Federal Court of Australia

Case Management Handbook

FEDERAL COURT OF AUSTRALIA

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CHIEF JUSTICE'S CHAMBERS
FEDERAL COURT OF AUSTRALIA

Foreword

This Handbook is a very important development in the ongoing dialogue between the Federal Court of Australia and the legal profession who practise before it about how best to manage the cases which are commenced in the Court.

The Federal Litigation Section of the Law Council of Australia and the members of that Section who gave so generously of their time to author the individual chapters which make up the Handbook are to be congratulated.

It is a first class product and contains a wealth of information, guidance, ideas and suggestion about the tools and techniques available for use in the Court. It garners the experience of judges and practitioners alike and provides a valuable insight to case management in litigation in the Federal Court.

I commend the Handbook to all practitioners and encourage them to make full use of this outstanding resource.

P A Keane
Chief Justice
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ABBREVIATIONS:

ADR	Alternative Dispute Resolution
CDRA	*Civil Dispute Resolution Act 2011* (Cth)
Evidence Act	*Evidence Act 1995* (Cth)
FCA	*Federal Court of Australia Act 1976* (Cth)
FCR	*Federal Court Rules 2011*
Old FCR	Federal Court Rules (prior to 1 August 2011)

A INTRODUCTION
1 THE SCOPE AND OBJECTS OF THE HANDBOOK

1.1 This work had its inspiration in a workshop on case management conducted in 2008 by the judges of the Federal Court of Australia and practitioners from around the country. Several things emerged from the papers that were presented and the discussions and debates which followed.

1.2 One was that, 35 years experience of case management notwithstanding, views as to the best way for litigation to be managed in the Court were far from settled. Even on what might be thought every day issues, there were significant differences of approach in evidence.

1.3 It also appeared that some judges were employing techniques which were seen, in some situations at least, to offer particular advantages, but which other judges and practitioners had not come across or considered employing. In the 2002 report on the Court's Individual Docket System[1] it had been observed that "a large number of those interviewed had little knowledge of what different members of the court were doing or how different chambers were managing their cases". No doubt the position is much improved since then but the issue does not seem to have gone away.

1.4 Further, it became apparent that the full breadth of the powers conferred on the Court was not always appreciated by practitioners and judges alike. On examination of the *FCA*, the *FCRs*, and the *Evidence Act*, the powers available to judges to manage individual cases are very wide indeed. In an absolute sense, there is little that a judge cannot do by way of case management. The major limitations on the Court's case management powers might be seen as residing more in constitutional than procedural law[2] – in particular the limitations imposed by the right to be heard, and to have controversies resolved by a tribunal which is and appears to be impartial.

1.5 This work is a response to those insights. In addition it seeks to address, albeit indirectly, one of the inevitable difficulties of case management under an Individual Docket System in a federal court – the natural tendency for practices and approaches to differ from venue to venue and judge to judge.

1.6 The principal aims of this work are twofold:

> *First*, to highlight the scope of the case management tools and techniques that are available to the Court and practitioners to assist in ensuring the quick, inexpensive and efficient resolution of proceedings before the Court; and
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> *Secondly*, and more importantly, to gather and distill the experience of practitioners and judges alike as to the merits and perils of specific techniques in different contexts.

1.7 It is hoped that a by-product will be fostering a more uniform set of *approaches* to case management issues.

1.8 It is also important to say what this work does not intend to do.

1.9 *First,* it is not intended to be a comprehensive treatment of practice and procedure in the Federal Court, nor a substitute for existing works on Federal civil procedure or evidence. *Secondly*, it is not intended to undermine the individual docket system or to restrict the

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1 Sage, Wright and Morris, *Case Management Reform: A study of the Federal Court's Individual Docket System,* Law and Justice Foundation of NSW, 2002, at 42.

2 *Nicholas v R* (1998) 193 CLR 173 at [74] per Gaudron J; *Bass v Permanent Trustee Co Limited* (1999) 198 CLR 334 at [56]

discretions of judges in performing case management. On the contrary, it is based on the belief that a particular advantage of proceeding in the Federal Court is that, in general, each case is managed from start to finish by the judge who will decide it, with the Court and the parties together able to attend to the circumstances of the particular case from the outset. This work seeks to encourage that process. *Finally*, the work is not intended to qualify or detract from the operation of the FCA or the FCR – indeed it could not do so. Again, the contrary is the case. The object is to encourage a better appreciation of the full scope of the opportunities they provide for quick, inexpensive and efficient resolution of disputes.

2 BRIEF HISTORICAL BACKGROUND

2.1 From its establishment in 1977 the Federal Court of Australia was a procedural innovator. The Full Court emphasised the importance of this in a case in 1990 in which the relevance of English decisions on procedure was called into question:

> [This] Court has a system of case management which is different from the procedures adopted in any of the Divisions of the High Court of Judicature. The critical significance of a case management system was pointed out by Lord Griffiths, with whom the other four members of the House of Lords agreed, in *Department of Transport v Chris Smaller (Transport) Ltd*[3] (at 1207). Dealing with a submission that inordinate and inexcusable delay after the expiration of the limitation period should be a ground for striking out an action as a deterrent to other dilatory plaintiffs, even though a fair trial was still possible, Lord Griffiths expressed his scepticism that such a course "would produce any greater impact on delay in litigation than the present principles". He went on:
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> > *I believe that a far more radical approach is required to tackle the problems of delay in the litigation process than driving an individual plaintiff away from the courts when his culpable delay has caused no injustice to his opponent. I, for my part, recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure that once a litigant has entered the litigation process his case proceeds in accordance with a time table as prescribed by Rules of Court or as modified by a judge ...*
>
> In this Court, there is just such a system.[4]

2.2 The Federal Court Rules are distinctive from their beginning. Whereas rules in other jurisdictions[5] impose time limits within which proceedings must be served *after* commencement (typically, 6 months or a year) the first time limit in the Federal Court Rules is the time within which proceedings must be served *before the first directions hearing,* and the first directions hearing is on a date fixed by the court. This emphasises that from the very start the case is in the control of the Court rather than the parties.[6]

2.3 Despite its radical beginnings, procedures in the Court did not stand still. Civil procedure has been the subject of debate, agitation, experiment, and actual reforms virtually continuously for the last quarter of a century and more. A chronology of some the major Federal developments would include:

1987	*ALRC Report 38: Evidence*
1988	*ALRC Report 46: Grouped Proceedings in the Federal Court*
1994	*"Access to Justice: An Action Plan"* (AJAC Report)
1995	Attorney General's Department *"Justice Statement"*
1995	Commencement of the *Evidence Act*
1997	Federal Court adopts the Individual Docket System
1999	Order 15 rule 2 Federal Court Rules replaced and Practice Note 14 published, confining the scope of discovery[7]

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3 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197

4 *Lenijamar Pty Ltd and Others v AGC (Advances) Limited* (1990) 27 FCR 388 at 394-5.

5 E.g. UCPR (NSW) r 6.2.

6 See Old FCR O 4 r 11; FCR r 8.06 and *MBD Management Pty Ltd v Butcher* [2010] FCA 1071 at [39]-[59].

7 See *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415 at [10].

January 2000	*ALRC Report 89: Managing Justice: A review of the federal justice system*
June 2002	*Case Management Reform: A Study of the Federal Court's Individual Docket System* (Sage, Wright and Morris)
15 November 2005	S 31A (summary judgment) introduced
24 April 2009	Practice Note 30 – Fast Track issued (now CM 8)
March 2011	*ALRC Report 115 – Discovery of Documents in the Federal Courts*

2.4 Finally, the decision of the High Court in *Aon Risk Services Australia Ltd v Australian National University* [2009] 239 CLR 175 at [93]-[98] has clarified the importance of case management principles in the exercise of courts' procedural powers.

2.5 This prompts the question of the extent to which continued discussion of case management is necessary or desirable.

2.6 In considering this issue it may be useful to keep in mind the broader history of modern civil procedure reform. In Anglo-Australian jurisdictions, the most dramatic single reform was not the product of the 20th century but of the 19th: the Judicature Acts of 1873-1875.

2.7 Prior to that reform, most English civil cases were divided between those at common law (dealt with by three separate courts – Kings Bench, Common Pleas and Exchequer) and those in Equity (dealt with by the Courts of Chancery). The division was the cause of immense difficulty. As described by Lord Bowen[8] in 1887:

> The remedies [the two jurisdictions] afforded to the suitor were different; their procedure was irreconcilable; they applied diverse rules of right and wrong to the same matters. The common law treated as untenable claims and defences which equity allowed, and one side of Westminster Hall gave judgments which the other restrained a successful party from enforcing. … The procedure of the Court of Chancery … was little adapted for the determination of controverted issues of fact, and it was constantly compelled to have recourse for that purpose to the assistance of a court of law. The common law had no jurisdiction to prevent a threatened injury [and] … had no power of compelling litigants to disclose what documents in their possession threw a light upon the dispute. … In all such cases the suitor was driven into equity to assist him in the prosecution even of a legal claim. The Court of Chancery, in its turn, sent parties to the Law Courts whenever a legal right was to be established, when a decision on the construction of an Act of Parliament was to be obtained, a mercantile contract construed, a point of commercial law discussed. Suits in Chancery were lost if it turned out at the hearing that the plaintiff, instead of filing his bill in equity, might have had redress in a law court; just as plaintiffs were nonsuited at law because they should have rather sued in equity, or because some partnership or trust appeared unexpectedly on the evidence when all was ripe for judgment. Thus the bewildered litigant was driven backwards and forwards from law to equity, from equity to law.[9]

2.8 As if these difficulties were not enough, procedures on both sides of the law/equity divide were, by today's standards, seriously deficient. On the common law side, the procedures were "antiquated, technical and obscure".[10] Just claims were liable to be defeated at trial by errors in pleading, by infinitesimal variances between pleading and proof, and by the

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8 "Probably the only judge in recent times whose work has commanded general interest": Veeder, "A Century of English Judicature", in *Select Essays in Anglo-American Legal History*, Boston, 1908, vol 1, p 730, at 817.

9 "Progress in the Administration of Justice during the Victorian Period", in *Select Essays in Anglo-American Legal History*, Boston, 1908, vol I, p 516 at p 517-8.

10 Ibid, p 519.

absence or presence of purely nominal parties.[11] And the process of appeal by writ of error was arbitrary, slow and, if successful, resulted in a new trial.[12] As for Chancery, quoting Lord Bowen again, "its practice was as dilatory and vexatious as its standard of right and wrong was noble and accurate."[13] According to George Spence, as things stood in 1839, no man could enter into a Chancery suit "with any reasonable hope of being alive at its termination, if he has a determined adversary".[14]

2.9 Despite some "teething problems",[15] the effect of the Judicature Acts was to sweep all this away. Bowen's description of the new regime is worthy of repetition:

> In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes – upon oral evidence or upon affidavits, as is most convenient.[16]

2.10 As for pleadings, a contemporary description was that it was no longer necessary to plead formal causes of action; rather "each party should tell his plain tale unfettered by technicalities".[17]

2.11 These great changes were, however, the culmination of a process of reform over several decades. Prompted by various commission reports, reform commenced forty years earlier with the *Uniformity of Process Act 1832*. It continued through the *Hilary Term Rules of 1834*, the *Common Law Procedure Act 1842* (which permitted parties to give evidence in common law trials, something previously prohibited), the *Documentary Evidence Act 1845-6*, and the *Common Law Procedure Act 1852*; and on the Chancery side, the *Chancery Amendment Act 1852*, the *Chancery Amendment Act 1858* (Lord Cairns' Act) [18] and the *Court of Chancery Act 1860*.

2.12 The pattern in the United States was similar – reform once commenced was continued over decades.[19]

2.13 Two things emerge from this brief reference to history. The first is that recent procedural reforms of the last 25 years, though significant, are in truth modest in scope and ambition compared to those of the 19th century. The second is that the development of civil procedure should be seen as a process which takes time. It may be, of necessity, never complete. As Austin observed in 1832:

> No code can be perfect; there should, therefore, be perpetual provision for its amendment on suggestions from the judges who are applying it, and who are in the best of all situations for observing its defects.[20]

2.14 In that light, the great innovation in the establishment of the Federal Court, namely, that from its outset judicial case management was the procedural model, should be seen not as the conclusion of the history of reform but the commencement of a new phase of development and change; as a starting point, not a destination.

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11 Veeder, supra, at p 731.
12 Ibid, p 522-3.
13 Ibid, p 524.
14 Ibid, p 529.
15 P. Polden, in *The Oxford History of the Laws of England*, 2010, vol XI, pp 766-770.
16 Bowen, in *Select Essays, supra,* at 541.
17 Hepburn, "The Historical Development of Code Pleading in America and England", *Select Essays* vol 2, p 643 at p 681.
18 See McDermott, "Jurisdiction of the Court of Chancery to Award Damages", (1992) 108 LQR 652.
19 See generally, Hepburn, *supra*.
20 Austin, *Lectures on Jurisprudence*, Vol 2, p 675.

3 SOME GENERAL CONSIDERATIONS

A Time is money

3.1 Lawyers' time is expensive. It cannot be too plainly stated that the only effective means for reducing the cost of litigation are means which result in less work being done by lawyers over the course of a proceeding.

3.2 Nevertheless, there has been a tendency for this basic fact to be overlooked. For example, case management conceived of as a series of time tabling events with the court focussing its role on "keeping the case on the rails" may increase the speed of disposition of matters but it is likely to *increase* costs. And procedures which require witness statements or affidavits to be exchanged before trial may increase the prospects of settlement, but they add to the costs of every case that does not settle and may not reduce the length of trials.

3.3 In the United States, the *Civil Justice Reform Act 1990*[21] promoted case management in Federal Courts and provided a statutory basis for empirical research on the effect of case management. In 1996 the Rand Corporation's Institute for Civil Justice published an evaluation of the reforms. Among its findings were two of particular relevance here:

> Early judicial case management significantly *decreased* time to finalisation by about 25% but significantly *increased* litigant legal costs by about 30%. The report suggested that the latter was because, in those cases that would previously have settled before judicial involvement, the early involvement of the judge increased lawyer work hours in responding to the judge's requirements.[22]
>
> Of the range of early judicial case management strategies or techniques, simply fixing an early trial date for final hearing had by far the most significant effect, and did not affect litigant costs.[23]

B Efficiency cannot be left to the parties

3.4 It is not the case that all the parties to litigation are concerned, or equally concerned, that their litigation be conducted efficiently. A consideration often mentioned in this context is that relatively well-resourced parties may seek to exploit that advantage. While this may occur, more prosaic factors are likely to be at least as important: a case that is vital for one party may be of less moment for the other on account of wider business ramifications, reputational issues or the size of the claim relative to the party's assets; a well-resourced party will feel free to spend more on any dispute; and respondents are typically less concerned by delay than applicants. Even where one party exerts pressure on its lawyers for the process to be efficient, they are to a significant extent at the mercy of the other party. Many litigants still prefer an approach to the litigation of their disputes that leaves "no stone unturned".

