costs" in cases that may settle. I suggest that such an objection ignores the fact that we are not asking for full witness statements and, anyway, speaking to potentially important witnesses at an early stage may help you settle the case. You may be surprised by what the witness will say.

Encouraging lawyers to speak to crucial witnesses sooner can facilitate settlements and curb the cost of disclosure. It may cost to cold call a potential witness and ask them to send you a note about what they have to say, or to dictate a file note of what they say to you. But it may save more than it costs. The witness' words are likely to be the product of a relatively fresh recollection, not something recalled years later after disclosure is done. It may send you in the direction of crucial documents or a crucial witness.

Requiring lawyers to nominate at an early stage an initial list of the witnesses they expect to call is not a bad thing. It will prompt lawyers actually to *speak* to potential witnesses, learn about the case and consider these basic questions: have we got the witnesses to win the case, and how are our witnesses likely to perform at trial? Better to ask those questions at the start of the case rather than too late, after a lot of money is spent on pleadings, document management and disclosure.

Changing our culture of litigation so that lawyers speak to crucial witnesses earlier is in the interests of justice, and part of the task of facilitating the just and expeditious resolution of disputes at a minimum of expense.

Getting to critical documents sooner

Documents are important to the just resolution of litigation. But not all documents are equally important. The collection, review and disclosure of large volumes of documents that, at best, are of marginal relevance impede the early and just resolution of litigation. The focus of attention should be on the early identification and exchange of **critical** documents that are likely to be tendered at any trial and that are likely to have a decisive effect on the resolution of the matter, either at mediation or at trial.

Current practice does not have this focus. The emphasis is on document management. The net is cast widely to capture potentially relevant documents. Huge volumes of documents are gathered at great expense. Clients, knowing of the sanctions against not discovering relevant documents, often assemble large volumes of unimportant documents. This results in delay and "over-disclosure".[4] Late in the litigation, and at significant additional expense, a relatively few critical documents are selected from this mass.

[4] For an example of a case in which over-disclosure was found, see *Central Qld Mining Supplies Pty Ltd v Columbia Steel Casting Co. Inc* [2011] QSC 183.

The escalating cost of document management, document review and disclosure in many categories of civil litigation prompts the question: is there a way to identify and exchange at an early stage the **critical** documents that are likely to make a difference to the resolution of litigation?

In an article that I wrote in February 2010,[5] I asked two questions:

1. How many discovered documents are used to real advantage in mediations or trials?

2. How much time and money is wasted on disclosure of documents that will never make a difference to the resolution of the case?

In some cases there is no significant problem in relation to document management and disclosure. Parties adopt sensible practices, or resolve problems in a way that accords with the objective of the civil litigation: the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. However, in many cases too many documents are assembled in hard copy form, electronic form or both. The result is excessive cost and undue delay.

Why are too many documents assembled?

A number of factors seemingly give rise to the problem of excessive assembly of documents and consequential over-disclosure. In many cases persons without a proper knowledge of the case or the relevant issues are involved in gathering documents that *may* be relevant. These voluminous documents are then collected and often electronically scanned. The initial review may be undertaken by a non-lawyer, such as a paralegal, or by an inexperienced lawyer. If this person is in doubt about whether a document is relevant (and potentially disclosable) the inclination is to include it. At that stage it is easier to include a document than to make the hard decision to exclude it. There also is an element of self-protection. It is safer to include a document and avoid a later accusation of not having given proper discovery, or to include a document for fear that it might later be suggested or ascertained that the document was important, and that its omission was negligent.

In some cases the disclosure process is misused by defendants to slow down litigation, or by parties to "snow" the other side. Disclosing too many documents places the burden upon the other party to find the critical documents.

An old problem made worse by new technology

The problem of an excessive number of documents being dumped on another party in the name of "disclosure" is hardly new. However, new technology makes it a bigger problem than it used to be. The volume of documents stored electronically has grown exponentially. Information technology enables masses of documents stored on servers and in electronic archives to be captured. The cost of identification, preservation and collection of these *potentially* disclosable documents is significant. But it is dwarfed by the cost of reviewing the collected documents. At some stage someone has actually to read the documents. Often that occurs relatively late in the litigation.

There may be some scope to use technology to help solve the problem that information technology has exacerbated. Clever electronic searching devices may thin the forest. But a forest

[5] Justice Peter Applegarth, "The Devil is in the Documents", *Hearsay: The Electronic Journal of the Bar Association of Queensland* 40 (March 2010); available online at <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=681&Itemid=48>.

of largely useless documents may remain. The use of technology is at best a partial response to a complex problem. The problem that exists with over-disclosure was not created by technology. We should not expect technology to solve it.

The time has arrived to think about the way we deal with documents in litigation. Document management and "doing disclosure" have become goals in themselves, rather than aids to doing justice. Worse, the way documents are managed in too many cases actually impedes the objectives of civil litigation, namely the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

Documents are important but not all documents are equally important

Documents are important to the resolution of most cases. The credibility of a witness may be tested by reference to contemporaneous documents. These documents may sink or save a party's case. However, the current devotion of time and resources to document management often is at the expense of the proper proofing of witnesses, and of an early and hard assessment of whether an individual will be a truthful and reliable witness at trial. Proofing and testing witnesses in conference is often delayed until disclosure is complete, and somehow it is never quite complete because there are always more documents out there to be found.

Documents are important to ADR. Settlement is more likely when both parties have a reasonably similar expectation of how the case will be decided if it goes to trial. In seeking to arrive at this common expectation, mediators and practitioners usually proceed on the basis that disputed questions of fact are likely to be determined by reference to contemporaneous documents (or the absence of them) and the inferences that can be drawn from these documents (or their absence).

Fewer cases will settle by ADR if parties do not have access to documents held by the opposing party that significantly help or harm their cases. In theory one could conduct a system of civil litigation without disclosure, or with disclosure only by leave. However, such a system would generate significant problems, including a reduction in the number for matters resolved by ADR, and there would be routine applications for leave to have disclosure of documents that are likely to make a significant difference to the resolution of the case.

The proposition that documents are important to the just resolution of litigation does not mean that all documents are equally important.

The view from outside

An alien visiting our planet, or a human being unfamiliar with litigation practices, may question the wisdom of the way we deal with documents in litigation. The process may resemble the digging of a large hole, into which an enormous volume of documents is placed. Then, at great expense, a small selection of these documents is slowly located from within the mass and brought to the surface. If the case does not settle at mediation, this selection of documents (often only a small percentage of the mass) becomes the "trial bundle". Amongst the trial bundle is a relatively small number of documents which actually affect the outcome of the trial. An outsider, alien or otherwise, would think that the process is completely inefficient.

Is it possible to identify critical documents at an early stage in litigation?

By the time litigation is commenced, usually after pre-action disputes in which parties have consulted lawyers and obtained advice, most parties should know the critical documents upon which they intend to rely at any trial, and also to know some, if not most, of the documents upon

which the other party intends to rely and which are adverse to the first party's case. If the critical documents are identified and exchanged in a suitable format at a relatively early stage in litigation then this should facilitate the early resolution of cases which are capable of settlement, and the supervision of those that do not settle and which require case management.

Identifying critical documents

Some critical documents emerge well into litigation when a party, in compliance with an obligation to give disclosure, or in the general preparation of the case, locates a "killer document". The killer document may kill the other side's case or one's own. The fact that on *some occasions* killer documents emerge only through the costly process of digging for documents well into the course of litigation should not blind us to three other realities.

The first is that in many cases most of the critical documents that help or harm a case are known relatively early in the piece, often before the litigation is commenced, and there is no reason why these critical documents should not be exchanged as soon as practicable. Ideally, that should be done in a form that can be used at an electronic trial ("E-Trial"). The Queensland Supreme Court's E-Trials program has demonstrated that large and small trials can be conducted with greater efficiency if documents are scanned into a searchable PDF format and placed on a simple spreadsheet that the Court has developed.

The second reality is that "doing disclosure" in the conventional way delays the selection and exchange of many critical documents.

The third reality is that the costly search for *additional* critical documents by the conventional process of document management and disclosure is a good illustration of the law of diminishing returns. In a bygone era, one might justify spending some hours scouring through the other side's cardboard boxes of discovered documents in search of a few documents that might make or break the case. These days the documents are not usually in a few boxes. They are often in an electronic format, including repetitious e-mail trails. The cost of accessing and reviewing them may not justify the small chance of finding something of use.

These and other realities of modern litigation suggest that there must be better ways to identify and exchange critical documents than the present blunt instrument of disclosure conducted in accordance with the rules, followed by the costly process of finding the critical documents from amongst the mass of discovered documents.

One may question whether amending the rules of disclosure is the best way to proceed. Experience has shown that the reform of discovery by introducing the test of "direct relevance" has made little practical difference to the way in which litigation is conducted. If anything, there has been an increase in the amount of disclosure. That has been the experience of practitioners and academics in relation to the adoption of the "direct relevance" test under the Queensland *Uniform Civil Procedure Rules*. It is also reflected in overseas experience. Lord Justice Jackson's *Review of Civil Litigation Costs* found that parties in the United Kingdom who strictly complied with the test of "direct relevance" would disclose fewer documents, but incur higher costs, as that requires lawyers to evaluate the relevance of disclosable documents. However, Lord Justice Jackson reported that, in practice, solicitors simply continued to disclose everything that might be relevant:

> "In other words, they continue to follow the old rules, thus saving costs (on their own side) but disclosing a greater quantity of documents than should be disclosed."[6]

In the past one of the biggest vices in litigation was inadequate disclosure. It remains a problem, as reflected in applications for further disclosure and the late emergence of relevant documents in some cases. However, today a bigger problem is "over-disclosure" notwithstanding the narrowing of disclosure obligations under the rules.

The challenge is to develop practices whereby only critical documents are identified and exchanged. One definition of "critical documents" is: the limited number of documents that are likely to be tendered at trial and which are likely to have a decisive effect on the resolution of the matter either at mediation or at trial. The exchange of these documents should occur early in the litigation before unnecessary costs are incurred. No one pretends that these documents will be the only documents to see the light of day at a mediation or trial. Documents not known to the parties and which may significantly affect the case may emerge at a late stage in the litigation. If they do, they can supplement the bundle of critical documents that will be the point of reference for settlement negotiations, case appraisal or trial. The possibility exists that a "smoking gun" in the form of a new crucial document will emerge late in the litigation. In many cases, however, the search for a smoking gun is a costly and futile exercise. The documents that win or lose the case will have been known to one or both parties early in the litigation.

If this is so, it seems preferable to develop practices by which critical documents are identified and exchanged early in litigation, to be supplemented, if required, by additional documents if good cause is shown. Such an early exchange is likely to enhance the early resolution of cases which are destined to settle.

New practices

The early identification and exchange of critical documents can be encouraged by rules and protocols that limit the extent of searching and that inject principles of proportionality. Compliance by practitioners with practices that limit costly searches should provide them with protection from professional sanctions. Failure to comply with these rules and "over-disclosure" should be the subject of adverse costs orders and other consequences. However, adverse costs orders against parties and their lawyers who engage in over-disclosure is unlikely, in itself, to have a major impact. The costs associated with seeking such a costs order may be so significant as to deter bringing such an application and an application may not be sought at the end of exhausting litigation.

An important issue is whether a party should be obliged to submit only the documents upon which it relies (unless already submitted by another party), or whether the obligation should extend to documents of which the party is aware which may be adverse to that party's case. If there is such an additional requirement then it will be necessary to define the scope of any obligation to undertake a reasonable search, and also to include some process by which there is a suitable assurance that the "adverse documents" that are included are all of the adverse documents about which the party and/or its lawyers are aware.

The proposal to have critical documents submitted or exchanged may be subverted if an excessive number of documents are submitted. It is necessary to ensure that the process involves the

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[6] The Right Hon. Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), 368; available online at <http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf>.

submission and exchange of *critical documents*, not simply documents that are directly relevant. In order to prevent the process from becoming unwieldy it may be necessary to limit the number of documents. A default position may be to require no more than a specified number of documents being assembled and exchanged unless the Court otherwise directs. In any event, it should be clear that only critical documents are to be submitted and exchanged, namely documents which are likely to be tendered at trial and which are likely to have a decisive effect on the resolution of the matter either at mediation or at trial.

Proportionality

Parties and their lawyers should ensure that disclosure and document management steps are proportionate, taking into account matters that include:

(a) the nature and complexity of the proceedings;

(b) the amount at stake or the relief sought;

(c) the real issues in dispute;

(d) the stage the proceedings have reached;

(e) the volume of potentially relevant documents;

(f) the ease with which documents may be retrieved or reviewed;

(g) the time and costs associated with the proposed steps;

(h) the likely outcome or benefits to be derived by taking the proposed steps and the extent to which these are likely to have a significant impact on the outcome of the proceedings.

Documents and judicial case management

Excessive judicial management of document management in cases which do not require judicial intervention will unjustifiably add to the costs of the parties and be an additional burden on the already scarce public resource of available judicial time. However, judicial intervention in cases that require specific directions in relation to document management and disclosure should occur sooner rather than later.

Directions about documents that suit the individual case

If a party seeks to supplement the critical documents, whether by a formal process of disclosure or otherwise, then a case for this should be made out. This should include, among other things, an estimate of the likely cost of locating, assembling, reviewing and providing such additional documents.

Parties should only be put to these costs if a case is made for such a course. In a particular case the Court may direct that the requesting party pay the costs associated with locating, assembling, reviewing and providing such additional documents. The Court may order that the requesting party pay those costs in any event. Alternatively, if the supposed benefits of disclosure of those additional documents are not demonstrable then the costs of the exercise should remain with the party that requested them (whether that party is successful or not). These and other directions in the nature of "cost shifting" are necessary to ensure that the costs associated with document management and disclosure are not unduly burdensome.

Before approaching the Court to make specific directions in relation to disclosure and document management, the legal representatives should meet to discuss their proposals.

In formulating and submitting directions the parties should have access to standard document protocols that are developed by the Court in consultation with practitioners. Parties should be encouraged to consult and agree upon directions that are appropriate to the particular case and, in doing so, select options from such a "menu".

The parties may agree, or the Court may direct, that the matter will proceed to trial on the basis that the critical documents, or the critical documents supplemented by a limited number of specified documents, and that these will constitute the "trial bundle". A particular case may warrant a direction similar to the Fast Track Discovery Direction in the Federal Court.

Guidelines for practitioners in supervised cases

I have been involved with others in drafting guidelines about the management of documents during litigation. The guidelines are intended to assist practitioners in supervised cases. Practitioners and litigants are directed to adopt a proportionate and efficient approach to the management of both paper and electronic documents at all stages of the proceedings. Subject to an order to the contrary, a party is not required to give disclosure under the Rules until ordered by the court. The early development of a document plan is encouraged. A sample document plan is included with the guidelines.

The use of approved forms for presenting and exchanging documents, including the alternative *UCPR* form 19 and the e-trial document management spreadsheet template is encouraged. The guidelines encourage parties to seek directions that suit the circumstances of the case. These include:

- The exchange of critical documents;
- Fast Track Orders;
- The exchange of documents to be relied upon, supplemented by additional requested documents;
- The exchange of documents limited to certain categories of documents or orders that exclude certain categories of documents.

Reasonable search

In undertaking searches for documents, including for the purpose of making disclosure pursuant to Chapter 7 of the *Uniform Civil Procedure Rules*, or in compliance with a direction of the Court in relation to documents, a party must undertake reasonable searches bearing in mind the principle of proportionality.

Parties are required to inform each other about the extent of searches that they propose to undertake or have undertaken for the purpose of making disclosure pursuant to Chapter 7 of the *Uniform Civil Procedure Rules*, or in compliance with a direction of the Court in relation to documents, and to verify the searches that they have undertaken in a statement ("disclosure statement").

Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, it must state this in its disclosure statement and identify the category or class of document, with an explanation.

The factors relevant in deciding the reasonableness of a search include the following:

(a) the number of documents involved and their location;

(b) the nature and complexity of the proceedings;

(c) the ease and expense of retrieval of any particular document;

(d) the significance of any document, which is likely to be located during the search, in the ultimate resolution of the case.

As a general rule, the parties should discuss any issues that may arise regarding searches for documents and the preservation of documents **before** undertaking searches. The parties should confer and agree about the extent of searches to be undertaken. The matter should be referred to a Judge or Registrar for directions only if the parties are unable to resolve a difference of substance, if the referral of the disagreement to the Court is warranted as a proper use of judicial resources, and if the legal costs involved in seeking a judicial resolution of their differences are justified.

The extent of the search which must be made will depend upon the circumstances of the case. The parties should bear in mind the overriding principle of proportionality. It may, for example, be reasonable to decide not to search for documents coming into existence before some particular date, or to limit the search to documents in some particular place or places, or to documents falling into particular categories.

Exchange of critical documents

Critical documents are those documents in the possession or under the control of a party after a reasonable search and that are likely to be tendered at trial and to have a decisive effect on the resolution of the matter. They include documents that are either supportive or adverse to a party's case.

The guidelines envisage the following process, which is directed to the early identification and exchange of critical documents, with a view to facilitating the early resolution of matters:

1. Subject to contrary directions, critical documents should be exchanged on a date to be fixed shortly after the close of pleadings.

2. The number of such documents to be exchanged should be limited to a specified number stated in the direction.

3. At the time critical documents are exchanged a party should provide a statement that:

    - sets out the extent of the search that has been undertaken to locate critical documents;

    - draws attention to any particular limitations on the extent of the search (such limitations being adopted for proportionality reasons), and explains why the limitations were adopted (e.g. the difficulty or expense that a search not subject to those limitations would have entailed or the marginal relevance of categories of documents omitted from the search);

- certifies that documents that are considered to be adverse to the party's case and that have been located by the search, or which are otherwise known to the party, have been included.

If a party seeks to supplement the critical documents, whether by a formal process of disclosure or otherwise, then a case for this should be made out. This should include, among other things, an estimate of the likely cost of locating, assembling, reviewing and providing such additional documents.