C Efficiency cannot be left to the lawyers

3.5 Lawyers are not always encouraged to give priority to efficiency. The law is increasingly complex. Clients' demands have not become less insistent. The risk of liability for professional negligence is a powerful incentive to thoroughness but a weak incentive for

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21 USCA Title 28, Ch 23.

22 Sage et al, supra, at p 25.

23 Sage et al, supra, at p 26.

efficiency. Admittedly the risks in that regard have diminished to some extent due to statutory reform.[24] But other reforms have increased the risk of discipline by courts.[25] It scarcely needs saying that time charging, for lawyers not already working at or close to full capacity, does not provide an incentive to be efficient.

D The Judicial Advantage

3.6 Judicial case management involves a departure from the model of the judge as merely an umpire. The departure is nevertheless consistent with the judicial role. As Learned Hand said many years ago now:

> … a judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.[26]

Observations to the same effect have been made in the Federal Court:

> The days when parties were left at leisure to pursue private litigation in the way that they thought best suited their purposes have long gone. Courts have an overriding obligation to see to it that those using their facilities are proceeding in a way best calculated to bring litigation to an end at the earliest possible moment so long as the primary goal of achieving justice is not lost sight of.[27]

3.7 The court has wide powers to achieve the objective of efficiency in the administration of justice. But perhaps the most important power of the judge is the power to question, that is, the power to require practitioners and parties to account for the positions they have taken: whether a claim adds materially to the prospects of success and if not why it is pressed; why facts not seriously in dispute are not admitted; whether proof sought expensively (e.g., by discovery) might be more cheaply obtained (e.g., by an interrogatory or two). Deployed wisely, but vigorously, this power can be a major contribution to efficiency.

3.8 This judicial advantage has been reinforced by the obligations imposed on parties and their representatives to conduct proceedings consistently with the overarching purpose of the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (ss 37 M(1), 37 N(1), (2) of the FCA). These statutory duties assist practitioners to resist demands of clients that are not conducive to the efficient conduct of litigation. And they provide a standard that the court can require parties and their representatives to strive for.

3.9 Nor should it be forgotten that judges require practitioners to account for their cases in an environment in which, to a significant degree, practitioners depend on the court retaining confidence in them. This is certainly true of those who practise regularly in a particular court or area of law.[28]

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24 *Civil Liability Act* 2002 (NSW) and cognate legislation in other jurisdictions.

25 For example, by costs orders: FCA ss 37N(4), (5) and 43(3)(f); Old FCR O 62 r 9; FCR r 40.07.

26 *US v Marzano* 149 F2d 923, 925 (2nd Cir, 1945). Quoted in *Civil Litigation Management Manual*, Judicial Conference of the United States, 2nd ed, 2010, at p 9.

27 *E I Du Pont De Nemours & Co v Commissioner of Patents and Others* (1987) 16 FCR 423 at 424 per Sheppard J, with whom Burchett J agreed. See also *Aon Risk Services Australia Ltd v Australian National University* [2009] 239 CLR 175 at [93]-[98]

28 Chief Judge Posner went so far as to describe English barristers as functioning more like adjunct judges than private attorneys: *Law and Legal Theory in the UK and the USA*, Oxford, 1996, at 21-30.

3.10 A corollary of the foregoing is that cost and delay are most likely to be reduced by an early, and continuing process of "narrowing" so that there are:

(a) fewer issues in contest;

(b) in relation to those issues, no greater factual investigation than justice requires; and

(c) as few interlocutory applications as are necessary for the just disposition of the matter.

3.11 A further corollary is that this process is unlikely to occur without active judicial engagement.

3.12 There are risks of course. Encouraging (or requiring) parties to meet and confer, or to mediate, in the hope that the need for judicial resolution of an interlocutory dispute may be avoided, will inevitably increase costs and delay if agreement is not reached. In addition, an outcome agreed by the parties may be inefficient. This is particularly a risk in the case of disputes about discovery. And some procedures which encourage early issue identification will "front end load" the costs, and may increase costs overall if there is a settlement.

3.13 On the other hand, the time and expense of a hard fought interlocutory application (about pleadings, or even discovery) may provide an ideal opportunity for the Court to come to grips with the case, and so facilitate its subsequent management.

3.14 One risk deserves to be addressed specifically: risk of appearance of bias or pre-judgment of the issues in a particular proceeding. It has been suggested that trial judges might require statutory protection if they were to engage in active case management. The concern is that such engagement might involve the frank expression of views which would create the risk of an appearance of bias or pre-judgment, and so a ground for disqualification of the judge from the case.[29]

3.15 This concern may be overstated. The decision of the High Court in *Johnson v Johnson* has indicated that trial judges have enough latitude to do what is necessary:

> At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. ... Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.[30]

In this regard it is perhaps worth keeping in mind that a procedural model of robust judicial engagement was provided for by the *Commercial Causes Act* 1903 (NSW) and its analogues. These gave the court power, in the interests of the "speedy and inexpensive determination of the questions in the action really at issue between the parties"[31] to dispense with pleadings, to dispense with the rules of evidence and to require the parties to make admissions.[32]

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29 R Sackville, "Mega-Litigation: Towards a New Approach", a paper delivered at the Supreme Court of NSW annual conference, August 2007, at [50].

30 (2000) 201 CLR 488 at [13]. Some observations in the decision of the NSW Court of Appeal in *Australian National Industries Limited v Spedley Securities Limited* (1992) 26 NSWLR 411 may need to be treated with reserve in light of *Johnson*: cf Sackville, supra, at [43].

31 *Commercial Causes Act* 1910 (Qld) s 4(4).

32 *Commercial Causes Act* 1910 (Qld) s 5.

B GENERAL CIVIL LITIGATION
4 MECHANICS OF CASE MANAGEMENT

A The First Directions Hearings

4.1 Directions hearings are the central events of case management. They are the primary occasions on which the parties and the Court engage with each other as to the best means of achieving the just and efficient resolution of the dispute. They are the primary mechanism for monitoring compliance with directions and for the making of orders concerning case management. The particular subjects that are discussed and resolved on these occasions are dealt with in later chapters (issue definition, discovery, conduct of the trial). Here it is necessary to address the subject more generally.

4.2 The previous structure of the Federal Court Rules was such that the date for the initial directions hearing was before any response to the applicant's case (whether by defence, affidavit or otherwise). For example, former O 11 r 20 provided that where an application was accompanied by a statement of claim a defence had to be filed within seven days *after the directions hearing*.

4.3 This structure had its disadvantages. They are addressed further in Chapter 5. In summary, it meant that the first directions hearing typically would occur in circumstances where there was no real definition of what was in issue between the parties. This promoted a tendency for orders on the first directions hearing to be formulaic or only to cover initial steps. In either case, the occasion was, if not wasted, at least a less than optimal use of the Court's and the parties' time and resources.

4.4 The new FCR change this structure materially, but incompletely. As before, the Registrar sets the date for the first directions hearing when the originating process is filed (r 5.01 note 2, r 8.06 of the FCR). However the date for filing a defence is now 28 days after service of the statement of claim (r 16.32 of the FCR). This structure at least creates the possibility of the first directions hearing being set for a date after the defence is due to have been filed and served. The change is incomplete however, as it continues to be the case that the applicant is not obliged to serve the originating proceedings until 5 days before the return date fixed by the Registrar (r 8.06 of the FCR).

4.5 Absent a change in the rules, this leaves the possibility of a first directions hearing occurring before delivery of a defence in the hands of the applicant. In many cases commenced by application and statement of claim, the interests of efficiency will suggest that the applicant should seek a return date sufficiently distant as to permit, before that time:

(a) service of the originating application;

(b) 28 days to elapse for service of a defence; and

(c) an opportunity for the parties to consider and confer as to appropriate directions.

4.6 To some extent the process of issue identification will be assisted by the pre-action steps requirements of the CDRA. However these steps cannot be counted on to result in issue definition suitably clear to enable efficient case management.

B Directions Hearings Generally

4.7 When the Individual Docket System was introduced an indication (admittedly non-prescriptive) of an appropriate model for case management "events" was also published by the Court. It had these elements:

- **Directions Hearing** – designed to enable early assessment of cases, transfer from the Federal Court cases that should have been brought in other courts and make directions to prepare the case for the Case Management Committee.
- **Case Management Conference** – designed to consider settlement, administer dispute resolution options, review compliance with directions made at the Directions Hearing, set a trial date range and make such further directions as may be shown to be necessary.
- **Evaluation Conference** – designed to focus on disposition without trial, arrange a mediation conference if desirable, evaluate state of preparation of the case including compliance with directions given at the Case Management Conference, and attempt to dispose of the case and, if not, allocate a trial date.
- **Trial Management Conference** – designed to establish the ground rules for the conduct of the trial.

4.8 A significant feature of the subsequent history was that this model was scarcely ever applied in practice.[33] Most of the practitioners interviewed by Sage, Wright and Morris were unaware that the model even existed.[34]

4.9 Much of the work envisaged in 1997 for the first three events is captured by the provision for the Scheduling Conference in the Fast Track (CM 8 Part 6). Importantly, the Scheduling Conference only occurs after:

(a) issues have been defined by Fast Track Statements, responses and cross-claim and replies (see Part 6.1);

(b) each party has been able to prepare an initial witness list (Part 6.4);

(c) the parties are expected to be in a position to outline the issues, the facts in dispute, and to indicate if the matter is suitable for mediation and if so a timetable for that (Part 6.7).

4.10 Sage, Wright and Morris reported significant practitioner support for a model of case management, as long as it was a flexible one.[35] The Fast Track model is not especially flexible. That is as it should be – it is designed only for cases that suit that particular model. But there is much to be said for the view that the Fast Track style of scheduling conference, coming after issues have been defined, would promote the efficient management in many cases. This is discussed further in Chapter 5.

C Communication between parties and the court

4.11 The introduction of the Individual Docket System made it natural for the docket judge and her or his staff to have more frequent direct communication with practitioners about cases on the list. This phenomenon was adverted to by the ALRC in its report on the federal civil justice system.[36] The ALRC noted:

> The Law Council supports the development of this relationship to enable parties to approach the judge on an informal basis at short notice to resolve issues and to avoid formal applications and unnecessary costs.[37]

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33 Sage, et al, supra, pp 81-83.
34 Ibid, p 84.
35 Ibid.
36 ALRC 89, at p 448, [7.8].
37 Ibid, at n 24.

4.12 It bears emphasis that attendances before the Court are costly.[38] An object of the Individual Docket System was to reduce the number of directions hearings. Facilitating informal communication between practitioners and the Court reduces the need for attendances.

4.13 The Court's rules and practices provide other mechanisms for avoiding unnecessary court attendance:

(a) 4.13.1 – Orders may be made in accordance with a written consent –FCR rr 1.36, 39.2, 39.11

(b) 4.13.2 – The Court may dispense with the need for an oral hearing and deal with an application on the papers – s 20A FCA. Former FCR O 32A provided a procedure for this. There is no equivalent in the new rules, but directions to similar effect could be made on an ad hoc basis. For Registrars, see FCR r 3.01(10(e)).

4.14 In addition, from its inception, the Federal Court has been committed to innovative application of technology with a view towards increasing access to justice and efficiency, reducing inconvenience and cost, and assisting its judges "to carry out their duties as efficiently and effectively as possible".[39]

4.15 The Court continues actively to explore opportunities for enhanced use of various technologies with particular regard to the needs of those in outlying regional, rural and remote localities.

4.16 The FCA gives the Court broad powers, for the purposes of any civil proceeding, to direct appearances, submissions, and testimony to be given by way of video link, audio link or other appropriate means.[40] Telephone services and video-conferencing have been utilised as an adjunct to traditional interactions for sufficient time that they are now regarded as "tried and tested technologies" in the Court.[41] Directions hearings are sometimes conducted by telephone, and directions made by telephone and fax[42] and email. The Court has actively encouraged legal practitioners to avoid unnecessary directions by the use of telephone, email and facsimile, if there is agreement (especially in the absence of default).[43]

4.17 The Court's national video-conferencing system, the first of its kind in the world, operates to reduce the cost and time of witnesses giving evidence and has enabled more effective case management by Judges, regardless of location. This system is recognised by the Court as increasingly relevant to facilitating participation in court processes for those in rural and remote areas.[44]

4.18 Finally, the Court's eCourt strategy permits much to be done electronically that formally would require filing of documents and attendance at court or a registry.

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38 See Sage, et al, pp 88-9.

39 "Overview of eCourt strategy" <http://www.fedcourt.gov.au/ecourt/ecourt_strategy.html> (7.7.11).

40 See ss 47, 47A, 47B, 47C and 47D FCA; O 10 r 1(2)(a)(xvii) of the Old FCR; FCR r 5.04(3) Item 26.

41 "Overview of eCourt strategy" <http://www.fedcourt.gov.au/ecourt/ecourt_strategy.html> **(7.7.11)** describing the objectives of the Court's eCourt strategy.

42 See Sage, et al, 111; ALRC *Report 89* (2000) 448.

43 See, for example, Federal Court Intellectual Property Users' Group Meeting - NSW – Minutes Thursday 5 June 2003 <http://www.fedcourt.gov.au/aboutct/nsw_ip_minutes_05062003.html> (7.7.11); Notices to practitioners issued by the NSW District Registrar Admiralty and maritime matters (2005/1) <http://www.fedcourt.gov.au/how/practicenotices_nsw_old21.html> (7.7.11).

44 "Video conferencing" <http://www.fedcourt.gov.au/ecourt/ecourt_strategy.html#vc> (7.7.11).

5 IDENTIFYING AND NARROWING THE ISSUES

A Introduction

5.1 Federal Court Practice Note CM 1 restates the purposes and principles of the "Individual Docket System" which is utilised in the Federal Court. Importantly, CM 1 provides that the Court and the parties must observe the overarching purpose of case management, which is "*the just resolution of disputes as quickly, inexpensively and efficiently as possible*". To that end:

(a) the Court is expected to have regard to "*identifying and narrowing the issues in dispute as early as possible*"; and

(b) the parties and their representatives "*have an obligation to cooperate with, and assist, the Court in fulfilling the overarching purposes and, in particular, in identifying the real issues in dispute as early as possible and dealing with those issues in the most efficient way possible*" (emphasis added).

5.2 Litigation is adversarial. It is also strategic and tactical. A party will understandably want another party to be tied to a very clear and narrow position whilst allowing itself maximum flexibility in its position. A specific response can be prepared to another party's narrow position.

5.3 The advantage of a broad position is that it affords "wriggle room". A party may not be certain, particularly at an early stage of a proceeding, precisely how it will ultimately put its case at trial. It may wish to wait and see the other party's position, discovered documents or evidence before the party nails its colours to the mast.

5.4 An approach of studied ambiguity does not, however, make for efficient litigation. A lack of clarity regarding the issues in dispute invariably requires practitioners to spend more time considering the various possible alternative positions of the other party, and considering a response to each of those positions. The costs, delays, uncertainty and frustration of litigation increase as a result.

5.5 A lack of clarity as to each party's position is also a serious impediment to reaching a negotiated resolution. Sometimes parties may not properly appreciate each other's position until well into the litigation process – such as during a Court-ordered mediation or even at trial. By then, the parties may have each spent a significant amount of time and money on the matter. If issues had been clearer from the outset, it is likely that some of that expenditure of time and money likely would have been avoided.

5.6 In a perfect world, all parties would have clearly and precisely defined positions from commencement and there would be no deviation from those positions during the course of the proceeding. In reality, however, there does need to be some allowance for parties to modify their position in appropriate circumstances, otherwise they will likely refuse to be tied down to specific allegations or to make reasonable concessions in the first place.

5.7 The Court's procedures therefore need to strike a balance between:

(a) tying parties to a position, so that all parties understand the issues in dispute and the proceeding can be conducted efficiently; and

(b) demanding no more certainty of parties than it is reasonable to expect, especially at the commencement of a proceeding.

5.8 This chapter considers the ways in which the Court's procedures can be used to assist and encourage the parties and the Court to identify and narrow the issues in dispute as early as possible in the course of the proceeding.

B Summary of proposals

5.9 **Pre-commencement costs:** The Court should have a discretion to order a party to pay the other party's pre-commencement legal costs where the party:

(a) is unsuccessful in the proceeding; and

(b) has, prior to the commencement of proceedings, unreasonably failed to take genuine steps to resolve the matter, to respond to another party's genuine steps, or to otherwise identify and narrow the issues.[45]

5.10 **Case management orders**

(a) Case management orders should be made by the Registry upon the filing of an application.[46]

(b) Different orders may be made for various types of proceedings, reflecting their particular requirements or features.

(c) More complex matters should generally involve longer time periods and greater judicial case management.

5.11 **The first directions hearing and pleadings: statements of facts and contentions**

(a) The first directions hearing should ordinarily be held after the respondent has responded to the applicant's allegations.[47] The hearing then provides a greater opportunity for the parties and the Court to engage in a discussion aimed at defining and narrowing the issues in dispute.

(b) Either party should, however, be able to bring the matter before the Court for an early directions hearing if it has a good reason for doing so.

(c) The first directions hearing should generally address the issues in dispute as well as how the matter will be conducted leading up to trial. The parties' lead counsel should be required to attend.

(d) The default position should be that in advance of the first directions hearing, the parties file and serve statements of facts and contentions in the form of the current Fast Track statements and responses.

(e) To the extent that the parties are able to agree on relevant matters that are not in dispute, they should prepare a list of those matters. To the extent agreement cannot be reached, this is a matter that the Court could address, as appropriate, at the first directions hearing.

C The requirement to take "genuine steps" before commencement

(i) The *Civil Dispute Resolution Act 2011* (Cth)

5.12 The CDRA received royal assent on 12 April 2011 and commenced on 1 August 2011. The CDRA encourages the parties to take "genuine steps to resolve a dispute" wherever possible before proceedings are commenced. A party who commences a proceeding is required to file a "genuine steps statement", setting out the genuine steps which the party has taken to resolve the dispute, or the reasons why no such steps have been taken.[48]

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45 The FCR and the Old FCR do not provide the Court with any power to award pre-commencement legal costs.

46 Rule 5.04 of the FCR empowers the Court to make directions for the management, conduct and hearing of a proceeding at any hearing, but not on the filing of an application.

47 Cf r 5.04 FCR.

48 sections 6 and 7

5.13 The CDRA encourages parties to turn their minds to the issues in dispute, the outcomes they are seeking and how this can best be achieved prior to proceedings being commenced. This has the potential to help identify and narrow the issues in dispute at an early stage.

(ii) What are genuine steps?

5.14 The CDRA includes some examples of genuine steps, including:

(a) exchange of correspondence notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolution (see, e.g., s 4(1)(a) of the CDRA);

(b) exchange of relevant information and key documents (see, e.g., s 4(1)(c) of the CDRA); and

(c) holding a "meet and confer", negotiation or mediation between the parties (see, e.g., ss 4(1)(d)-(g) of the CDRA).

(iii) No requirement to file genuine steps statement in certain cases.

5.15 The CDRA provides that there are a number of types of proceedings that are excluded from the requirement to file a "genuine steps statement".[49] These include, among others:

(a) proceedings for an order imposing a pecuniary penalty for contravention of a civil penalty provision;

(b) proceedings in connection with a criminal offence;

(c) proceedings that relate to a decision of various tribunals;

(d) appeals;

(e) ex parte proceedings;

(f) proceedings under certain Acts; and

(g) proceedings excluded by the regulations.

(iv) Duty of lawyers to advise people of the requirements of the CDRA

5.16 A lawyer acting for a person who is required to file a genuine steps statement must:

(a) advise the person of the requirement; and

(b) assist the person to comply with the requirement.

(v) The cost of genuine steps and the discretion of the Court.

5.17 Part 3 of the CDRA provides that:

(a) the Court may have regard, when exercising functions or powers in proceedings before it, to whether a party who was required to file a genuine steps statement in the proceedings filed such a statement, and whether they took genuine steps; and

(b) the Court may take into account when exercising its discretion to award costs against a party (or that party's lawyer) whether a party who was required to file a genuine steps statement in the proceedings filed such a statement, and whether they took genuine steps.

5.18 In addition to its discretion under Part 3 of the CDRA, the Court possesses a broad discretion in relation to costs. A failure to take pre-action steps that should have been

[49] subsection 6(3); sections 15, 16 and 17

undertaken before the commencement of proceedings may result in adverse costs consequences for a party.[50]

5.19 Nevertheless, a party who attempts to take genuine steps still faces the risk that those steps will "fall upon deaf ears" and/or that the cost of undertaking genuine steps will not be recoverable. This is because an order for costs is usually made on a party-party basis based upon the relevant scale of costs (Schedule 3 of the FCR). Schedule 3 does not contain any scale items for genuine steps undertaken before the commencement of proceedings.

5.20 The CDRA does not ameliorate this position. Some of the genuine steps identified by the CDRA have the potential to be very costly, depending on the nature of the dispute.

D The first directions hearing

5.21 In the general division of the Federal Court, a first directions hearing is usually held after the service of the Application but before the filing of any Defence by the respondent.[51] This means that the applicant may not be aware at the time of the first directions hearing of the respondent's position on the allegations. The Court will ordinarily be in a similar position.

5.22 By contrast, in the Fast Track List, a Scheduling Conference must be set down no later than 45 days after the filing of the Fast Track Application.[52] Because the respondent's Fast Track Response is due 30 days after service of the Fast Track Application,[53] the Scheduling Conference usually occurs after service of the Fast Track Response. It follows that by the time of the Scheduling Conference, the parties and the Court will be aware of the issues in the case.

(i) Purpose of the first directions hearing.

5.23 The first directions hearing provides an opportunity for the parties to be heard as to timetabling of interlocutory steps and any other matters immediately arising.

5.24 As presently conducted, the first directions hearing is generally administrative in nature. It is often not attended by the parties' lead counsel. Further, as noted above, at the time of the first directions hearing, the respondent may not yet have indicated its position.

5.25 Because of these matters, the first directions hearing does not usually provide an appropriate opportunity to identify and narrow the issues in dispute.

5.26 It is recommended that the current process be changed, so that, in the absence of good reason to the contrary, the first substantive directions hearing be held after the filing by parties of statements of facts and contentions.

(ii) A comparative example: the Commercial Court in the Supreme Court of Victoria.

5.27 In the Commercial Court of the Supreme Court of Victoria there are two types of directions hearings:

(a) directions hearings, which may be first, further or final;[54] and

(b) Case Management Conferences, which may occur at any time.[55]

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50 See, e.g., *Glaxosmithkline Australia Pty Ltd v Ritchie (No. 2)* (2009) 22 VR 482.

51 Old FCR O 11 r 19. The same position seems to be implicit in the FCRs: see r 5.04.

52 Practice Note CM 8, paragraph 6.1.

53 Practice Note CM 8, paragraph 4.7(b).

54 Practice Note 1 of 2010, part 8.

55 Practice Note 1 of 2010, part 7.

5.28 At the first directions hearing, Practice Note 1 of 2010 provides that the parties:

> *should be ready to explain briefly, if requested, the nature of the dispute and the substantial questions in controversy, and to assist the Court to determine the course to be followed in order to achieve the Court Objective.*[56]

5.29 Some of the matters which should be considered at the first directions hearing include "*any of the procedures referred to in paragraph 8.9*", which procedures include:

> *8.9.1 encouraging the parties to cooperate with each other in the conduct of the proceeding;*
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> *8.9.2 identifying the questions in issue at an early stage;*
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> *8.9.3 deciding promptly which questions need full investigations and trial and disposing summarily of others;*
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> *8.9.4 deciding the sequence in which questions are to be determined;*
>
> *8.9.5 encouraging the parties to use alternative dispute resolution procedures;*
>
> *8.9.6 encouraging and helping the parties to settle all or part of the dispute;*
>
> *8.9.7 fixing timetables or otherwise controlling the progress of the proceeding;*
>
> *8.9.8 considering whether the likely benefits of taking a particular step justify the cost of taking it;*
>
> *8.9.9 dealing with as many aspects of the proceeding as possible on the same occasion;*
>
> *8.9.10 managing the proceeding by making interlocutory orders on the papers, that is, upon written application and material without the necessity of appearance before the Court;*
>
> *8.9.11 making use of technology.*

5.30 At a Case Management Conference, lead counsel are required to attend and the parties are required to prepare several documents in advance of the hearing, including a Case Memorandum, Draft List of Issues and Case Management Information Sheet, all of which are designed to assist the parties and the Court to, among other things, identify and narrow the issues in dispute.

(iii) Presumptive case management orders.

5.31 A purely procedural first directions hearing could be avoided in the vast majority of cases through the use of presumptive case management orders.[57] Such orders could be made by the Federal Court Registry upon the filing of the application. The orders would set out a basic timetable leading up to a substantive directions hearing to be held after the respondent has responded to the applicant's allegations. The first directions hearing would then provide a greater opportunity for the parties and the Court to engage in an effort to define and (if possible) narrow the issues in dispute.

5.32 The Fast Track List essentially implements this procedure in Practice Note CM 8. Paragraph 4.7 of that Practice Note provides for the filing and service of the Fast Track Application, Fast Track Response, Fast Track Cross-Claim (if any) and Fast Track Reply (if any) according to a predetermined timeframe. The first directions hearing is timed to occur shortly after the filing and service of the respondent's Fast Track Response.

5.33 One limitation of presumptive case management orders is that not all proceedings require the same amount of time for the preliminary stages. In particular, some matters are more

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56 Practice Note 1 of 2010, paragraph 8.5.

57 See Gordon J, 'Evaluation of the Docket System with Particular Emphasis on Case Preparation and Early Identification of Issues' (paper presented to the joint Federal Court / Law Council conference, Adelaide, March 2008, p 10.

complex than others – whether due to legal, factual or practical problems. To some extent, this could be accounted for by introducing categories of presumptive case management orders – based on, for example, the amount in dispute, whether the matter is a singular or class action or, more generally, the expected complexity of the matter. Where an action is commenced under a particular statutory provision, for example, migration, judicial review and *Fair Work Act 2009* (Cth) matters, it may be more amenable to a presumptive case management order. More complex proceedings would allow the respondent greater time to respond to the applicant's allegations, but would receive greater case management oversight.

5.34 Proceedings could be assigned to different categories based on the applicant's selection, subject to a respondent's right to challenge that selection. That challenge could be made at the first directions hearing, although (based on the above proposal), that would usually be after the respondent has replied to the applicant's allegations. Accordingly, the respondent should have liberty to bring the matter before the Court for an early directions hearing (before filing its response to the applicant's allegations) if the respondent has some good reason for doing so.

5.35 The parties should also be able to agree to vary the presumptive case management orders by consent.

5.36 There is another point to be made. Although, as will be seen below, it is recommended that the general rule should be that statements of contention, responses and replies replace traditional pleadings, not all matters are suitable or appropriate for determination in the manner contemplated by the Fast Track procedures. The Court will obviously retain a general discretion in relation to such matters.

(iv) Defining and narrowing the issues.

5.37 If the above proposals are adopted, the first directions hearing would be held after both an application and statements of case in the form of a statement of fact and contention and response have been filed, and will therefore provide a greater opportunity for the parties and the Docket Judge to identify the issues in dispute, narrow those issues (so far as possible) and map out the path to trial.

5.38 The lead counsel retained on behalf of each of the parties should be required to attend the directions hearing. The parties are unlikely to make significant concessions in the absence of lead counsel. Lead counsel should be expected to identify the issues in dispute and explain to the Court what is likely to be involved in resolving those disputes at trial. The parties should expect the Court to test the parties' legal and factual contentions and inquire as to how the parties intend to prove factual contentions, and the basis for the legal contentions.

5.39 In this regard, the matters to be addressed at the first directions hearing might include:

(a) Should there be a separate trial of a preliminary issue, and/or should issues of quantum be referred to arbitration, a registrar or an expert?