Parties should only be put to these costs if a case is made out for such a course. In a particular case the Court may direct that the costs associated with locating, assembling, reviewing and providing such additional documents be paid for by the requesting party. The Court may order that the requesting party pay those costs in any event.

The parties may agree, or the Court may direct, that the matter will proceed to trial on the basis that the critical documents, or the critical documents supplemented by a limited number of specified documents, will constitute the "trial bundle".

Trial bundle

The number of documents to be included in a "trial bundle" should be limited, and subject to a suitable direction that ensures that the bundle consists only of a limited number of documents to which reference will be made by witnesses, and to which the trial judge will be required to have reference in order to determine the real issues in the proceedings.

The trial bundle should typically only consist of "critical documents" and not be so voluminous that, if printed in hard copy format, it could not be easily transported by an individual to and from court.

This is not just an issue about discovery

In the process of convening the sub-group on Documents and Litigation over the last two years, I have come to realise that this is not just an issue about discovery. It is about the use of both paper and electronic documents at **all stages** of proceedings.

The Australian Law Reform Commission's review of discovery in Federal Courts was prompted by a finding of the Access to Justice Taskforce that noted the high and often disproportionate cost of discovery and recommended further inquiry on the issue. The ALRC's work is welcome. Its terms of reference required it to have regard to alternatives to discovery. However, the Commission's reference focused on discovery of documents, not the use (and abuse) of documents at all stages of a proceeding. If we frame the issue as one about discovery/disclosure we may miss the bigger picture. Practices in relation to disclosure should be integrated into practices about how parties and lawyers deal with documents at all stages of the proceedings, from the request for documents mentioned in the Statement of Claim through to the trial bundle.

It seems to me to be never too soon to think about the critical documents that are going to be tendered at trial, and make a difference to its outcome. One of the members of our group, made the important suggestion that if we exchange lists of documents in the spreadsheet form that we suggest then it should be possible for each party to asterisk or tick a specified, limited number of documents that will constitute the trial bundle. He reminds us that originally a trial bundle was of a size that enabled a judge to take the trial bundle home on the train. This has long ceased to be

the case. It is simply wasteful of time and money for lawyers to start thinking about the critical documents that are to constitute the trial bundle on the eve of trial.

The need for change

The proposal that we should begin by identifying at an early stage the critical documents that are likely to make a difference to the resolution of the litigation, and supplement them, as required, with any additional critical documents that come to light, is not perfect. However, it seems to me to be a more efficient and cost effective process than the current process that I have described.

In a paper prepared for the Federal Court of Australia in 2008, Justice Finkelstein said that disputes would inevitably arise over whether an order requiring the parties to produce the core documents relevant to the case had been properly complied with, with scope for disputes about what documents should be considered critical. He questioned whether mandatory discovery, even of a theoretically limited nature, would reduce the burden on the courts or litigants.[7] I acknowledge the scope for differences of opinion over whether a document is critical, and the need for resolution, in the circumstances of a particular case, of differences about the number of critical documents that should be exchanged. The imperfections of the system that I propose, and its costs, have to be compared with the imperfections and costs of the current system.

The Better Resolution of Litigation Group was convened because the Chief Justice of Queensland, the Senior Judge Administrator and other judges are not complacent about the current system, and consider that it must be improved.

Other members of the judiciary share our concerns. In an address given on 10 October 2009, Keane JA (as the Chief Justice of the Federal Court then was) stated:

> "There are a number of reasons for this state of affairs, but the principal reason is, I fear, the combination of technological capability and economic incentive. It is highly remunerative for solicitors to transfer vast amounts of their clients' information into a database – and it can be done so easily – without the need for the time, effort, and expertise involved in the application of a critical lawyerly intelligence to the information. The enthusiastic embrace of technology by the legal profession plainly has a lot to with the charging of costs for putting a client's corporate life history onto a litigation database. There is little evidence that it has much to do with the efficient prosecution of litigation.
>
> "And large commercial clients seem to acquiesce in this approach. Whether that is because their affairs are managed by in-house lawyers, who are by nature ultra cautious and are happy to accept over-servicing, or because they are cynically prepared to pursue the 'needle in the haystack' theory of discovery, I do not know. Recently, there have been some indications in the commercial press that large clients are becoming more resistant to this culture with the growing groundswell against time costing."[8]

[7] The Hon. Justice R Finkelstein, *Discovery Reform: Options and Implementation* (2008), paper prepared for the Federal Court of Australia, [8].

[8] The Hon. Justice P.A. Keane, 'Access to Justice and Other Shibboleths", paper presented to the Judicial Conference of Australia Colloquium (Melbourne, 10 October 2009), 27; available online at <http://www.jca.asn.au/attachments/2009AccesstoJustice.pdf>.

His Honour remarked that solicitors' firms are likely to be resistant to change, given the powerful economic incentives in favour of information collection and its storage. He continued:

> "We as judges can, I think, do something about the problem. It begins by recognising that easy and lucrative reliance on technology is actually a part of the problem, not a part of the solution. The strategy must be to re-engage the critical intelligence of the lawyers who can actually make a difference to the fate of the case. An integral part of that strategy involves by-passing the connection between mere information collection and lawyers' remuneration.
>
> "The sooner a senior lawyer's attention can actually be engaged upon an analysis of the real issues the better. We must not tolerate the idea that a case is in some way being progressed if millions of pieces of information are put in a database. And we must not tolerate a situation where the trial judge becomes the first experienced lawyer in the case to have any real understanding of all the relevant documents."[9]

The kind of guidelines that have been developed by the Supreme Court of Queensland are intended to avoid litigation by trolley-load. Enforcing principles of proportionality and requiring parties only to undertake reasonable searches is an essential part of facilitating the just and expeditious resolution of proceedings at a minimum of cost. We cannot be proud of a system in which too many cases are resolved, not on their merits, but under the weight of the intolerable costs of doing disclosure. Our concern must be with the cost to litigants, to non-parties, and to society, of continuing with the present system, or even of outsourcing some of the legal drudgery to lawyers on other continents.

The current system of document management resembles a human pyramid. The paralegals, often students undertaking part time work, are at the bottom of the pyramid. If you eventually make your way to the top of the pyramid, the view is not bad. Those on the lower levels deliver to you the critical documents. But the pyramid system is an unsustainable business model which places access to justice beyond the reach of most citizens, and even medium-sized businesses. The maintenance of the current human pyramid system should not be dictated by the interests of those who profit most from its construction and its continuation.

The benefit to lawyers

Unfortunately in too many cases lawyers spend too long on soul-destroying (and costly) review of irrelevant documents. This cannot be good for their emotional health, and I suspect that the burden of document management and document review alienates some of our best and brightest law graduates from a career in the law. Professor Richard Susskind and others have remarked that the future of the legal profession requires lawyers' talents to be directed at tasks that clients value— analysis and judgment.

Too many lawyers spend too much time handling and reviewing thousands of documents which will never make a difference to the resolution of cases. The professional life of lawyers and the practice of litigation will be improved if we can find better ways to reduce the burden of document management.

[9] Ibid.

The ALRC Report on Discovery in Federal Courts

The ALRC's Report, *Managing Discovery: Discovery of Documents in Federal Courts*, was tabled in the Federal Parliament on 25 May 2011.[10] Its recommendations with respect to the Federal Court emphasise the development of discovery plans and the gatekeeper role of the Court in regulating discovery. The Commission proposes that a party should only be able to apply for discovery if it is necessary for the just determination of the issues in the proceedings. Support is given to amendments to the *Federal Court Rules* that will impose a clear obligation on parties to justify applications for discovery orders and, in turn, ensure that the Court scrutinises the need for discovery in each case.[11]

The ALRC also recommends that the parties and the Court should be encouraged, on a case-by-case basis, to adopt appropriate means to clarify the important issues in dispute to focus the scope of discovery in proceedings. Proposed changes to the Rules are complemented by recommendations for practice notes concerning the factors likely to be relevant in an application for a discovery plan order and, if the Court makes a discovery plan order, what the Court will expect the parties to do. The ALRC also proposes that the practice notes be complemented by a detailed set of best-practice guidelines on the formation and content of discovery plans. The practice notes will provide guidance for the parties as to the circumstances in which it may be appropriate to prepare a discovery plan and, in such cases, the matters that should be addressed in the plan.[12]

As part of the "toolkit" of case management solutions available to Federal Court judges, the ALRC discusses the ways in which judges may be supported by registrars and, in limited circumstances, referees. The ALRC recommends that registrars should be trained and equipped to undertake the tasks delegated to them, including preparing and critically interrogating discovery plans and making discovery orders, especially in large or complex proceedings where discovery may prove burdensome by way of cost or delay to the parties. The ALRC suggests that referees should only be used when neither the docket judge nor a trained registrar is able to hear the discovery application and spend the necessary time to ensure discovery is properly managed. Though registrars and referees may provide support in some matters, the ALRC considers that the docket judge should remain primarily responsible for managing discovery.[13]

The Report also recommends the targeted use of costs orders in the Federal Court to help control discovery. These include orders that:

- some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery;
- a party requesting discovery give security for the payment of the cost of discovery; or

[10] Australian Law Reform Commission (2011), *Managing Discovery: Discovery of Documents in Federal Courts* (ALRC Report 115); available online at <http://www.alrc.gov.au/publications/managing-discovery-discovery-documents-federal-courts-alrc-report-115>.

[11] Ibid at 19.

[12] Ibid at 7-8.

[13] Ibid at 21-22.

- specify the maximum cost that may be recovered for giving discovery or taking inspection.[14]

The ALRC did not recommend a reform to require the disclosure of "critical documents" at an early stage as of right. However it recommended that:

- the Federal Court of Australia should monitor the operation of the overarching obligation on parties to disclose critical documents in s 26 of the *Civil Procedure Act 2010* (Vic) to assess whether it would be an effective and efficient mechanism to introduce into all or any Federal Court proceedings; and

- Federal Court of Australia practice notes should highlight existing mechanisms that enable the production and inspection of documents prior to discovery in proceedings.[15]

It noted in respect of Supervised Cases in Queensland:

> " the ALRC was advised that the approach taken in the Queensland Supreme Court Supervised Case List has been operating successfully. Practice notes in this jurisdiction encourage parties to seek directions for the exchange of critical documents early in proceedings. Importantly, this establishes judicial control over any obligation on parties to produce documents prior to discovery—as the Court will make and tailor such directions in the circumstances of each case—rather than impose uniform disclosure obligations on parties in all cases. This is the ALRC's preferred approach to achieving the early production of critical documents for inspection by the parties to litigation before the Federal Court. Consistent with the principle of effectiveness and the facilitative model described in Chapter 2, court-ordered production of critical documents involves active judicial case management which, in the ALRC's view, is essential to achieving the best outcome for parties to litigation."[16]

A requirement to disclose critical documents has been adopted in Victoria. Without limiting or affecting a party's discovery obligations, litigants in Victoria have an overarching obligation to disclose the existence of all documents that are or have been in the party's possession, custody or control, of which the party is aware and considers or ought reasonably to consider critical to the resolution of the dispute.[17] This disclosure must occur at the earliest reasonable time after the party becomes aware of the existence of the document.[18] The test for "critical" documents is discussed in the Explanatory Memorandum to the *Civil Procedure Bill* 2010 (Vic):

> "The term "critical documents" is intended to capture a class of documents considerably narrower than those required to be discovered... The test is meant to capture those documents that a party would reasonably be expected to have relied on as forming the

[14] Ibid at 11, 22.

[15] Ibid at 7.

[16] Ibid at 115 (footnotes removed).

[17] *Civil Procedure Act* 2010 (Vic), s 26.

[18] *Civil Procedure Act* 2010 (Vic), ss 26(2) and 26(3).

basis of the party's claim when commencing the proceedings, as well as documents that the party knows will adversely affect the party's case."[19]

In recommending the introduction of this obligation in its *Civil Justice Review*, the VLRC commented that it would "accelerate disclosure of such information, provide the parties with an early opportunity to consider the strength of the other party's position and help to facilitate settlement".[20]

A similar philosophy informs current practices in the management of supervised cases in the Supreme Court of Queensland. Although there is no fixed rule requiring parties to exchange critical documents at an early stage of proceedings, this practice is encouraged by Judges who supervise cases. With respect to the ALRC, simply leaving an order for the early exchange of critical documents as one of the tools in the judicial toolbox is not enough to alter practices. The early exchange of a specified number of critical documents should be the default position in cases requiring supervision. The ALRC recognized that "[t]he production of significantly probative documents for inspection by the parties in the early stages of proceedings is broadly consistent with the principle of efficiency—that litigation should resolve disputes in the most efficient way possible, which in many cases will involve early assistance and support to prevent disputes from escalating."[21] However, it did not follow through on that principle by recommending that the early exchange of critical documents should be at least the default position, and that if a party wishes not to adopt such a practice in a particular case, it should explain its reasons to the Court.

It is one thing to say that orders about documents should be tailored to suit the circumstances of the particular case, and be the subject of close judicial case management. It is another thing to find the judicial time and resources to give all of the cases requiring judicial case management the close management they warrant. The Queensland Supreme Court has developed guidelines and practices in supervised cases so that parties will incorporate good practices about documents into consent directions, and will not require the Court to conduct unnecessary reviews, at unnecessary expense to the parties and the public. Guidelines that encourage parties to exchange a limited number of critical documents at an early stage of the proceedings are intended to change inefficient and costly practices, and to facilitate the early settlement of cases that are destined to settle.

The ALRC's endorsement of the Queensland practice of requiring the early exchange of critical documents by way of court order, rather than fixed rule, is welcome. However, unless and until parties are encouraged by practice directions and guidelines to agree to a direction for the exchange of critical documents at an early stage unless there is good reason to do otherwise, there may be little change in current discovery practices. That would be a pity, since the Chief Justice of the Federal Court, with his vast experience of litigation, advocated soon after his appointment the practice of the Court directing that the parties identify at an early stage a limited number of critical documents.[22] Experience of such a practice in supervised cases in the Supreme Court of Queensland, as reported by the ALRC, indicates that such a practice can work. In support of

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[19] *Civil Procedure Bill* 2010 (Vic), Explanatory Memorandum, cl 26.

[20] Victorian Law Reform Commission (2008), *Civil Justice Review* (VLRC Report 14), 190; available online at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/LAWREFORM+-+Civil+Justice+Review_+Report>.

[21] Above (note 10) at 113.

[22] J Eyers, "Chief Justice Keen to Get to the Point", *Australian Financial Review*, 19 February 2010, 20.

introducing a similar process in the Federal Court, the Queensland Law Society submitted to the ALRC that:

> "It is unlikely to be problematic or onerous for the producing party, given such documents would have been gathered for the purposes of preparing that party's case. It would assist the opposite party to plead in response. It may also facilitate earlier resolution."[23]

The recently enacted *Federal Court Rules* 2011 (Cth), which commenced on 1 August 2011, provide that a party must not give discovery unless the Court has made an order for discovery.[24] If a party gives discovery without being ordered by the Court, the party is not entitled to any costs or disbursements for the discovery.[25] A party must not apply for an order for discovery "unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible."[26]

An application can be for "standard discovery" (as defined in rule 20.14) or non-standard discovery. An order for standard discovery requires a party to give discovery of documents:

> "(a) that are directly relevant to the issues raised by the pleadings or in the affidavits; and
> (b) of which, after a reasonable search, the party is aware; and
> (c) that are, or have been, in the party's control."[27]

For the purpose of (a), the documents must meet at least one of the following criteria:

> "(a) the documents are those on which the party intends to rely;
> (b) the documents adversely affect the party's own case;
> (c) the documents support another party's case;
> (d) the documents adversely affect another party's case."[28]

Under rule 20.15 the Court might order non-standard discovery, including an order that discovery should be given in accordance with a discovery plan.

The practices that have been adopted in supervised cases in the Supreme Court of Queensland, the practices recommended by the Australian Law Reform Commission and the new practices in relation to discovery governed by the *Federal Court Rules* 2011 have a common theme: judicial control over discovery.

The practices of the Supreme Court of Queensland in supervised cases are not confined to discovery/disclosure. They relate to the use of documents at *all stages of proceedings*. In addition

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[23] Queensland Law Society, *Submission: Discovery in Federal Courts Consultation Paper* (11 February 2011), 6; available online at <http://www.qls.com.au/content/lwp/wcm/resources/file/eb563900aeb7d97/2272%20Discovery%20in%20Federal%20Courts%20Consultation%20Paper%20-%2011.02.pdf>.

[24] *Federal Court Rules* 2011, r 20.12(1).

[25] *Federal Court Rules* 2011, r 20.12(2).

[26] *Federal Court Rules* 2011, r 20.11.

[27] *Federal Court Rules* 2011, r 20.14(1).

[28] *Federal Court Rules* 2011, r 20.14(2).

to specific directions that suit the circumstances of the particular case, a typical general direction is made that the parties "adopt a proportionate and efficient approach to the management of both paper and electronic documents in the proceedings."

The Better Resolution Group has recommended a Practice Direction that encourages new practices in relation to documents in civil litigation. The draft Practice Direction, which has been the subject of consultation with the profession, is intended to state simply some important principles about how documents are used in civil litigation. It:

- directs practitioners and litigants to adopt a proportionate and efficient approach to the management of both paper and electronic documents at all stages of proceedings;

- requires parties to confer at any early stage and agree a basic plan for the management of documents, which is to be revised and developed once pleadings have closed and the real issues in dispute are identified;

- encourages parties to consent to an order pursuant to rule 224 that the parties be relieved, or relieved to a specified extent, of the duty of disclosure, until further order;

- provides that in lieu of, or in advance of disclosure, parties should exchange at an early stage of proceedings a limited number of critical documents, with a view to facilitating the early resolution of matters. Subject to contrary directions, critical documents should be exchanged on a date to be fixed shortly after the close of pleadings; and

- encourages parties to utilise technology to achieve efficiencies where possible.