(b) What are the factual issues in dispute?

(c) What legal issues are in dispute?

(d) Can frivolous or weak claims/defences be eliminated?

(e) As to disputed issues of fact, how do the parties intend to prove their position? In particular:

(i) Which witnesses are proposed to be called?

(ii) What documents are relevant to the disputed fact?

(iii) Is formal proof of the fact required and what disputed facts can be agreed?

(iv) Should the Court waive the rules of evidence in relation to any disputed fact pursuant to s 190 of the *Evidence Act*?

5.40 In addition to discussing the issues in dispute, the parties should be expected to address, and the Court will ordinarily make orders in relation to:

(a) **Forum:** is the chosen forum the most appropriate for the resolution of the dispute (would the matter better be dealt with in the Fast Track List or by the Federal Magistrates' Court, for example)?[58]

(b) **Interlocutory steps**: with the assistance of the lawyers for each party, the Court will set down some or all of the interlocutory steps to trial. In particular, the Court will, where appropriate, make orders as to the scope and timing of discovery to be provided.[59]

(c) **ADR**: the parties will be expected to address the Court as to whether mediation or some other form of ADR is appropriate and an appropriate timetable for completion.[60]

(d) **Trial date**: the parties will be expected to address the Court on an appropriate date for trial, and the Court will determine the date for trial and length of trial in an appropriate case.

(e) ***Viva voce* or affidavit evidence**: the parties will be expected to address the Court as to whether any or all evidence-in-chief at trial is to be given *viva voce* (perhaps with outlines of evidence, at least on non-critical issues), alternatively, affidavit evidence.[61]

(f) **Conduct of trial:** if appropriate, the Court may make orders for a "chess clock" style allocation of time for the trial, may apply Part 10.6 of the Fast Track Directions, and may make any other appropriate orders on the time to be taken for trial.[62]

(g) **Proportionality**: the Court should consider ordering that the parties advise the Court as to each party's costs of discovery and costs of the proceedings overall, and that the plaintiff provide an early estimate of the quantum of the damages sought.

(h) **Case management generally:** any other means to minimise cost and delay.

E Identifying the issues

(i) Pleadings

5.41 The function of pleadings is to inform a party of each other party's case so that the issues in dispute are identified and a party can prepare to deal with each other party's case.[63] Pleadings do so by setting out the applicant's position, and the respondent's response, such that, when read together, the whole of the pleadings should present a clear picture of the issues in dispute and the respective positions of both parties.

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58 Rule 5.04(3) Item 2 of the FCR allows the Court to make directions for the proceeding to continue as an expedited proceeding but does not allow transfer to another Court.

59 Rule 5.04(3) Item 10 of the FCR deals with this issue.

60 Rule 5.04(3) of the FCR deals with this issue.

61 Rule 5.04(3) Item 20 of the FCR deals with this issue.

62 See Old FCR O 32 r 4A. See FCR rr 30.23 and 5.04.

63 *Dare v Pulham* (1982) 148 CLR 658, 664.

5.42 Pleadings must "contain, and contain only, a statement in a summary form of the material facts on which the party relies, but not the evidence by which those facts are to be proved."[64]

5.43 Order 11 of the Old FCR (r 16.02 of the FCR) provides, among other things, that pleadings:

(a) must contain consecutively numbered paragraphs where each separate matter is pleaded in a separate paragraph;

(b) must be brief; and

(c) must not fail to disclose a cause of action or be legally embarrassing, otherwise they are liable to be struck out.

5.44 Pleadings should focus on the real or substantial issues in dispute, and responsive pleadings must specifically traverse all allegations of fact and a general denial of an allegation is not sufficient.

5.45 The benefit of properly particularised pleadings is that they mark out the "metes and bounds" of the issues between the parties such that, at trial, they provide a reasonably precise reference for the purposes of determining the relevance of evidence sought to be tendered.

5.46 Proceedings commenced in the Fast Track List pursuant to Practice Note CM 8 do not require pleadings. Instead, the parties are directed to use Fast Track statements, Fast Track responses and so on.

5.47 Fast Track statements and responses adopt a less formalistic approach to pleadings, in an effort to avoid prolonged disputes as to the form, rather than the substance, of pleadings at the interlocutory stage.

(ii) Particulars

5.48 In general, particulars should be used to prevent the other party from suffering embarrassment at trial. This is accomplished by:

(a) informing the other party of the nature of the case it has to meet (as distinct from the mode by which that case is to be proved); and

(b) limiting the generality of pleadings (see r 16.41 FCR).

5.49 Order 12 of the Old FCR does not prescribe a specific form that particulars ought to take. Rather, O 12 r 1 of the Old FCR simply states that "*a party pleading shall state in the pleading or in a document filed and served with it the necessary particulars of any claim, defence or other matter pleaded by him*." (See now to the same effect, r 16.41(1) FCR).

5.50 The Rules articulate several types of allegations of which particulars must be provided:

(a) fraud, misrepresentation, breach of trust, wilful default or undue influence (O 12r 2 of the Old FCR; r 16.42 FCR);

(b) conditions of the mind including knowledge (r 16.43 FCR); and

(c) damages (O 12r 4 of the Old FCR; r 16.44 FCR).

(iii) Adjuncts to pleadings

5.51 Each pleading only tells part of the story. To determine the issues in dispute, it is necessary to consider both the applicant's allegations and the respondent's response to those allegations. It is therefore often convenient to have a single document that

[64] Old FCR O 11 r 2. FCRs r 16.02.

consolidates the pleadings so that each allegation and the response to that allegation can be read at the same time.

5.52 Also, an agreed chronology often serves as a useful adjunct to pleadings. It is important that such chronologies be drafted in as neutral manner as possible.

5.53 Parties should consider whether it would assist to prepare a consolidated pleadings document and an agreed chronology. These documents could also be provided to the Court.

(iv) Criticisms of pleadings

5.54 Despite the fundamental role played by pleadings, they have been the subject of longstanding discontent.[65] The principal criticisms of pleadings may be summarised as follows.

(a) Pleadings may be based on formulaic precedents and reveal little about the actual dispute.

(b) Pleadings are technical and often overly formalistic and convoluted, making them difficult to understand – especially for parties who are unsophisticated or do not have access to legal resources. If parties cannot properly understand the case against them, they cannot effectively identify or narrow the issues in dispute.

(c) Contentions of law are not generally pleaded, so pleadings do not explain the basis for a party's contentions of law. This can result in a delayed understanding of the real issues in dispute, leading to increased costs and delays in informed settlement discussions.

(d) Pleadings rely on fine distinctions between "matters of fact" and "matters of law", and between substantive allegations and particulars.

(e) Although it is desirable for a party to put forward its case precisely as early as possible, a party may simply not be able to do so at the outset of the proceeding. This encourages broad, ambiguous pleadings, with the result that the issues in dispute are not narrowed even after a party becomes able to state its case more precisely (for example, after discovery).

(f) A respondent may seek to plead a bare denial or non-admission without explaining the factual or legal basis of the denial or non-admission.

(g) Pleadings are adversarial in nature. Rather than jointly identifying the real issues in dispute, parties use pleadings as an opportunity to advocate their case. There is little incentive to make genuine concessions.

(h) The technical and adversarial nature of pleadings encourages interlocutory pleadings disputes. Such disputes are often costly and achieve little in terms of progressing the determination of the matter.

5.55 These criticisms are real and substantial. To a considerable extent, they are ameliorated in the Fast Track List. The use of less formalistic Fast Track Statements, Fast Track Responses etc discourage interlocutory pleadings disputes. Parties in the Fast Track List know that the Court will not be receptive to interlocutory applications based solely upon an alleged defect in the form of the pleadings. The Fast Track procedures also allow the parties to state and explain their contentions of law, giving the parties and the Court an earlier understanding of the real issues in dispute. The general adoption of such procedures is recommended: paras [5.81] – [5.85] below.

(v) Lists of issues in dispute/not in dispute

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[65] See Elizabeth Thornburg and Camille Cameron, "Defining Civil Disputes: Lessons from Two Jurisdictions" (forthcoming paper).

5.56 The Court may at a directions hearing order that the parties take steps to clarify the real issues in dispute. This may be facilitated by the Court ordering the parties to agree on the real issues in dispute, and/or the issues not in dispute, in the proceeding (O 10, r 1(2)(h) of the Old FCR)[66], by the preparation of a list of issues.

5.57 In the Fast Track List, the Court may require the parties to provide a joint list of issues in dispute. Practice Note CM 8 requires that the parties' Fast Track Statement and Response set out each party's list of "issues ... likely to arise in the proceeding".

5.58 In the preparation of a joint list of issues, each party will understandably wish to present the issues in a way that is most favourable for that party. To try to reduce arguments about drafting, it should be required that the list of issues be drafted so as to present the issues in a manner that is as neutral as possible.

5.59 An agreed list of issues is an obvious mechanism by which the issues in dispute can be defined. Once the issues are properly defined, there is greater scope for the parties to narrow the issues by agreement and/or with the assistance of the Court.

5.60 To the extent that parties are able to do so, it is also desirable for them to agree a list of matters that are not in dispute. Such a document may assist the Court in understanding the nature or boundaries of the dispute. It will also assist the parties to direct their resources and attention to the issues that are genuinely in dispute.

(vi) Early production of key documents

5.61 In some cases, it may be clear that there are critical documents in the possession of one party. Ideally, such documents would be disclosed and provided as part of that party's genuine steps prior to the commencement of proceedings. However, if those documents have not been provided, it may be appropriate for that party to provide those documents to the other parties at an early stage of the proceeding, such as shortly after the first directions hearing or possibly even earlier. Once the other party or parties have access to those documents, they are likely to be in a far better position to assess its/their prospects in the case and the likely procedure required to bring the matter to trial (assuming the matter is to proceed).

5.62 If documents are produced early to enable a party to identify and narrow the issues in dispute, the party, after receiving the documents, should be expected to make a genuine effort to identify and narrow the issues in dispute. This would include the party making reasonable concessions or specifying its case with greater precision.

5.63 Under the FCR, a party not give discovery unless the Court has made an order for discovery; r 20.12 FCR. The Court of course has the power to make such an order at any stage of the proceeding.

(vii) Concerns with the use of a list of issues in dispute.

5.64 There are a number of significant concerns with the compulsory use of lists of issues, and their adoption is not recommended.

5.65 Trying to force the parties to agree on a list of issues may simply result in additional disputation and costs. In theory, if parties have relatively clear and settled positions it should be possible for them to agree what issues are in dispute and then specify those matters in a document. In reality, the parties may not have relatively clear and settled positions, particularly at the outset of litigation.

5.66 Even if the parties agree on what issues are in dispute, there may be disagreement as to how those issues are set out in a list of issues. This may include the relative prominence

[66] See also FCR r 5.04(3) Item 29.

given to various matters, the level of specificity or generality with which issues are framed, the language in which issues are described and even purely stylistic matters.

5.67 Each party may be expected to seek to have a list of issues framed in a way that is favourable to its case. Practitioners understandably seek to advocate their client's case at every opportunity. This would apply to an agreed list of issues. The parties will therefore often be at cross purposes in drafting the agreed list of issues.

5.68 Experience with agreed lists of issues in other Courts (such as the Commercial Court in the Supreme Court of Victoria and in the United Kingdom) is that they often involve protracted and frustrating negotiations. In those Courts the list of issues is generally used as an adjunct to pleadings, rather than replacing pleadings. If an agreed list of issues were to replace pleadings or statements of the parties' case, the negotiation of the document is likely to be even more protracted, since more will be at stake.

5.69 Alternatively, if an agreed list of issues it to somehow sit alongside the pleadings or statements of the parties' case, other questions arise. What is the relationship between those documents? Which prevails in the event of an inconsistency? Which defines the four corners of the dispute?

5.70 The question of whether lists of issues would be a useful tool to be adopted in some or all cases in the Court should be debated and considered by the profession and the Court.

(viii) Adoption of statements of facts and contentions in all matters?

5.71 It is recommended that the default position be that in all Federal Court matters, the issues be identified by way of statements of facts and contentions and responses thereto, similar to the procedure for issue identification adopted in the Fast Track list.

5.72 Identifying the issues in this way has the advantage of forcing the parties and practitioners to focus on the real factual and legal issues, and engage with those issues, at a much earlier stage in the dispute. This can result in substantial costs savings, and earlier settlements and trials. The adoption of these procedures for issue identification may also effect an important cultural change in forcing practitioners, and the Court, to focus on the issues in the proceeding at a deeper level at the "pleading" stage. At present, this kind of attention is often not brought to bear until much closer to the trial of the proceeding. By "front-ending" more of the work, it is hoped that more matters will be concluded (whether by trial or settlement) at an earlier point. The attendant savings to the parties, the Court and the community ought not be underestimated.

5.73 There has been some criticism of the Fast Track procedure to the effect that respondents can be "railroaded" and caught off guard by an organised applicant that has its case organised before proceedings are commenced. Not only might the Fast Track procedures raise an issue about "fairness" to a respondent who is not positioned to respond within the timeframes specified, the absence of sufficient time for a respondent to consider a case made against it (including by the obtaining and considering of legal advice) might render that party reluctant to make appropriate early concessions. In theory, the CDRA should help overcome such problems (at least in proceedings to which the CDRA applies), but in practice it can be a real issue, and the Court needs to be alive to the point.

F All cards on the table from day one?

5.74 The issues concerning cost and delay, especially at the pre-trial stage, are as much a concern (perhaps more so) in the United States of America as they are in Australia. The Economist recently published an article[67] in which it is noted that the Institute for the Advancement of the American Legal System propose that, at the pleading stage (i.e. right

[67] "Cutting legal costs: the paper chase", *The Economist*, 25 June 2011, pp 40-41.

at the start of the litigation process), litigants should put all the information they have forward at the outset.

5.75 Such a change would represent a radical departure from the traditional adversarial method of conducting litigation. However, methods such as this to reduce the cost and delays of litigation merit further consideration.

G Resolving issues

(i) Separate questions

5.76 In the ordinary course, all of the issues of fact and law in the proceedings should be determined together at one time.[68] Notwithstanding this, in some cases the conduct of the proceedings may be made more efficient by determining some issues before other issues.