Summary – getting to crucial documents sooner

Increasingly, irrelevant documents are routinely and electronically assembled in a process that resembles a vacuum cleaner collecting every possible document from a client's database, most of which are dumped on the other side in the name of making disclosure. At some stage the lawyers then have to find the truly significant documents within this mass.

The early identification and exchange of critical documents is essential to the just resolution of disputes at a minimum of expense.

The personal views expressed in this paper are designed to stimulate discussion about how we can improve practices. Practical problems include how we define what I have described as "critical documents" and how a party can reasonably determine which documents will be "adverse" to a party's documents. The development of new practices will not be a simple task. However, the escalating cost of "doing disclosure" and current document management practices cannot be sustained in the long term.

Improvements will enhance the delivery of justice. They also should enhance the professional lives of lawyers. Rather than being absorbed in reviewing irrelevant documents, lawyers can focus on the documents that are likely to make a difference, and the strengths and weaknesses of the witnesses whose evidence will win or lose the case. Lawyers can direct their energies to what they do best, and what clients value the most—analysis and judgment.

Pre-trial examination of witnesses

Pre-trial oral examinations are rare in our legal system and, given the cost of US-style depositions, are viewed with understandable suspicion. Their widespread use in all categories of civil litigation would increase costs and delay the resolution of disputes at trial. The introduction of a system of pre-trial oral interrogation seems to run counter to other developments in our legal system. One is the abolition of interrogations without leave and the effective demise of the interrogatory in civil litigation. Another is the rise of the pre-trial witness statement which, at least theoretically, informs the other party of what a witness will say. Another still is the change to committal proceedings in criminal cases. In an era in which pre-trial examination of witnesses in criminal cases is in decline on grounds of cost, delay and efficiency, it seems odd to be proposing the introduction of pre-trial examination of witnesses in civil cases. It also may be greeted with little enthusiasm by those who have had to sit through liquidators' examinations or the compulsory interrogation of persons at investigative hearings, where sometimes the examination is ill-prepared, directionless, costly to clients and soporific to those representing the interrogated.

Time does not allow me to say all that I would like about the adoption of the deposition in Australia. I commend to you Michael Legg's 2007 article in the Melbourne University Law Review,[29] the Victorian Law Reform Commission's Work on "Getting to the Truth Earlier and Easier"[30] and the more recent work of the Australian Law Reform Commission on "Discovery of Documents in Federal Courts".[31] Part of its reference was to have regard to alternatives to discovery, and one of these was pre-trial oral examination.

Mr Legg explains how:

> "the deposition can provide better information than that gained by relying upon document discovery alone, facilitate settlement and narrow the issues for trial. The main argument for adopting the deposition is that greater expenditure on better information during discovery should reduce costs overall by removing the need for a trial or reducing the extent of any trial. The negative aspect of the deposition is that, like other aspects of discovery, it can be over-utilised, employed when its use is not warranted or subject to obstructive behaviour, thus increasing costs. The deposition is a double-edged sword in that it may advance the efficiency of the legal system by narrowing issues and testing the prospects of success, but the informational advantage that the deposition provides may invoke adversarial responses that drive up costs. This is best illustrated by complex cases, which could benefit the most from the deposition. This is because the deposition can elucidate the real issues in dispute and allow the prospects of success on those issues to be more accurately determined than other discovery mechanisms, which in turn promotes resolution. Ironically however, discovery abuse, which could increase costs and delay, is most prevalent in complex cases.

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[29] Michael J. Legg, "The United States Deposition—Time for Adoption in Australian Civil Procedure?" (2007) 31 *Melbourne University Law Review* 146, [2007] MULR 6.

[30] Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), Chapter 6; available online at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/8/1/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf>.

[31] Australian Law Reform Commission, *Discovery of Documents in Federal Courts: Consultation Paper* (November 2010); available online at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/Whole%20Discovery%20CP.pdf>. See also the Law Council of Australia's submission in response to the consultation paper (31 January 2011), available online at <http://www.alrc.gov.au/sites/default/files/pdfs/DR%2025%20Law%20Council%20of%20Australia%20.pdf>.

> "In the US, the cost concerns have been responded to through carefully drafted court rules, active case management by the judiciary and sanctions. These avenues would be open to Australian courts as well."[32]

Mr Legg posed a number of questions in relation to current forms of discovery, its cost and the existence and extent of "discovery abuse". In a balanced manner he identifies the advantages of the deposition, and its disadvantages. The use of a deposition is said to promote the efficient attainment of justice by providing better information than may be obtained from reliance upon document discovery alone, facilitating settlement and narrowing the issues for trial. The prime disadvantage of the deposition is cost. He concludes:

> "Despite the deposition offering considerable advantages, its adoption will turn upon the acceptance that its costs can be controlled and that the conduct of civil litigation will change, both in foreseen and unforeseen ways."[33]

The Victorian Law Reform Commission addressed the limited use of oral examinations under civil procedure rules in Australia, the use of oral examinations under the *Corporations Act* 2001 and the *Bankruptcy Act* 1966, and examinations conducted by official agencies, before turning to the use of depositions in the United States and Canada. It reported that depositions in the United States are used for discovering information about a case, developing and assessing cases, and preserving testimony that may not be available if the matter proceeds to trial. *Moore's Federal Practice* more fully identifies these purposes as:

(1) to discover evidence, including the identity of documents;
(2) to discover what a witness knows or thinks;
(3) to discover how the witness will testify at trial and to commit the witness to that testimony;
(4) to perpetuate helpful testimony that may be unavailable at trial;
(5) to obtain testimony to support or oppose a motion (e.g. for an injunction or summary judgment);
(6) to discover an expert witness' calculations, assumptions, authorities, opinions and conclusions, and the limits of the witness' studies, tests and examinations;
(7) to assess the persuasiveness and credibility of witnesses;
(8) to establish foundation testimony needed for trial;
(9) to impress one's opponent with the strength of one's case in order to induce a favourable settlement; and
(10) to preserve testimony in case a witness is unavailable at trial.[34]

Under the rules governing civil procedure in US federal courts, pre-trial examinations or depositions are part of a broader discovery regime. Similar provisions apply in most US state courts. Under the federal regime, a party to a proceeding may depose any person as of right and without leave:

- unless the taking of a deposition would mean that more than ten depositions had been taken by the plaintiffs, by the defendants or by third party defendants in the proceeding;

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[32] Above (note 29) at 168-69.

[33] Above (note 29) at 170.

[34] 7 *Moore's Federal Practice*, 3rd ed (2011) § 30.41, reproducing a list set out in Schwarzer, Pasahow and Lewis, *Civil Discovery and Mandatory Disclosure A Guide to Efficient Practice*, 2nd ed. (1994), 3-3.

- the proposed deponent has been deposed in the proceeding at an earlier stage; or
- the party seeks the deposition prior to the time otherwise applicable for the commencement of discovery.

The deponent's attendance may be compelled by subpoena. Parties need only be given notice. The presumptive list of ten deponents per side was introduced in order to limit burdensome discovery. Reasonable notice in writing must be given. Usually the deposition must be taken before an "officer", being a person authorised to administer oaths by federal law or by the law of the place of examination. The procedure at a deposition is usually that the lawyer acting for the party noticing the deposition examines the deponent, and then the lawyer for the deponent may conduct an examination. Rules govern the making and recording of objections. There are a limited number of circumstances where the lawyer may instruct the deponent not to answer. Obviously, if the party taking the deposition wishes to rely upon the evidence at trial, the questions must be in an admissible form.

As Legg notes, the deposition plays a major role in case development in the US legal system. Questions are asked in order to obtain admissions, to adopt a particular position so that it cannot be changed without drawing adverse inferences, and to test how deponents respond to the version of events given by the opposing party. He writes that "[o]nce the key witnesses from both sides have been deposed, a case may be evaluated from an educated position." Intrinsic to the evaluation is the advocate's "unfiltered access to the witness":

> "[T]he story of the opposing party is presented in their own words rather than through those of the opposing lawyer as set out in pleadings, interrogatories or an affidavit."[35]

In the US, a witness will be deposed rather than have an affidavit or witness statement prepared for them. The cost of having their lawyers prepare affidavits is not incurred, but parties do incur the substantial cost of having their lawyer attend a deposition for each of their witnesses and take the deposition of each of the opposing party's witnesses. The amount of time required to do this may significantly increase costs.[36]

The entitlement to conduct depositions as of right under the discovery rules has led to allegations of discovery abuse, including the taking of depositions from people with a peripheral involvement in the case, or the examination of topics at deposition that go beyond the real issues in dispute. Legg's article examines writings on discovery abuse in the US.

The Victorian Law Reform Commission also considered studies of the use and abuse of depositions in the United States, and remarked that the findings of empirical studies in the United States tended to call into question some of the assumptions often made by critics of the regime. In a 1997 study into the use of discovery in civil cases, document production generated the highest rate of reported problems. However, depositions accounted for by far the greatest proportion of discovery expenses. The study by Willging and others reported that the median cost was $3,500 in cases with depositions, and that depositions were found to cause fewer reported problems than all other forms of discovery. They report:

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[35] Above (note 29) at 155.