5.77 Order 29 of the Old FCR provides that the Court may order that any question or issue (whether or fact or law) in the proceedings be decided before, at or after any trial or further trial in the proceedings – that is, as a "separate question".[69]

5.78 For example, if in a proceeding:

(a) the respondent denies liability;

(b) even if the respondent is found liable, the respondent disputes the quantum of the liability; and

(c) the evidence as to the quantum of liability will be extensive and complex,

it may be appropriate to determine the issue of liability first, before the issue of quantum is determined.

5.79 Another example is shareholder class actions based on alleged misleading or deceptive conduct by the respondent company. It is common for the Court to order that common issues, such as whether the respondent engaged in misleading or deceptive conduct, be determined in advance of individual issues.[70]

5.80 If orders are made for a separate question (or questions), the process generally entails:

(a) the formulation of the "separate questions" for the Court to answer; and

(b) a trial confined to the issues raised by the separate questions.

5.81 If the answer to the separate questions does not resolve the proceeding, it may then be necessary for a further trial to be held.

5.82 Whether a separate question is appropriate is ultimately a matter for the Court. Generally, a separate question will not be appropriate unless:

(a) the outcome of the entire proceedings will be determined if the separate question is determined in a particular way; or

(b) there is some reason to think that, if the separate question is determined, the parties are more likely to negotiate a resolution of the proceedings.

5.83 A reason why separate questions are often inappropriate is that they can lead to complexities in the appeal process. A party may wish to appeal from the determination of the separate question before the other issues have been determined. This would require

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68 *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130, 141–2.

69 Rule 30.01 of the FCR provides the court with a similar power.

70 Although, often, causation (reliance) issues for one or more group members will be determined at the first stage of the trial.

leave of the Court. If the separate questions do not resolve the proceedings, then, if leave is granted, there may be a considerable delay before there is an outcome in the proceedings. Alternatively, if leave is not granted, it will then be necessary to determine the other issues (which may be complex or time-consuming) when it is clear that one party will in due course wish to appeal based on the determination of the separate question.

(ii) Summary judgment of whole or part of the proceedings

5.84 Section 31A of the FCA provides that the Court may give judgment for one party (in relation to the whole or any part of the proceeding) where the other party has no "reasonable prospect" of successfully defending or prosecuting the claim.[71] Order 20 r 5 of the Old FCR (r 26.01 FCR) allows the Court to give judgment (generally or in relation to any claim for relief) where it is satisfied that the proceeding or claim is frivolous, vexatious, an abuse of process or no reasonable cause of action is disclosed. This is generally known as "summary judgment".

5.85 An application for summary judgment should only be brought if there is a strong case that summary judgment is warranted. Otherwise, the application is likely to have the opposite effect to that intended – delaying the proceedings, rather than disposing of them swiftly. Nevertheless, in cases where summary judgment is warranted, an application for summary judgment will prevent a party from being involved in an ongoing unmeritorious claim.

(iii) Reference of issues to a referee

5.86 The parties and their legal representatives are responsible for investigating all of the factual and legal issues in the proceedings and presenting to the Court as admissible evidence the necessary material upon which the Court makes its decision. The Court does, however, have the power to appoint a person (a "referee") and refer the proceedings or one or more issues in the proceedings, to the referee.

5.87 The Court's power to refer the proceedings or issues in the proceedings to a referee is contained in s 54A of the FCA and regulated by O 72A of the Old FCR (see now Div 28.6 of the FCR). It is a very broad power.

5.88 An example of a situation where a referee might be appropriate is if there was a large, detailed accounting exercise that needed to be undertaken.

5.89 Upon receiving the referee's report, the Court may:

(a) adopt, vary or reject the report, in whole or in part;

(b) require an explanation by way of a further report by the referee;

(c) remit on any ground, for further consideration by the referee, the whole or any part of the matter that was referred to the referee for inquiry and report;

(d) decide any matter on the evidence taken before the referee, with or without additional evidence; or

(e) give any judgment or order in relation to the question it thinks fit.

5.90 Under r 72A 7(1) of the Old FCR, the Court may direct how the referee is to make his or her inquiries.[72] Otherwise, the referee is to conduct those inquiries as he or she thinks fit. A referee is not bound by the rules of evidence. Evidence may be given orally or in writing. The referee may require evidence to be on oath or affirmation.

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[71] See also r 26.01 of the FCR.

[72] See r 28.65(1) and (2) of the FCR for a similar provision.

H Multiple proceedings

(i) Consolidation etc.

5.91 In some cases, multiple proceedings may be commenced which relate to a common question of law or fact, a similar or the same set of transactions or otherwise give rise to a common theme or set of circumstances which it is convenient to dispose of at once. Order 29 r 5 of the Old FCR[73] provides that the Court may order those proceedings to be:

(a) consolidated;

(b) tried at the same time or one immediately after the other; or

(c) stayed, pending the determination of one of them.

[73] See r 30.11 of the FCR.

6 ALTERNATIVE DISPUTE RESOLUTION

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7 DISCOVERY OF DOCUMENTS

A Why?

7.1 As Practice Note CM 1 states, the overarching purpose of case management within the individual docket system is the just resolution of disputes as quickly, inexpensively and efficiently as possible. This reflects the overarching purpose of the civil practice and procedure provisions of the FCA: see s 37M. For this reason the Court will in each case fashion any order for discovery to suit the issues in the particular case: see CM 5.

7.2 Documentary discovery is an invasive process which requires the compulsory identification and, subject to claims of privilege, disclosure of documents (including, in appropriate cases, information concerning certain documents no longer in the possession of a party and a description of documents in respect of which privilege is claimed) relevant to matters in dispute. The process has the following objectives:

- to facilitate the proof of facts in issue;
- to avoid ambush or surprise with associated delay and wasted costs.

7.3 Like other interlocutory procedures, discovery may also serve the important secondary purpose of permitting the parties to properly assess the strengths and weaknesses of their respective cases prior to trial with a view to early settlement of claims.

7.4 The process of disclosure in the form of documentary discovery is clearly conducive to the fair determination of disputes in accordance with the merits. It may arm the parties, and ultimately the Court, with a more complete body of relevant material as a foundation for the resolution of the dispute. However it is frequently identified as a principal cause of excessive litigation costs and has the capacity to impose significant burdens upon the parties and the Court and to delay the progress of matters towards trial. The dogged pursuit for the illusive "smoking gun" may come at too high a price. Parties may seek to use the threat of wide-ranging discovery to impose an intolerable cost burden on an opponent, as a lever for settlement. The Court has a broad discretion in relation to discovery and will balance the costs, time and possible oppression to the producing party against the importance and likely benefits to the opposing party of such discovery.[74]

B Whether

(i) Purpose/Utility

7.5 It has been noted that one of the principal objects of discovery is to facilitate the resolution of issues in dispute in the litigation. The essential starting point is, of course, to identify the issues in dispute – usually by reference to the pleadings – and to determine what, if any documents in the hands of an opposing party, may advance the client's case with respect to those matters. However a consideration of the need for, and utility of, discovery in a particular matter extends beyond a mere identification of matters in dispute by reference to the pleadings. Proper case preparation and Practice Note CM 5 prompt early consideration of the following matters prior to the formulation of any request or order for discovery:

- To sustain a claim, or to establish a defence, does a party require discovery of an opponents documents at all and, if so, for what purpose?
- Can that purpose be achieved by a less expensive means?

[74] see *United Salvage Pty Limited v Louis Dreyfus Armateurs* SNC [2006] FCA 116 at [3] and *Kyocera Mita Australia Pty Ltd v Mitronics Corp Pty Ltd* [2005] FCA 242

- Can a party's interests be served by discovery only with respect to particular issues in dispute?

- Should discovery occur by reference to defined categories and, if so, how should those categories be defined so as, on the one hand, to maximise the prospect of uncovering material with genuine forensic value and, on the other hand, containing costs within sensible bounds?

- Should discovery occur in stages so that, in the first instance, discovery is confined to particular issues or to "high level" or "summary documents" with a view to the possibility of focussed supplementary discovery at a subsequent stage?

- Has the Court already ordered, or should the Court be asked to order, some bifurcation of the issues: for example, a separate hearing on liability prior to quantification of loss?

7.6 In approaching these questions the parties should consider the overriding purpose of discovery and its utility in a particular matter.

(ii) Discovery not as of right

7.7 Under the Federal Court's rules and practice notes discovery is not as of right. In every case a party must apply to the Court to obtain an order for discovery. FCR r 20.11 embodies the fundamental principle of case management expressed in CM 1: 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. While practitioners are certainly expected to co-operate with a view to negotiating and agreeing orders for discovery, the process of discovery remains at all times with the discretion of the Court and subject to its directions: FCR rr 20.11 to 20.13; CM 5; CM 6. FCR rr 20.11 and 20.12 make clear that the Court is to retain control of the scope of discovery in proceedings and that a party to proceedings which gives discovery beyond what the Court considers necessary will not be entitled to its costs of that discovery. Accordingly, the Court will not merely endorse consent orders for discovery presented to it by the parties (particularly orders for general discovery) but will require practitioners to justify those orders by reference to considerations set out in the Practice Note.

(iii) Discovery must be for the just resolution of the proceeding

7.8 Rule 20.11 provides that "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". The Rules then provide what is effectively a two-track approach. FCR r 20.14 obliges a party to discover documents "that are directly relevant to the issues raised by the pleadings or in the affidavits" where an order for "standard discovery" is made. Where standard discovery is not appropriate a party may seek an order for "non-standard discovery" under FCR r 20.15 which may provide for discovery of only certain categories or types of documents or documents from certain sources etc.

(iv) Pre-discovery conference and discovery plan

7.9 The formulation of an appropriate discovery regime in a particular case having regard to the principles articulated in the Rules and Practice Notes may, in a complex case or a matter requiring extensive discovery, call for significant cooperation between the parties prior to the making of discovery orders. The parties will be unable to formulate a proposal without significant information exchange regarding a range of matters including the following:

- Is there an opportunity to further refine the pleadings or to provide further particulars in order to define or narrow the scope of issues in dispute and, in particular, those issues likely to give rise to a significant discovery burden?

- What is the appropriate stage for the formulation of discovery, orders or requests for production of documents? Should discovery (as a whole or with respect to particular issues) be deferred pending, for example, the service of evidence with respect to all or particular issues in dispute?

- Is there an opportunity in particular areas to obviate the need for formal discovery by, for example, the informal exchange of high level or summary documents (with or without verification by affidavit), informal data exchange (with or without verification), statements of agreed fact, notices to admit, or targeted interrogatories?

- Is it possible to identify with sufficient precision the particular personnel who may have generated or who hold documents relevant to particular matters in dispute?

- Should the parties exchange information regarding their management structure and/or information flows within their respective organisations in order to focus discovery?

- Should the parties first be required to exchange information (with or without verification) concerning such matters as their financial or accounting systems, document retention policies, hard copy and electronic file storage systems and the like?

- Is it possible to agree in advance categories of documents which should be excluded from discovery such as, for example, documents common to the parties such as sent and received emails passing between those parties, publicly available information and the like?

7.10 Except in relation to electronic documents (as to which see Practice Note CM 6), the Rules and Practice Notes do not require the parties to conduct a pre-discovery conference to develop a discovery plan addressing the issues identified above prior to seeking discovery orders. However, in many instances practitioners and the Court will not be able to address the matters identified in Practice Note CM 5 unless such a process has been undertaken. In many cases it will be in the interests of the parties that such information exchange and joint planning occur prior to the discovery process being embarked upon. Significant cost can be incurred if disputes subsequently arise regarding the adequacy to the discovery (which disputes could have been avoided by prior information exchange and planning), if supplementary discovery orders are made requiring a party to substantially repeat the discovery process, or if the interlocutory timetable is otherwise disrupted as a consequence of delays or difficulties relating to discovery.

7.11 While a cooperative approach is to be preferred, and will be expected by the Court, in the absence of cooperation the Court may choose to make a range of orders prior to the discovery process being embarked upon. Those orders may require:

- The filing of some or all of the evidence of a party so as to more clearly define the matters in dispute and the scope of required discovery.

- The parties to file affidavits, participate in oral depositions, attend for examination or to otherwise exchange information, concerning internal management structures, accounting or other financial or management systems, document management systems and the like. In some cases an order requiring an appropriate witness with direct knowledge of a parties' business and document

retention systems to attend before the Court for examination about the nature and sources of potentially relevant documents will be preferred by the Court. Such an approach can avoid the costly preparation of affidavit material on those issues.

- A party to produce specified documents or data categories or summary documents containing data drawn from financial or other systems.

- The provision of further particulars and/or strike out inadequately particularised allegations in the pleadings.

7.12 The role of the Court in relation to the management of the discovery process obviously extends beyond the framing and making of discovery orders. The formulation, prior to the making of discovery orders, of a joint discovery plan will enable the Court to monitor the discovery process. In particular cases it may be appropriate for the Court to direct the parties to file and serve reports on a regular basis to inform the Court of the progress of discovery by reference to the discovery plan.

(v) An order fashioned to the particular case, and taking into account alternatives

7.13 When addressing the questions posed by the Rules and Practice Note CM 5 summarised in section 7.5 above, practitioners and the Court should have regard to the following matters:

- **pleadings and narrowing issues**: the identification of issues in dispute is undertaken primarily by reference to the pleadings (as amplified by any particulars). When approaching discovery the parties should actively consider not only whether a matter in dispute warrants discovery (and, if so, the scope of that discovery), but whether it is in the party's interests that the dispute be eliminated or at least narrowed.

  For example, the applicant may wish to consider whether an allegation in its statement of claim which has not been admitted should still be maintained. Other allegations, sufficient to sustain an aspect of that party's case, may have been admitted or may give rise to less extensive discovery burden. By maintaining the non-admitted allegation the applicant may "unnecessarily" expose itself to a significant discovery. On the other hand, a respondent may wish to review a non-admission having regard to the cost and burden of potential discovery on that issue. The provision of particulars may convert allegations of a general nature into something more specific and conducive to a more focussed discovery request.

  Practitioners should expect the Court to test such matters prior to making any discovery orders. The Court will wish to be satisfied the parties have made every effort to narrow the scope of matters in dispute before addressing itself to the appropriate scope of discovery with respect to those disputed matters.

- **Production of documents referred to in pleadings or affidavits and notices to produce:** before discovery orders are made it will generally be appropriate for parties to have taken advantage of their right pursuant to FCR 20.31 to seek production of documents referred to in pleadings or affidavits. In this way it may be possible to obtain early production of centrally relevant material, and thus confine the subsequent discovery burden. This may also be achieved by service of a Notice to Produce in accordance with FCR 20.35.

- **Notice to admit facts:** a party may serve a notice upon an opponent calling upon it to admit facts or documents (FCR 20.01). Adverse cost consequences may follow if the recipient of the notice fails to admit a fact or document which is subsequently proved. The purpose of the Notice to Admit process is not to

permit a party to reproduce all of the non-admitted allegations in its pleading and to call for admissions. However, a properly targeted notice may eliminate an area of factual dispute and, accordingly, obviate the need for discovery with respect of that matter.

- **Statement of agreed facts:** in certain matters it may be possible for the parties to jointly formulate a statement of agreed facts as a foundation for the Court determining some or all matters in issue. The statement of agreed facts may serve as a common factual foundation for expert reports. To the extent that facts are agreed, the discovery burden may be eliminated.

  Some caution is required however. It will not be possible, or indeed sensible, to seek to agree facts in many cases. Indeed, the ability of the parties to agree facts may depend upon the prior provision of discovery. Further, the time and expense associated with endeavours to agree facts may exceed the cost and delay associated with discovery. Further, except in the clearest cases, statements of agreed fact may prove to be an inadequate or incomplete basis for the Court to determine the dispute.

- **Interrogatories:** the subject of the interrogatories is addressed in Chapter 8. It is sufficient to note at this stage that, as with a notice to admit facts, a targeted interrogatory may, in an appropriate case, obviate the need for documentary discovery or at least assist to confine the scope of discovery.

C When

(i) The traditional approach

7.14 As the primary purpose of discovery is to elicit material relevant to the determination of matters in issue, and as the matters in issue are usually identified primarily by reference to the pleadings, the traditional approach is for discovery to occur following the close of pleadings and prior to the exchange of any affidavits. Moreover the traditional approach is for discovery to be undertaken as a single exercise and in accordance with a single set of discovery orders or categories.

7.15 The traditional approach may be modified where the Court makes orders pursuant to FCR 30.01 for the bifurcation of issues. For example, the Court may order issues of liability to be determined separately and prior to any determination of the quantum of damages. In such cases discovery may be confined in the first instance to documents relevant to liability, with discovery in relation to quantum being deferred. In this way the parties and the Court may seek to defer significant costs associated with discovery of documents relevant only to quantum as such discovery may become unnecessary in the event that the applicant's liability case fails or is successful only in part.

7.16 Even adopting the so-called traditional approach, the bifurcation of discovery in this manner will not be appropriate in every case. The objectives of discovery include the avoidance of ambush and surprise and facilitation of early resolution and settlement. Unless the parties can informally test the applicant's claim for relief they will not know what is at stake. This will likely be an impediment to early resolution. Further it will prevent the parties and the Court moulding the interlocutory process in a way that reflects the nature of the case.

7.17 It is common, for example, for representative actions under Part IVA of the FCA to proceed in bifurcated fashion with common issues associated with liability tried first and issues of individual causation and loss deferred to subsequent hearings. In such matters the burden of discovery usually falls first upon the respondent as it will commonly hold the vast majority of documents relevant to the determination of disputed questions of liability. The Court has commonly not made orders for discovery by members of the

represented class (causation and loss issues) after the close of pleadings. This has frequently meant that representative actions progress through the complex interlocutory steps towards a trial on liability without the Court or the parties having a clear understanding of the amount at stake. This may be a significant impediment to early resolution.

(ii) The current approach – when appropriate in the particular case: CM 5

7.18 The Court has ample power to control all stages of the discovery process including the scope of discovery, the time at which it is to be given and whether it should occur in a single tranche or in stages[75]. Particular issues relating to the discovery of electronic material and the application of the Practice Note CM 6 are addressed below.

7.19 Practice Note CM 5 requires practitioners and the Court to actively consider the stage in the proceedings at which discovery should be ordered and whether that discovery should be given in stages.

7.20 Practitioners and the Court should consider the following matters:

- Do the pleadings define the issues in dispute with sufficient particularity? Should the plaintiff first be required to file some or all of its evidence? For example, in a complex competition matter, should the applicant be required to file expert reports in relation to market definition prior to discovery by one or all parties so that the expert report will be available to guide the formulation of discovery categories? [76]

- Should the parties be required to prepare a joint statement of issues in dispute?

- Should the parties be required to serve outlines of evidence (including expert evidence) prior to discovery?

- Should a party be ordered to provide evidence relating to its internal systems and procedures including document retention policies, electronic data/storage processes etc prior to discovery being ordered?

- Should discovery with respect to certain issues first be confined to high level or summary documents, with discovery of lower level or source documents being deferred?

- Is it possible to identify certain key individuals whose relevant files should be discovered in the first instance? Further discovery should be ordered only if justified upon review of initial discovery.

- Is there a prospect that the discovery burden will be eased if one or more parties first has leave to issue subpoenas to third parties?

- Is there an appropriate way in which the issues in dispute can be bifurcated (acknowledging the risks of doing so) so as to enable aspects of discovery to be deferred? On the other hand, could this increase costs in the longer term and/or create an obstacle to settlement?

7.21 As stated in section 7.10 above, the Court will expect the parties to have explored these issues prior to the formulation of the proposed discovery orders or any application for discovery.

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75 see generally *Sogelease Australia Ltd v Griffin* [2003] NSWSC 178

76 It may be necessary to provide in advance that the applicant may have to supplement initial evidence if cause is shown following the provision of discovery.

7.22 While the parties and the Court have considerable leeway when fashioning discovery orders several notes of caution are required:

- As already noted, the deferral of discovery on certain issues (for example, with respect to quantification of loss) may be antithetical to the early resolution of the dispute.

- Staged discovery may sometimes increase rather than reduce the costs associated with the discovery process. For example, if it becomes necessary for parties to repeat the review of hard copy documents or to run search processes across electronic documents repeatedly, the costs burden may be greatly increased. Anything that results in a party being required to repeat the review of large numbers of documents is likely to add very substantially to the eventual costs of discovery. The Court should explore whether ordering staged discovery is likely to result in double handling of documents or the repetition of tasks which might otherwise be avoided, with a view to framing staged discovery orders in a way which avoids or minimises this problem.

7.23 Once discovery is ordered, a party's discovery obligation is ongoing, as is made clear by FCR 20.20(1). Helpfully, r 20.20(2) provides that a party is not obliged to discover any document created after commencement of proceedings if the party is entitled to claim privilege in respect of the document.

D Categories of Documents

7.24 In light of Practice Note CM 5 it is likely that an order for standard discovery (pursuant to FCR r 20.14) will only be made in proceedings where the issues in dispute are very limited and clearly defined, such that an attempt to further limit discovery by use of categories would be otiose. In most cases the specification of categories or classes of documents which must be discovered will be an effective and appropriate approach. The Court will ordinarily include the relevant categories in the discovery order.

7.25 The use of discovery categories constitutes a recognition that the Court will attempt to strike an appropriate balance between the completeness of disclosure being made by the parties, on the one hand, and the need to ensure that the costs and burdens of discovery are proportionate and reasonable, on the other hand.

7.26 It should be noted that categories will generally only reduce the overall burden of discovery if they effectively target the discovery effort to particular subsets of the total documentary records held by the party giving discovery. If the categories are framed in a way that requires a party to review of all of its documents in order to locate documents that fall within the categories, the use of categories will not reduce the overall burden of discovery when compared to general discovery.

7.27 Categories are also useful because they effectively translate the issues arising on the pleadings into a more practical description of the kinds of documents that are likely to be relevant to those issues. Where the discovery is of such a size that a number of different people will review documents to assess whether they are discoverable (as will usually be the case) the use of categories helps reduce the subjectivity and inconsistency that may otherwise be involved. The process of developing proposed categories of documents also does much to focus the parties' attention on just what documents will be required to run their case.

7.28 Examples of types of categories that may be appropriate in some cases are:

- all tax invoices/contract notes/consignment notes issued by Widget Co. Limited to Purchaser Corporation Limited in the period [date] to [date];

- all senior management reports/incident reports/financial reports prepared in the period [date] to [date];
- all email correspondence between Mr Smith and Mr Jones in the period [date] to [date] which refers to [topic];
- all foundation core samples taken by Engineering Co Limited at the Site in the period [date] to [date].

7.29 As far as possible, the categories should be framed by reference to particular custodians or repositories of documents, or particular types of documents. This helps reduce the number of primary documents that need to be located and reviewed to identify potentially relevant material (see further below). If categories are not framed in this way, it may be necessary for a party to review a range of primary sources that is similar to that which would need to be reviewed to give general discovery.

7.30 As far as possible, the categories should be framed by reference to attributes of the documents which are likely to be readily apparent on their face. Categories which call for evaluative judgements should be avoided.

7.31 Categories can often usefully be defined by reference to documents authored by certain key personnel (usually the relevant decision makers/protagonists). For example, a category might be framed as:

- all emails between Ms Smith, Mr Jones, Ms Bloggs and Mr Page relating to the profitability of the Parramatta and Richmond stores in the period [date] to [date]; or
- all documents prepared by Ms Smith, Mr Jones, Ms Bloggs or Mr Page relating to the profitability of the Parramatta and Richmond stores in the period [date] to [date].

7.32 The Pre-discovery Conference Checklist issued with Practice Note CM 6 makes clear that the parties should give consideration to appropriate categories and seek to agree such categories if possible, prior to the Pre-discovery conference.

E The Peril of Categories

7.33 Despite the best intentions, there is often a tendency to frame the categories broadly to catch as many documents as possible for fear that something critical may be missed. Where this happens the categories can amount to little more than an enumeration of the documents which would otherwise be caught by an order for general discovery. Examples of categories which are framed too widely may (in certain cases) include:

- All documents relating to or evidencing the profitability of Investment Co. Limited in the period [date] to [date];
- All documents relating to the investment by Principal Co. Limited in Investment Co. Limited;
- All emails relating to Project X;
- All documents in relation to the investment strategy of Principal Co Limited.

7.34 A category which calls for “all documents relating to” a certain matter will often be considered too wide because a document may relate to something in many different ways and the relation of a document to the relevant matter may be subjective and tenuous.

7.35 Detailed thought directed to proper and close framing of the categories is generally time well spent and can significantly reduce the time and expense involved in discovery while ensuring that material with genuine forensic value is disclosed[77]. The pre-planning and disclosure process described in sections 7.9 and 7.10 above is vital in this regard.

7.36 It is all too easy for the parties to pass "like ships in the night" when it comes to identifying appropriate categories of documents. They can find themselves trying to specify categories without any knowledge of the record keeping systems, reporting lines or document management practices of the other party. As a result, a party can find themselves subject to a discovery order demanding significant time and cost for compliance, which could have been avoided or made significantly more efficient by the party providing information about these matters in advance of the orders.

7.37 The provisions of Practice Note CM 6 relating to parties' discovery plans and the discovery conference provide an appropriate opportunity for parties to volunteer information about:

- their internal management structure, including delineation of functions and responsibilities between departments or business units;
- the organisational reporting lines and management structures;
- their accounting and accounting record keeping practices;
- series of regular reports prepared and kept by the organisation;
- methods by which their files and records are maintained (e.g. hard copy or electronic);
- all relevant documents are available without the need to resort to backup tapes (see further discussion of backup tapes below).

7.38 Where appropriate, such information may be required to be disclosed in affidavit form or on oral examination, but in the first instance an informal disclosure will often be of significant assistance so that the parties and the Court may seek to achieve the objectives of CM 5 and CM 6 armed with relevant information about the nature of potentially relevant documents, how they are stored and how information relevant to the proceedings might most efficiently be obtained.

7.39 In framing the categories in commercial disputes it can be a useful exercise for practitioners to consider how, if they were in the position of an officer of the other party, they would most readily obtain access to the information which the party requires for the purpose of its case. By employing that mindset, attention is focussed on how the required information can be obtained most efficiently rather than seeking to trawl through every document in the hope of locating a "smoking gun".

(i) The utility of "source" based categories

7.40 Particularly in the case of email correspondence, it is usually desirable for the parties to identify key personnel whose correspondence or emails will be discovered in order to cut through the sheer volume of documents. In identifying those personnel consideration should be given to the decision making processes of the relevant organisation and its internal management structures. For example, in relation to issues of intent or purpose in the context of trade practices matters, discovery may properly be limited to the senior executives of the relevant organisation, being the people who are capable of forming the

[77] in relation to categories see generally *KGL Health Pty Limited v Mechtler* [2008] FCA 273 [9] and *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415 at [10]

necessary intent, or having the relevant purpose, forming an element of the cause of action.

(ii) The utility of document type based categories

7.41 The advantage of categories framed with reference to types of documents is that generally documents of a similar type, for example regular reports forming part of a reporting series, will be co-located in the records of the parties and therefore more easily accessible. Also, significantly less time and cost will be involved in legal review of documents and making assessments as to relevance, where discrete series of business records are discovered.

(iii) Do categories reduce the burden of the discovering party?

7.42 In practice, categories which are framed by reference to the subject matter of documents are often the least useful in limiting the scope of discovery, while categories that identify the creator or recipient of documents or the types of documents (e.g. nominated categories of reports or types of correspondence) tend to be significantly more useful in focussing the discovery.

7.43 Categories which require production of all documents "evidencing" some issue raised by the pleadings are often of little use in focussing the discovery because a document can evidence a fact in an almost unlimited variety of ways. Also, such category may be objectionable because a document may, as a matter of fact or law, evidence something even though this is not apparent from the face of the document. The document may be "one piece of the jigsaw" but this may not be apparent without knowledge of a significant number of other documents of which the person reviewing documents for discovery may not have personal knowledge.

7.44 Finally, if there is a large number of categories, it may impose a significant additional burden on the party giving discovery, because potentially relevant documents may need to be carefully assessed against each of the categories, which increases the level of legal decision making required.

(iv) The risk of "gaming"

7.45 There can be a tendency to take the view that if the opposing party asks for a certain category or type of documents then the other party has a prima facie right or entitlement to seek discovery of similar categories of documents. Such an approach should be avoided. Each party should focus on the documents required to make out its case and where they might most readily be found.

(v) Other limiting devices

7.46 Categories may be confined by use of exclusions including:

- documents reasonably believed to be in the possession of the opposing party. For example, emails passing between the parties may be excluded;
- drafts;
- publicly available documents;
- specified source accounting documents (if the information they contain is incorporated in high level summary records).