[36] Thomas E. Willging et al, "An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments" (1998) 39 *Boston College Law Review* 525 at 540, finding that depositions account for the greatest amount of lawyer-related discovery expenses.

> "About 25% of the 67% of attorneys who said they had used depositions in the sample case reported problems with this discovery tool. The most frequent complaint (12% of those who used depositions) was that too much time was spent on a deposition. The median length of the longest deposition was four hours; 25% of the longest depositions took seven hours or more".[37]

The Victorian Law Reform Commission considered provisions in Canada for the taking of an "examination for discovery".[38] An examination can take place through either oral or written questions, but not both. In practice, primary reliance is on oral examination, and there are significant differences between jurisdictions. Most jurisdictions restrict the use of examinations in relation to claims that fall below a particular monetary threshold.

In 1996 the Canadian Bar Association noted that oral examinations are "the target of much dissatisfaction under the current litigation process" and are seen as "an expensive and sometimes wasteful exercise". It recommended that all Canadian jurisdictions:

- amend their rules to limit the scope and number of oral examinations for discovery and the time available for discovery; and
- devise means to assist parties in scheduling discoveries and resolving discovery disputes in an efficient manner.[39]

The various jurisdictions took some form of action in relation to the first recommendation. Taskforces have examined the issue in different jurisdictions. For example, in Ontario a Civil Justice Reform Project addressed problems associated with prolonged examinations, which were said by some to be caused by "poorly prepared counsel who are unduly concerned about overlooking potential facts and issues".[40] The review recommended that each party should have up to a maximum of one day (seven hours) to examine parties adverse to interest, subject to agreement otherwise or a court order. Although it was recognised that this default position had the potential to generate applications for extension of time, the author of the report concluded that "counsel acting reasonably and having considered the cost of discovery and the importance, nature and value of the claim should be able to agree as to whether or not more than one day is needed."[41]

The Victorian Law Reform Commission received submissions in response to its consultations. Some respondents opposed the use of pre-trial examinations as another "costly process-driven step" in legal proceedings. A concern was the potential for pre-trial examinations to both increase and "front load" the cost of counsel. The Victorian Bar, on balance, opposed their introduction

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[37] Ibid at 538.

[38] Above (note 30), at 400-409.

[39] Canadian Bar Association, *Systems of Civil Justice Task Force Report* (August 1996), 43; available online at <http://www.cba.org/cba/pubs/pdf/systemscivil_tfreport.pdf>.

[40] The Hon. Coulter A. Osborne QC, *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007), 59; available online at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf>.

[41] Ibid.

on the basis of their potential cost and the potential for their abuse. However, the Victorian Bar recognised several benefits of pre-trial examinations.[42] These were said to be:

- the parties can "lock in" a witness' evidence under oath at a pre-trial stage;
- the parties can develop evidence for use in dispositive motions;
- the parties can gauge the effectiveness of each others' witnesses prior to trial;[43]
- opposing parties' cases can be elicited in their own words, rather than "filtered through the editorial judgment of opposing lawyers";
- light can be shed on discovered documents;
- "the number, length and costs of witness statements", which are "one of the principal sources of litigation expense in complex commercial cases in Australia", could be reduced; and
- expert evidence could be better probed and understood.

The Victorian Bar submitted that if pre-trial examinations were to be introduced in Victoria, it should occur on an experimental basis, and it cautioned against an open-ended deposition regime. It proposed that the use of oral depositions be subject to leave of the Court and limited to (say) four to six key witnesses for a limited and specified duration.[44]

The Victorian Law Institute and others supported the greater use of pre-trial examinations as an alternative to written interrogatories. It submitted that any new procedure should have features that will limit the potential cost and delay burden on the parties and help avoid any abuse of process. Its suggestions included limiting the number of witnesses able to be deposed, and limiting the duration of depositions to four hours, except in exceptional cases.[45]

The Victorian Law Reform Commission concluded that, subject to appropriate safeguards, provision ought to be made for pre-trial oral examinations. It observed that if the purpose of discovery is to promote disclosure and prevent trial by ambush, it makes little sense to distinguish between written and oral information in that context, and it drew on US experience and Mr Legg's article to conclude that the advantages of depositions cannot be obtained from document discovery. The deposition was said to offer something more than can be gleaned from the bare text of a document. Pre-trial examinations would also assist in the process of discovery of documents.[46]

In the light of concerns expressed about the potential for abuse of the procedure and for escalation of costs, the Victorian Law Reform Commission modified its original proposal, and recommended that pre-trial examinations only be permitted with leave of the Court. If the Court granted leave it could set down conditions to be observed in the conduct of the examination to ensure that the process was not abused, to protect vulnerable witnesses and to control costs. The key features of the Commission's proposed pre-trial examination process were as follows:

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[42] Above (note 30) at 410-11.

[43] The Victorian Bar in its submission noted that a "weak or ineffective presentation by [a] witness—both as to substance and body language—may well have a critical impact upon the dynamic of the case and result in a quick settlement": above (note 30) at 411, footnote 308.

[44] Above (note 30) at 411.

[45] Above (note 30) at 412.

[46] Above (note 30) at 414-18.

- examinations would be possible by consent, or with leave of the court;
- parties would be expected to attempt to agree on the details of the examination;
- the court would have the power to make directions limiting the number and duration of examinations;
- it should not be necessary to require examinations to be conducted before an independent third party in most instances, but in appropriate cases examinations may be held before an examiner who is not a judicial officer (including an independent legal practitioner);
- there would be a process for identifying appropriate corporate deponents;
- examinees would be entitled to refuse to answer questions on the ground of legal professional privilege, and protected against the disclosure or future use of self-incriminating information revealed in response to a question;
- objections to particular questions asked during the course of an examination would be noted on the record for determination by the court in the event that the answer is later sought to be introduced into evidence;
- the transcript of the examination would be able to be introduced into evidence at trial in a number of circumstances;
- subject to certain limits, the costs of examinations should be recoverable as costs of the proceeding.[47]

The Commission's recommendations for pre-trial oral examinations were not implemented in the *Civil Procedure Act* 2010 (Vic). Instead, s 57 of that Act provides for leave to conduct an oral examination of the deponent of an affidavit of documents if there is a reasonable belief that the party to be examined may be misinterpreting the party's discovery obligations, or failing to disclose discoverable documents.

In its November 2010 Consultation Paper on "Discovery in Federal Courts", the Australian Law Reform Commission surveyed the advantages and disadvantages of oral depositions. It agreed with the Victorian Law Reform Commission that the primary object of oral examinations "is not preparation for trial, but the narrowing of issues in dispute in order to facilitate settlement, or if the matter proceeds to hearing, to restrict or eliminate the need to call or test particular evidence."[48] The ALRC recognised that the introduction of depositions would have a significant impact on legal culture in Australia, in particular, the need for lawyers to be educated and trained in the use of oral depositions. However, the process of oral examination was not entirely new. It observed:

> "The experience in the US suggests that there are benefits to depositions in terms of promoting settlement and narrowing the issues in dispute. The challenge lies in leveraging these benefits, while ensuring the procedure is not subject to abuse by parties, and controlling cost implications. The ALRC agrees with the VLRC that a necessary safeguard is that depositions only be taken with leave of the court, and allowing the courts to set the limits and parameters in which depositions take place."[49]

The ALRC invited stakeholder views about whether cost issues could be controlled by limiting oral examinations to particular types of disputes and which, if any, mandatory considerations a court should take into account in granting leave for oral examinations.

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[47] Above (note 30) at 414-18.

[48] Above (note 31) at 187.

[49] Above (note 31) at 187.

The Law Council of Australia in its 31 January 2011 submission noted that the introduction of a new pre-trial procedure, with leave of the court, for oral examination would have a significant impact on the legal culture in Australia. It recommended that, before implementing such a procedure, detailed consultation with the relevant stakeholders should occur, and there should be a detailed study of the experiences in other jurisdictions.[50]

The ALRC's Report on *Managing Discovery: Discovery of Documents in Federal Courts*, which was released on 25 May 2011, restates arguments for and against the use of "oral depositions", and possible conditions for granting leave for pre-trial oral examination. It notes that its discussion of the use of pre-trial oral examination was in a broader context than just discovery, and that in other jurisdictions the procedure has a number of objectives. It does not advocate the use of pre-trial oral examination in all discovery matters, but considers that "there may be real value in the Federal Court being able to order oral examination in the discovery stage—albeit only in a few, limited cases." It concludes that there is "sufficient evidence to support the use of pre-trial oral examination *for discovery* in specific cases".[51] It recommends that a necessary safeguard for the use of pre-trial oral examinations about discovery is that they only be allowed with leave of the Federal Court, and envisages that such a procedure would be subject to the threshold outlined in proposed r 20.11 of the *Federal Court Rules*—namely, that "[a] party may apply for discovery only if it is necessary for the just determination of issues in the proceedings". It recommends that the *Federal Court Rules* should be amended to provide expressly the limited circumstances in which the Court or a judge may order pre-trial oral examination about discovery—for example, to discover evidence about the identity and location of potentially discoverable documents, to assess the reasonableness and proportionality of a discovery plan, and to resolve any disputes about discovery.[52]

The ALRC recommends that pre-trial oral examination be added to the Federal Court's "tools" to manage discovery.[53] Such a tool may be usefully employed in a well-prepared, short oral examination which seeks to find "the smoking gun" amongst an opposing party's documents. Such an oral examination may prove less expensive than lengthy correspondence in which one party probes the opposing party about compliance with orders and rules for disclosure of documents, about why a document has not been disclosed, whether it exists and where it might be found. A simple oral examination may prove more efficient than applications for further disclosure.