7.47 There may be certain types of data (for example weekly/monthly/annual financial figures) which will appear across a large number of documents within a party's possession. Where this is the case, rather than include a category such as "all documents containing

monthly profit figures for the period [date] to [date]" it will often be more efficient and easier for the party holding the documents to prepare a summary document which collects of the relevant data over time in one place. The same effect can be achieved in a more formal way by use of an appropriate interrogatory. Alternatively, a party may itself proffer such a data capture and thereby avoid what would otherwise be a significant burden of discovery if all document containing those figures were required to be discovered.

F The Virtual Mire – Electronic Documents

(i) General

7.48 Discovery of electronic documents will usually comprise the bulk of the discovery exercise in modern commercial litigation. Practice Note CM 6 provides a framework for the management of electronic discovery. Importantly paragraph 6.1 provides that before the Court makes an order that discovery be given using documents in electronic format, it expects the parties to have discussed and agreed upon a practical and cost effective discovery plan. The Default Document Management Protocols and Advanced Document Management Protocols released with the practice note should guide the electronic discovery process. The protocols specify (among other things) a uniform approach to the identification and numbering of documents by the parties and the manner in which documents and lists of documents should be exchanged.

7.49 The discovery plan should give particular attention to identifying the sources of relevant documents and can explain any particular complexity that may need to be addressed or difficulty that might be expected to be encountered so that the Court has foreknowledge of this.

7.50 Two sources of documents in particular can often prove challenging in the context of electronic discovery: emails and documents contained on disaster recovery backup tapes.

7.51 The steps involved in discovery of electronic documents (including documents from backup tapes) will usually include the following:

- identifying the relevant authors or sources of documents to be discovered;
- identifying the relevant storage devices including servers (and possibly backup tapes) on which the relevant authors' documents were stored during the relevant period (this in itself can be an exercise of significant complexity as management structures and/or technology may have changed through the relevant period);
- capturing the relevant documents from the storage device, server and/or restoring relevant backup tapes;
- restoring data from backup tapes into a readable format (often this will need to be outsourced to IT specialists);
- identifying documents linked to the relevant authors;
- delimiting and de-duplicating the documents so that where multiple copies or versions of the same document are stored electronically they are only discovered once (e.g. an email will appear in the senders "outbox" and identically in each of the recipients' "inboxes");
- the formulation of search terms and protocols so that potentially relevant data/documents may be identified amongst a large data set;

- running searches across a potentially relevant data set to identify documents which may come within relevant electronic search terms;
- uploading of the relevant documents into a database for legal review;
- legal review to identify claims for confidential privilege and/or confidential material;
- creation of meta data files and imaging of the documents for provision to other parties.

7.52 To give some idea of the volume of material that can sometimes be faced in giving discovery of electronic documents, as a general indicative rule:

- a typical CD-ROM of 650 megabytes (Mb) can hold up to 320,000 typewritten pages; and
- one gigabyte (Gb) of data can hold up to 500,000 typewritten pages.

7.53 While it has typically been the practice for parties to give electronic discovery by way of exchange of electronic lists of documents accompanied by copies of the documents in electronic form (usually on CD-ROM) it may be appropriate in some cases for the parties to agree to provide discovery by uploading documents to a central electronic document repository/database.

(ii) Search terms

7.54 Search terms are commonly employed to identify potentially relevant documents or records amongst a large number of electronic data retrieved from a storage device or computer memory. Employing the terms, search software can search across the whole of, or specified parts of, each electronic file to isolate material for further manual review. By this means parties may discharge their obligation to undertake reasonable searches and enquiries to identify discoverable material.

7.55 The use of search terms is a powerful and necessary tool in limiting the scope of electronic documents. They are usually used to identify a subset of electronic documents which can them be subject to a process of manual review to ascertain whether they fall within the discovery categories. Although in some cases, the search terms may take the place of categories.

7.56 It will usually be desirable for the parties to have reasonable certainty as to what is required of them at the outset of the electronic discovery process, including some certainty that their proposed search terms are adequate and not contentious. Otherwise parties may be faced with the prospect of having to revisit the document set to identify further documents if it is shown that the search terms employed were inadequate, involving additional cost and delay.

7.57 To obtain such certainty, parties should usually seek to exchange draft lists of proposed search terms at an early stage. This can be done in the context of the discovery plans contemplated by CM 6. There is the prospect that the other party may seek to expand the scope of the search list, but this is perhaps the price that to be paid for obtaining certainty. Subject to the Court's supervision, it is for the discovering party to formulate an approach to electronic discovery which enables it to discharge its "reasonable search" obligations. It is important for parties to recognise that the rules do not impose an obligation of absolute disclosure. Neither party is expected to warrant that every relevant document has been identified and disclosed. Search terms involve a trade-off between completeness of disclosure, on the one hand, and cost and delay, on the other hand.

7.58 The appropriateness and adequacy of the proposed search terms should be analysed in light of the pleadings and the facts known to the parties with a view to agreeing such categories in advance of the pre-discovery conference and any ultimate order for discovery. It may be appropriate for the search terms to be included in the discovery orders and such an approach is within the Courts general discretion in relation to discovery orders.

7.59 The challenge is to formulate search terms that are sufficiently specific to the issues which are the subject of the proceedings to identify the relevant documents, while capturing as far as possible all relevant documents. Key business terms such as "contract", "negotiation", "profit", "report", "management" etc will typically be of little assistance in this area and should generally be avoided. Useful search terms can include the names of persons involved in relevant transactions and the names often given internally to commercial projects and transactions within large organisations.

7.60 It will often be necessary or desirable for the search terms to be married with appropriate Boolean operators (i.e. "AND", "OR" and "NOT") to create structured searches. For example in a case relating to preference shares of X Co. Limited where the document set is likely to contain many references to other types of shares, it may be necessary to use a search constructed as "preference AND (share or shares)". Where a case relates to representations made by Jones or Smith as agents for Y Co. Limited about X Co. preference shares, an appropriate search structure may be "(Jones OR Smith) AND preference AND (share OR shares).

7.61 Exclusionary search terms (i.e. in Boolean logic NOT "X") can be powerful in limiting the scope of discovery although they must be used with care. Such terms can be used to remove from the set of potentially relevant material, documents which contain one of the keywords in association with another key word. For example, where a keyword "report" is used it may be appropriate to exclude documents which include "report" but also include "engineering" because the proceedings relate to financial reporting and the electronic records contain many irrelevant engineering reports. In that case the search chain would be "report NOT engineering".

7.62 Care must be taken however, as such exclusionary terms can remove from the pool of potentially relevant documents at the outset documents that may be of significance, simply because they contain one of the exclusionary terms. To be effective the exclusionary terms must be precise and they must be so unusual that they would not reasonably be expected to appear in a relevant document.

7.63 The process of developing and refining appropriate search terms and structures will often be an iterative one. Where the underlying document set is very large, it may be necessary to test various iterations of the searches across the documents using an electronic search tool in order to identify a search structure that limits the number of irrelevant documents captured for manual review while still capturing the relevant documents.

7.64 The formulation of appropriate search structures by reference to the peculiarities of the particular underlying document set and the issues in the dispute can be a science in itself and the knowledge of those with experience in the area of forensic IT and applied legal technology can be of great assistance in this process. Where it is sought to have the search terms included as part of the discovery orders, it may be necessary to put on evidence from a suitably qualified expert in the area in order to satisfy the Court of the adequacy of the proposed search terms.

(iii) Back-up tapes/disks

7.65 Restoration of documents contained on backup tapes created by organisations for disaster recovery purposes can often be a very expensive and time consuming process and yield little in terms of useful documents. For that reason back-up tapes should be

seen as an option of last resort where they contain documents that cannot be accessed/or more readily accessed) by other means.

7.66 Often such backup tapes are periodically reused and when this occurs the information from previous backups (also called sessions) is not necessarily erased from the tape.

7.67 The process of identification, restoration and review of documents from backup tapes will typically involve the following steps:

- performing a search of back-up tape and server records to identify relevant backup-tapes;
- retrieve relevant back-up tapes from the organisation's archival library or depository;
- sorting the tapes into a logical order for restoration;
- analysing the file types contained on the tapes to ascertain whether they are readable;
- restoring the file directory structures on the tape to identify the areas and sessions of relevance;
- constructing a computer hardware and software environment capable of reading the data on the tapes (this is sometimes necessary where the tapes were created some time ago);
- converting potentially relevant unreadable file types into a readable file format (where possible);
- de-duplicating the data by removing exact duplicate copies.

7.68 Where a party demands production of material from backup tape in circumstances where the restoration and extraction of data will involve significant cost but a risk of little return in the form of information relevant to the proceedings, it may be appropriate for the Court to order production of such material on the basis that the costs of restoring, extracting and producing the documents is borne (or borne in the first instance) by the party seeking production regardless of the outcome of the proceedings.

7.69 Parties should also give consideration to whether the process of identifying, restoring and extracting documents from backup tapes should be undertaken internally or outsourced. This may largely be determined by what electronic and human resources the party may have available internally. The parties and their advisors should also have regard to the ultimate recoverability of the costs of the necessary work. It may be that where this work is outsourced and invoiced to the party, the costs may be more readily quantifiable for the purposes of assessment and taxation. As a matter of practice, internal costs of document retrieval and processing of documents for discovery are seldom recoverable upon taxation, even if the process may be more efficiently undertaken internally.

7.70 Practitioners should be cautious before advising their clients who may be required to give discovery to embark upon wholesale restoration of backup tapes or take preparatory steps prior to having a reasonable expectation that discovery of the documents contained on the backup tapes will ultimately be required. While a pro-active approach may in some cases be laudable, recent authority suggests that a party who voluntarily undertakes the burdensome task of retrieving electronic documents in anticipation of discovery orders may subject themselves to a discovery burden which the Court would not otherwise have been inclined to order[78]. The Court should be alert to this difficulty as

[78] see *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65

there is some expectation that the parties will not "sit on their hands" and defer all work on discovery and evidence during the pleading stages. An expectation that the parties will, in an unguided fashion, get on with those tasks may be misplaced and the Court should gain an understanding, at least in broad terms, of the potential scope and nature of discovery at an early stage. If appropriate it should direct the parties to meet, to exchange information and report to the Court.

(iv) Meta-data

7.71 Electronic documents commonly include a record of information relating to their creation and alteration referred to as "meta-data". Meta-data may include the file name of the document, the user name of the creator of the document, the date of its creation and modification and when it was printed. In the case of emails, meta-data will include the name of any document attached to the email. Meta-data can be thought of as information about information. Depending on the issues in dispute, it may have significant forensic value.

7.72 Where an electronic document is discovered the associated meta data comprises part of the document and is therefore prima facie discoverable. Modern document review databases will generally capture and preserve this material in an appropriate form. The default document exchange protocol issued with CM 6 provides for how meta-data is to be handled between the parties.

G Redaction

(i) Relevance

7.73 The authorities suggest that there is no absolute entitlement for a party to redact irrelevant material in an otherwise relevant document[79]. If the document contains material relevant to the proceedings or otherwise falls within the categories for discovery then it is discoverable in its entirety although the parties and the Court may be amenable to some arrangement for redaction of irrelevant material. The parties would commonly may make appropriate provision for this in the discovery plan or protocol.

7.74 Simply because material is not relevant to the proceedings does not necessarily mean that there is a sound or proper basis for it to be redacted. Large scale redaction of documents may render the documents difficult to interpret, because the relevant material has been shorn of its context, and so lower the overall forensic utility of the discovery process. Redaction may be costly and spawn collateral disputes.

7.75 Where the material said to be irrelevant is also commercial in confidence this may be a proper ground for seeking to redact it (see below). Consideration should be given to whether a confidentiality regime should be established to protect such material. Such regimes typically provide for certain types of confidential documents (unredacted) to be made available only to certain persons or classes of person (e.g. the parties' legal advisers, experts retained in the proceedings and the principal instructing in-house counsel). Redacted versions of the documents are available to others.

(ii) Confidentiality

7.76 Confidentiality regimes can be a source of particular complexity, cost and collateral disputation in proceedings. This is because it becomes necessary to prepare confidentiality undertakings, put in place systems to ensure confidentiality is maintained (including redaction), and the parties' inability to freely provide instructions will often be impeded. Costs associated with such regimes – including the cost of return or

[79] *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4)* [2010] FCA 863

destruction of documents at the conclusion of the proceedings – are frequently overlooked.

7.77 Consideration should be given to whether a confidentiality regime is in fact required as parties will in any event be bound by the usual undertaking as to use of discovered material. A breach of the usual undertaking is regarded as a serious matter.[80] Any regime adopted should go no further than is reasonably required to protect the commercial and confidential interests of the party. The Court will not endorse a confidentiality regime as a matter of course. The Court will be alert to the risk that disclosure of commercially sensitive material may be used inappropriately as a lever for early settlement, however, the Court has an overriding obligation to ensure that justice is, and is seen to be, administered in an open and transparent matter. Even if the parties agree a particular confidentiality regime, the Court may ultimately not adopt that approach at trial if it considers that such a regime would go too far in restricting public review and scrutiny of the Court's process. The parties will need to justify why the proposed regime is appropriate.

7.78 One approach, which has not generally been favoured, is to have a general confidentiality regime which limits the extent of disclosure that may be made of all documents produced by the parties. The implied undertaking should be the starting point for any confidentiality regime.

7.79 The more common approach has been for the parties to nominate only particular discovered documents to which the confidentiality regime will apply. Keeping track of which documents are subject to the regime, who holds those documents and what use is being made of them can become a significant (and expensive) task in itself.

7.80 The parties may adopt the approach of having multiple levels of confidentiality: that is, there may be some "super confidential" documents which are only made available to the parties' external advisors and experts, while other documents of a less sensitive nature may be made available to certain specified internal officers of the opponent. Multiple tiers of confidentiality add significantly to the complexity of administering the document review and management process, increase the attendant costs and also increase the risks of inadvertent non-compliance with applicable restrictions. For this reason, the Court will examine the need for such measures carefully.

7.81 The Default Document Management Protocols issued with CM 6 contain provisions relating to redaction of confidential and privileged information.

7.82 The parties may be content to agree to redact commercial in confidence material completely in discovered documents, however, to the extent that material is confidential but also relevant to the facts in issue in the proceedings, the other parties should be given access to that information at least via their external legal advisers and ideally also through relevant in-house counsel (providing such counsel do not also have a commercial role).