It is understandable that, in dealing with a reference about discovery, the ALRC confined its recommendations about pre-trial oral examination to examinations about discovery. However, the legitimate use of pre-trial oral examinations for other or additional purposes remains a major topic for consideration. Experience shows that pre-trial oral examination can serve a number of legitimate purposes, and it is possible to imagine that a properly conducted examination about discovery could serve a number of incidental purposes. An oral examination of a witness that aims to identify the existence and location of potentially discoverable documents almost inevitably will touch upon the matters in issue in the case, and will ask the witness about facts that are central

[50] Law Council of Australia, *Discovery of Documents in Federal Courts* (31 January 2011), 8; available online at <http://www.alrc.gov.au/sites/default/files/pdfs/DR%2025%20Law%20Council%20of%20Australia%20.pdf>.

[51] Above (note 10) at 280-81 (emphasis in original).

[52] Above (note 10) at 282.

[53] Above (note 10) at 282.

to the case. For example, the search for a document that records what was said at a critical meeting might be advanced by asking the witness whether s/he attended the meeting, what was said at it and what record was kept of it. The answers to those questions may serve other purposes than discovery. Would such a line of examination be permitted under the kind of order envisaged by the ALRC?

The ALRC's recommendations are welcome. Its report on discovery, and pre-trial oral examination as an "additional discovery tool", is part of a wider review of access to justice in the federal civil justice system.[54] However, the fact that its report is concerned with discovery has obvious limitations. As earlier noted, so far as document discovery is concerned, as important as reforming practices in relation to discovery/disclosure is, it is only part of a bigger issue, namely how we deal with documents **at all stages** of litigation. To compartmentalise the problem as one about discovery is likely to lead to a partial solution to the challenge of how we deal with documents at all stages from pleadings through to trial.

Likewise, to devise rules about the use of pre-trial oral examination of witnesses for the purposes of discovery is important. However, our civil justice system has to address the legitimate use of pre-trial oral examination of witnesses for other legitimate purposes, and rules for its use for those purposes. Introducing new rules for oral examination of witnesses for discovery is an important reform. However, at some stage a problem is bound to occur when a party complains that an oral examination for discovery purposes is being used to achieve additional purposes, such as committing a witness to a version of events about what was said at a critical meeting.

Rather than court those problems, it may be better to deal with the broader issue of whether our rules should be amended to provide for pre-trial oral examination of witnesses for a variety of legitimate purposes, subject to the kind of limitations recommended by the Victorian Law Reform Commission or which exist in other jurisdictions. The introduction of new rules for the pre-trial examination of witnesses for purposes that include the discovery of evidence, including the identity of documents, would mark a significant change in our civil procedure.

In *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" N.V.* Lord Brandon directed attention to essential differences between the civil procedures of the High Court in England on the one hand, and of courts of the United States on the other, with regard to pre-trial discovery.[55] He identified the limitations in England on compelling pre-trial discovery against a person who is not a party to the action, either by way of disclosure of documents or by way of giving oral or written testimony. Of course, a person who was not a party to an action may be compelled to give oral testimony, or to produce documents at the trial of the action itself. Lord Brandon stated:

> "the civil procedure of courts in the United States differs essentially from that in the High Court in England in that under it parties to an action can compel, as against persons who are not parties to it, a full measure of pre-trial discovery, including both the disclosure and production for inspection and copying of documents, and also the giving of oral or written testimony. This power of compulsion can be, and regularly is, used at an early state of an action."[56]

[54] Above (note 10) at 279-80.

[55] [1987] AC 24 at 35-36.

[56] Ibid at 36.

The *Uniform Civil Procedure Rules* 1999 (Qld) contain various rules which permit the pre-trial oral examination of certain witnesses, but their use for the purpose of discovery would be distinctly controversial. For example r 367 empowers the Court to make any order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of the Rules. In deciding whether to make an order or direction, the interests of justice are paramount. Among the non-exhaustive list of directions that a court may make are orders that "require evidence to be given by affidavit, orally or in some other form."[57]

Chapter 7 of the Rules relates to Disclosure by Parties, and is concerned with the disclosure of documents and the delivery of written interrogatories by leave. Part 2 of Chapter 7 relates to Non-Party Disclosure and relates to the production of documents. In short, our pre-trial disclosure rules do not contemplate orders for oral disclosure.

Rules can be found which contemplate the examination of witnesses and, if the circumstances justify it, an order can be made for pre-trial examination of a witness. For example, r 637(1)(b) of the *UCPR*, which appears in the Probate and Administration Chapter, relevantly provides that a person may apply to the Registrar for a subpoena requiring another person "to attend the court for examination in relation to any matter relevant to a proceeding under this chapter." The rule has its historical precursors in Queensland and in England.[58] The English provision is used in non-contentious cases where there is doubt about the due execution of a will or compliance with the requisite formalities, and where attesting witnesses have refused to voluntarily answer questions about the circumstances of execution. It is also used in the early stages of contentious cases, when witnesses have been identified and the need arises to examine them about their knowledge of documents or events.

Rule 637(1)(b) of the *UCPR* was recently used to order certain witnesses to attend for examination in relation to the circumstances of the preparation and execution of a will. The main issue in that case was one of testamentary capacity. Justice Philippides ordered that the examination of the witnesses be before a Registrar at a time and place to be appointed by the Registrar, and that the examination of witnesses be conducted in accordance with rules 396-399 and 401-407. Each of the witnesses was to be cross-examined by the counsel or solicitor for each of the parties in the proceedings.[59] With respect, Her Honour's order for subpoenas to be issued pursuant to r 637(1)(b) was appropriate. The evidence given before the Registrar about the circumstances in which the relevant document was made and a copy of it kept by the hospital assisted the resolution of the proceedings, which went to trial.[60] For example, the evidence of the doctors and nurses who were present when the deceased made the disputed will was able to be considered by expert witnesses on the issue of testamentary capacity in their expert reports.

One can imagine other cases in which the pre-trial oral examination of witnesses can assist the resolution of proceedings by agreement or at trial, including providing the concrete evidence upon which an expert opinion can be based.

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[57] *UCPR*, r 367(3)(d).

[58] *Probate Act* 1867 (Qld) s 3*; Court of Probate Act* 1857 (Eng) s 24; *Supreme Court Act* 1981 (Eng) s 122.

[59] *Frizzo v Frizzo*, Supreme Court Proceeding 5422 of 2008, Order made 27 May 2009.

[60] *Frizzo v Frizzo* [2011] QSC 107.

Part 2 of Chapter 11 of the *UCPR* is headed "Evidence given out of court". Rule 396 provides for an examination order in the following terms:

> "The court may, for obtaining evidence for use in a proceeding, order the examination on oath of a person before a judge, magistrate or another person appointed by the court as an examiner at a place inside or outside Queensland."

The court may not order the examination of a person before a judge of a higher court. Provision is made for the appointment of an examiner, the conduct of an examination, the recording of objections and the recording of evidence. However, these provisions relate to the recording of evidence for use in a proceeding, and differ in form and content from the kind of informal deposition that some advocate should form part of pre-trial practice in this country.

Part 4 of Chapter 11 contains r 414, which empowers the court to issue certain kinds of subpoenas. Again, the rule relates to the production of documents or the giving of evidence. Under r 414(2) the court may, on its own initiative or at the request of a party, issue a subpoena requiring the attendance of the person specified in the subpoena "before the court or before an officer, examiner, referee or other person having authority to take evidence." There is no reason in theory why the court could not issue a subpoena requiring a person to give evidence before an appropriate person with authority to take evidence on oath, and for such evidence to be given at a relatively early stage of the proceedings. However, just as the power to subpoena documents should not be used as a substitute for the disclosure of documents under the Rules, the power to require a person to attend before a court officer or some other person having authority to take evidence should not be used for a purpose for which the power was not conferred, and, in effect, to introduce into our Rules provision for oral disclosure.

The Federal Court is empowered to make orders for the attendance of any person before the Court, a Registrar, an examiner, a referee or other person authorised to take evidence "for examination", or "for production by that person of any document or thing specified in the order."[61] It is also empowered to make orders for the examination of any person on oath or affirmation before a Judge or "before such person appointed by the Court as examiner at any place whether in or out of Australia".[62] Again, such provisions should not be equated with procedures for compulsory oral discovery. Justice Lindgren in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 4)*[63] remarked in 1996 that "*compulsory oral discovery* is not available against either parties or non-parties" in the Federal Court. His Honour noted that it is possible for a party to serve a subpoena to give evidence requiring a person to attend before the court or before a judge, officer, examiner or other person having authority to take evidence, to give evidence. There was said to be no provision "authorising any judge, officer, examiner or other person to take evidence otherwise than as part of a hearing."[64]

Rules in a similar form can be found in the various Australian jurisdictions, and they have not been treated as authorising US-style depositions or even the practice of oral examination as an aid to document disclosure.

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[61] *Federal Court Rules* 2011, r 30.03 (previously Order 33 r 13).

[62] *Federal Court Rules* 2011, r 29.11 (previously Order 24 r 1).

[63] (1996) 64 FCR 61 at 67 (emphasis in original).

[64] Ibid.

The absence of specific provision in the *Uniform Civil Procedure Rules* 1999 (Qld) for compulsory oral disclosure to replace or supplement the provisions for compulsory documentary disclosure does not preclude the making of appropriate directions under r 367 if the court considers that the interests of justice require such an order to be made. However, my personal opinion is that caution would need to be exercised in making an order for, in effect, a US-style deposition. Consideration would need to be given as to whether the interests of justice required such an order, and careful consideration would need to be given concerning the procedure by which it was conducted. A regime for depositions should not be introduced through the side door. The policy issues considered by law reform commissions about the advantages and disadvantages of deposition warrant consideration. If such a process is thought appropriate, provisions should be enacted in statutes and rules to govern it.

If such a process was enacted, its effectiveness would need to be evaluated, perhaps after a trial of the process in a limited number of cases. The potential costs and complications of introducing depositions into our civil procedure have been identified. They should not necessarily deter us from experimenting with such a procedure which, if properly used, has the potential to bring benefits and cost savings. The lessons learned in other jurisdictions should be appreciated. Pre-trial oral examinations would not be a matter of right. They would only be ordered with leave of the court. The ground rules for such an examination would need to be stated in rules and practice directions. The court would need to set limits on the number of witnesses to be examined and the total duration of any examination.

The introduction of procedures for pre-trial oral examination of crucial witnesses would involve recognition of the important fact that the resolution of cases usually stands or falls on the evidence of crucial witnesses. The evidence given at such an examination would not necessarily be a substitute for evidence at trial. However, as Legg and others have argued, the use of such a procedure in Australia would aid in promoting settlement, or if no settlement occurs, in a narrowing of the issues in dispute:

> "The deposition is an opportunity for a party to test its view of the facts with opposing witnesses. Consequently, the opposing witness will be required to say which facts they agree with and why. In a complex case, those points of disagreement may be numerous but there will be many points of agreement which do not need to be dealt with before the court. The trial can therefore focus on the key issues and be conducted more efficiently."[65]

The introduction of such a process would result, as Mr Legg observes, in "a major transformation of civil procedure in Australia". The need for lengthy affidavits or witness statements for crucial witnesses would be substantially reduced or replaced by depositions. This has implications for the culture of the legal profession and the skills required of lawyers:

> "Legal practitioners would need to move from drafting affidavits with only the witness present to the adversarial deposition.... The deposition requires practitioners to have a skill-set that is often split between solicitors (witness preparation) and barristers (witness examinations) which will likely need to be reconciled".[66]

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[65] Above (note 29) at 165.

[66] Above (note 29) at 167.

In some cases introduction of a procedure for the pre-trial examination of one or more of the other party's witnesses may be a quicker and less expensive way to ascertain what a crucial witness will say, compared to the time-consuming analysis of documents obtained in disclosure, and wondering whether an individual's "witness statement" will reflect their evidence following cross-examination.

The targeted and discriminating use of pre-trial oral examination should be available to Australian courts in appropriate cases. Pre-trial oral examination should not become a matter of routine. It has a number of advantages. It may reduce the cost of discovery and reduce the cost of obtaining witness statements. It enables parties to test the strengths and weaknesses of their case well before the hearing. This may lead to earlier settlement of the dispute or, if a settlement does not occur, significantly narrow the matters in dispute. Critically, it enables a party to assess the strengths and weaknesses of its case, and to actually **hear** what the witness has to say, rather than read what has been written for them by a lawyer in a highly-polished witness statement.

Conclusion

Judicial case management in the last few decades of the twentieth century led to greater, and excessive, reliance on affidavits or witness statements being exchanged prior to trial. The idea was to replace time-consuming evidence in chief and to promote fairness to parties, reduce surprise at trial and encourage settlement. Judges in the Supreme Court of Queensland long ago realised the cost burden and limitations created by trial on affidavit, and for many years now pre-trial directions have required the exchange of witness summaries, rather than witness statements, let alone affidavits. However, the witness statement and the practices related to its preparation still govern the way in which many lawyers conduct litigation. The witness statement is only prepared late in the piece after the case has not resolved through mediation and, possibly, years have been occupied with disclosure.

A cultural shift is required so that litigators speak to potential witnesses sooner. You never know what you may learn. You certainly will be better informed. The revelation of what a potential witness will say is better than the sanguine expectation that a witness, when eventually approached, will support a theory of the case built upon lengthy examination by lawyers of discovered documents. Speaking to important witnesses sooner may have the beneficial effect of limiting disclosure of documents, and directing lawyers to where the crucial documents are to be found.

The introduction of a procedure for the pre-trial examination of crucial witnesses warrants consideration. Such a procedure has both advantages and disadvantages. Appropriate rules and directions may limit its costs and potential for abuse. Its advantages should be harnessed and available to the court to facilitate the just and expeditious resolution of disputes at a minimum of expense.

There is nothing like hearing a witness tell his or her story. It gives us an understanding of the case that we previously lacked. It may cause parties to alter their assessment of their prospects. We should hear from witnesses sooner. The rise of the lawyer-prepared witness statement has led to a loss of "orality" in civil litigation in this country and elsewhere.[67] The introduction of

[67] Justice Arthur R. Emmett, "Towards the Civil Law? The Loss of 'Orality' in Civil Litigation in Australia" (2003) 26 *University of New South Wales Law Journal* 447 at 458-61; Adrian A.S. Zuckerman, "Justice in Crisis: Comparative Dimensions in Civil Procedure" in Adrian A. S. Zuckerman (ed), *Civil Justice in Crisis: Comparatives Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999), 19, 47.

carefully-drafted procedures for the appropriate use of pre-trial oral examinations would counter this trend.

One of the main challenges to our civil justice system is to devise practices by which we get to critical witnesses and critical documents sooner. Justice involves more than achieving the correct decision at the end of a trial. The objectives of our civil justice system include the timeliness of a dispute's resolution and the cost of securing its resolution. Devising better means to secure the evidence of critical witnesses at an early stage, and limiting disclosure to critical documents, aids the expeditious resolution of the real issues in civil proceedings at a minimum of expense. I suggest that it also facilitates the *just* resolution of the real issues. The just resolution of the real issues in civil proceedings will be aided by hearing from crucial witnesses sooner, rather than reading at a late stage of the proceedings, and after disclosure is completed, a witness summary, a witness statement or an affidavit that is not written in the witness' own words and only tells part of the story. The stories that critical witnesses have to tell should be told voluntarily to lawyers who approach them soon after the proceedings are commenced and, in appropriate circumstances, compulsorily at pre-trial oral examinations of limited duration.

Most cases that are destined to settle are capable of being settled on their merits on the basis of a small number of critical documents. Unfortunately, too many cases settle not on their merits but under the weight of the costs of having lawyers conduct expensive reviews of unnecessary documents. The way in which complex cases are resolved increasingly depends upon the erection of a human pyramid. I suggest that we collapse the human pyramid. It is costly to build, and it is no fun being at the bottom. We fool ourselves and the public if we think that a system of justice by which cases settle under the weight of legal costs generated by document review is a good system of justice. A better system of justice is one in which decisions are based upon the evidence of critical witnesses, and consideration of critical documents that either support or detract from their testimony.

Some people, especially those with vested interests in maintaining the human pyramid system, justify it on the basis that the expensive collation and review of thousands of documents may turn up a "smoking gun". That is always possible, but the search for the smoking gun comes at great expense to litigants, the public and those who toil in our system of justice.

If litigators are serious about finding smoking guns in either their own client's documents, or in the documents of another party, then I make this suggestion: speak to potential witnesses. They may be able to direct you to where the smoking gun is buried, and enable you to find it more quickly and at less cost than by a process of document review. The introduction of procedures for pre-action oral examination would limit our dependence on disclosure of documents. A well-conducted, short oral examination may direct you to where the smoking gun is to be found.

Speaking to critical witnesses sooner rather than later may involve some cost. It also may save substantial cost, and result in an early settlement. You never know what a witness will say until you ask them. The sooner you speak to critical witnesses, the better. Under our present practices we get to hear from critical witnesses far too late, and at great expense.

Our collective responsibility to the administration of justice should prompt us to think about how we can improve the system. Coincidentally, it may lead to a more satisfying professional life, particularly for a new generation of lawyers. Hearing witnesses tell their stories is surely a better way to spend one's working day than scanning and coding masses of irrelevant documents.