7.83 Redaction of electronic documents can usually be undertaken by document reviewers using one of the specialist proprietary software programs. A box is drawn over the materially electronically on screen and the relevant data is then extracted from the form of the document prepared for exchange with the other party. In paper based discoveries it is a matter of physically blacking out the relevant material in the copy produced to the other party.

7.84 Examples of precedent confidentiality undertakings and orders that may be of assistance are reproduced in Appendix A.

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80 *Hearne v Street* (2008) 235 CLR 125

(iii) Privilege

7.85 Documents may contain a record of a privileged communication while the balance may not be privileged. It is the practice in such cases to redact the privileged portion and to produce the balance.

7.86 Redaction of privileged information can be of assistance in so far as it allows the other parties to have access to the balance of the document, while maintaining the client's privilege in the redacted portion.

7.87 However, care should be taken to ensure that the material over which privilege is claimed is in fact privileged. Where the balance of the document is not privileged, it may be that this is because it has been used for a purpose which is incompatible with the maintenance of the privilege.

(iv) Dealing with privilege claims

7.88 A party's list of documents should provide a least a basic indication of the basis on which privilege is sought. For example where the author or recipient of a communication is an external legal adviser this should be made clear on the face of the list in order to avoid unnecessary correspondence about the basis of privilege.[81]

7.89 The authorities make clear that work product from and correspondence with in-house lawyers may also attract legal professional privilege if certain requirements are met. If there are a significant number of documents from a variety of in-house counsel over which privilege is claimed, the party giving discovery may consider putting on a brief affidavit identifying the relevant in-house counsel, their roles and whether they hold current practising certificates, with a view to avoiding any protracted dispute about privilege.

7.90 To the extent that it may be necessary to make application to the Court to determine challenges to claims of privilege, the parties should endeavour to bring all such disputes before the Court in the course of one application rather than having to return to Court on multiple occasions.

7.91 In many cases, material which is redacted for privilege may not be of direct relevance to the proceedings and the producing party need not be concerned if the docket judge wishes to inspect the material in order to determine whether the claim for privilege is properly made out. However, where the material is such that it would be prejudicial for the docket judge to inspect it for the purpose of resolving the claim it may be appropriate that the docket judge nominate another judge to inspect the material and determine the validity of the claim/s for privilege. Alternatively, an ADR regime may be established in relation to discovery and privilege issues and privilege issues dealt with by an independent third party in that context. Questions of admissibility will, of course, remain to be determined by the trial judge.

7.92 Where the process of identifying privileged material prior to the exchange of documents would be a time consuming task and the privileged material is unlikely to be directly relevant to the case, the Court may make an order that the production of documents by way of discovery will not amount to a waiver of such privilege. While such an approach has the advantage of avoiding the costs of legal review of documents, in a large number of cases it will not be appropriate because the privileged material will be such that it delivers a real forensic advantage to the other party or least puts that party in a position where it will have to conduct its casing trying to ignore its knowledge of relevant information which is privileged.

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[81] see generally *Gardner v Irvin* (1878) 4 Ex D 49; *Webb v East* (1880) 5 Ex D 108; *City of Baroda* (1926) LT 576; [1926] All ER 653

H Production of documents from non-parties

7.93 While the most efficient and appropriate method for a party to access a document in the possession of a stranger to the proceedings will be by way of subpoena, in appropriate circumstances the Court may order a non-party to give discovery pursuant to FCR r 20.23. The Court is generally more cautious in ordering discovery against a non-party to the proceedings and the party seeking such discovery is under an added obligation to endeavour to formulate the discovery order as precisely as possible so as not to impose an unnecessary burden on the person subject to the order.

I Summaries of Voluminous Documents – Evidence Act s 50

7.94 Parties should have regard to the availability of *Evidence Act* s 50 which provides for the use of summary documents as a means of proving voluminous or complex documents. That provision may be useful, where, for example, a document has been through many revisions over time and it may be most efficient to prove the various revisions by reference to the original document and then a cumulative table of amendments. Similarly, where a series of complex reports over a long period contains particular data of relevance to the proceedings, that data might be proved by use of a document (for example, a graph) which extracts only the relevant data from the larger reports.

7.95 If such a summary is to be used, the other parties should be given access to examine the underlying documents and an adequate opportunity (in advance of trial) to raise any objections or suggestions in relation to the content of the summary.

J ADR in Relation to Discovery

7.96 Particularly in large discoveries that may be conducted on a staged basis over a number of months, a multiplicity of disputes may arise between the parties. Rather than rely on the Court to determine such disputes it may often be easier and more efficient for the parties to adopt a suitable ADR process, such as a private mediation facilitated by an experienced barrister or retired judge.

Such an ADR approach may also assist the parties to formulate discovery plans and to shape proposed discovery orders. However, as noted above the Court will ultimately determine the scope of discovery and will not necessarily make orders simply because they have been agreed by the parties.

8 DISCOVERY OF "FACTS"

8.1 Interrogatories may be defined as a form of discovery that involves one party asking the other party specific questions relating to the matters in issue in the proceeding in a written form in accordance with the rules of Court.[82]

8.2 FCR r 21.01 provides that a party may apply to the Court for an order that another party provide written answers to an interrogatory. Such application must be accompanied by an affidavit annexing the proposed interrogatories.

8.3 In *Ryan v Federal Capital Press of Australia Pty Ltd* (1990) 101 FLR 396 at 397, Miles CJ observed:

> "Interrogatories tend to increase delay and add to the cost of litigation … In practice, the unrestrained application of this principle means that questions asked by way of interrogatories can be and often are more prolix than those asked in cross-examination. The cross-examiner tends to ask only those questions to which a favourable answer is expected. No such inhibition restricts the range of interrogatories, particularly those generated or assisted by the word processor. The tendency towards the greater use of extensive interrogatories has led to a more widespread recognition in the courts if not among practitioners that interrogatories should be not be used as a general substitute for a request for further and better particulars of the opponent's case as a means of pinning down a witness to a particular answer in the hope of having the witness contradict it at the trial. In some cases a Notice to Admit will be an appropriate alternative or preliminary to interrogatories and will be far cheaper."

8.4 In the Fast Track, interrogatories are only allowed in exceptional circumstances.[83]

8.5 The use of interrogatories can lead to parties behaving in inefficient ways (expending time and cost for little result, or for tactical purposes) and controlling the use of interrogatories is a mechanism by which that inefficiency can be reduced.[84]

8.6 A tightly drafted interrogatory may in certain cases be a useful tool in refining the issues in dispute at a relatively early stage of proceedings. A wide ranging interrogatory or one that puts to the opposing party complex and multi-faceted questions in a summary way will often simply become a source of dispute in itself and add little that is not otherwise available to the parties via the Court's other procedural mechanisms. In many cases a Notice to Admit facts or documents pursuant to FCR r 22.01 may be a simpler alternative to an interrogatory. The Notice to Admit procedure does not require an application to the Court.

8.7 An appropriate interrogatory can be of assistance in reducing the scope of discovery where, for example, a party wishes to rely on certain data (perhaps financial data) which is generated on a regular basis and may be found across a number of different documents generated by the party giving discovery. In such a case, rather than calling for production of "all documents evidencing monthly profit figures" consideration should be given to the use of an interrogatory requiring the other party to disclose such information. This will often alleviate the need for the discovering party to review a large number of documents in order to capture all documents that contain the information.

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82 Butterworths Australian Legal Dictionary 1997.

83 See Federal Practice Note CM 8.

84 VLRC Civil Justice Review Report March 2008 at p 299.

9 INTERLOCUTORY APPLICATIONS

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10 EVIDENCE OF WITNESSES

A Means of Adducing Evidence

(i) General Rule?

10.1 The FCA and the FCR disclose an apparent preference for oral evidence to be given at hearings other than interlocutory hearings. Provisions of this sort are common in modern courts (*see, for example WA Supreme Court Rules O 32 r 1; UK Civil Procedure Rules 32.2*).

10.2 Order 33 r 1 of the Old FCR provides that, unless the Court otherwise orders or the parties otherwise agree, the evidence of the witness at the trial of a cause (for present purposes – a non-interlocutory hearing) shall be given orally.

10.3 Although the currently circulated draft of the FCR does not include a provision replicating O 33 r 1, s 47 of the FCA will continue to apply with the following effect, inter alia:

(a) subject to s 47 itself and other provisions, testimony at the trial of causes shall be given orally in court – FCA s 47(6);

(b) the court may at any time at the trial of a cause, for sufficient reasons and on such conditions as the court thinks necessary in the interests of justice, direct or allow proof, to such extent as the court thinks fit, by affidavit – FCA s 47(3);

(c) testimony may also be given by affidavit at the trial of a cause if the parties so agree and the court does not otherwise order – FCA s 47(5);

(d) in civil proceedings other than the trial of a cause, testimony shall be given by affidavit or as otherwise directed or allowed by the court – FCA s 47(1).

10.4 It may be observed that the FCA s 47 appears to contemplate, in so far as final hearings are concerned, that evidence may only be given orally or by affidavit. Nevertheless, it is suggested that it is clear that the court has power, generally pursuant to FCA s 23 and the inherent power of the court to control its own processes, and specifically pursuant to FCA s 37P and O 10 r 1(2)(a)(xvii) of the Old FCR (FCR 5.04(3) Item 21), to give directions that evidence be given by means different to those contemplated by s 47.

10.5 Until relatively recently, the usual practice in the majority of cases heard in the Federal Court has been to direct that evidence in chief be given by way of affidavit, with a timetable set to commence after the issues have been limited and defined (at least in theory) by the pleadings.

10.6 Enlivened by the individual docket system, there are now a number of differing approaches to the adducing of evidence in chief including:

(a) by affidavit. The usual practice is still the dominant one. Unless leave is given to supplement the affidavit by oral evidence, for example, upon a successful objection to a part of the affidavit or by reason of an oversight in the compilation of the affidavit, the evidence in chief of the witness is received wholly in writing;

(b) by witness statement. In jurisdictions where this procedure is permitted, a witness statement is a signed but unsworn document provided in circumstances where it is expected that there will be an order that the statement (subject to exceptions) will stand as the evidence in chief of the witness. (See for example, *WACR O 32 r 2; United Kingdom Civil Procedure Rules 32.4, 32.5*). In proceedings in the Federal Court, s 21 of the *Evidence Act* applies to the effect that witnesses must take an oath or make an affirmation before giving evidence. Notwithstanding that provision, O 10 r 1(2)(a)(xvii) of the Old FCR (r 5.04(3) Item 21) provides that the court may make directions as to the filing and exchange of signed statements of evidence and their use in evidence at the hearing. It is

probably prudent to proceed on the basis that s 21 of the *Evidence Act* applies to the use of witness statements. Keeping the procedural implications of that limitation in mind, the usual effect of the written statement process discussed in this chapter will be that the evidence in chief of a witness will be given in writing (as to uncontested matters) and orally (as to contested matters);

(c) by outline of evidence. An outline of evidence serves as notice of the evidence expected to be given by witness, but usually will not stand as the evidence in chief of that witness. The usual effect of this procedure is that the whole of the evidence in chief of the witness is given orally.

10.7 It is unlikely that any one approach to the giving of evidence in chief will suit all of the very many different types of case that come before the Federal Court, or the different judges who hear those cases, or the different types of evidence that may be given, or the different types of witnesses the eliciting of whose evidence in an efficient but fair manner is, after all, the point of the exercise. An overview of some of the features of each of these approaches appears below. Prior to the first directions hearing, or so soon thereafter as the nature of the evidence to be given can be ascertained, the parties should be prepared to engage with the court in an exchange designed to determine which of these approaches, or which combination of them, is appropriate for the matter in question.

(ii) Affidavits

10.8 Assuming that it be accepted that it is desirable practice for the parties to litigation to be informed, prior to the hearing, of what evidence is to be deployed against them in support of the allegations made (or the defences raised) in the pleadings, there is no doubt that affidavits can be an efficient means of achieving this outcome. However, particularly where they deal with matters which are going to be in issue, they are not so effective.

10.9 The prohibition on asking leading questions of a witness in chief is not a quaint device designed to make legal proceedings more impenetrable to the lay observer or to the witness being questioned – although it sometimes appears that way. It remains useful as a prohibition because, inter alia, it is a way of ensuring that the evidence given is the evidence of the witness, not of some other person. In practice, affidavits are drafted, redrafted and settled by lawyers – quite apart from whatever other defects may be instilled by this process, affidavits thus enshrine, in a way which precludes objection, the answers to questions which were likely, for the most part, to have been leading.

10.10 In addition, it is almost impossible to convey in an affidavit the tone, colour and quality of a witness' evidence. There are no pauses for thought, no glances to the body of the court, no uncertainties, no body language.

10.11 The result is that the judge, who is required to assess, inter alia, the demeanour of the witness as part of their consideration of the whole of the evidence, is deprived of seeing that demeanour except under the adversarial pressure of cross examination and the objection-strewn process of re-examination. It is suggested that it will generally be unsatisfactory for a judge to be deprived of the opportunity to hear the evidence of any witness as to a contested event in their own words. Another common incident of the use of affidavits is that judges are exposed to lengthy cross-examinations depending upon points of detail in circumstances where the witness is often too polite or intimidated to mention that the offending words were not his or her own.

10.12 It is not unimportant to observe that, simply in terms of the detailed preparation of affidavits (and of the witness statements referred to below);

(a) the cost to the parties of preparing affidavits and witness statements is often very high, even to the point where thousands of dollars are spent making minor alterations in language and correcting internal cross-references;

(b) many affidavits and witness statements repeat or substantially repeat others served by that party;

(c) the requirement that affidavits and witness statements be expressed in admissible form (e.g., avoiding hearsay) means that, often, a number of different affidavits or statements have to be prepared in order to prove a relatively uncontroversial point (e.g., how a mass mail-out was effected, or how a cheque came to be drawn by a company); and

(d) since most cases settle, much of the cost spent on affidavits and written statements is wasted, and the feared extra court time involved with oral evidence never eventuates.

10.13 Another common failing of affidavits, even in relatively simple matters, is that they tend to incorporate, despite all of the exhortations in the rules and elsewhere, matters of argument and conclusion. This leads to a process of striking out or reading down portions of the affidavit or rulings that what is stated as one thing should be read as another. Oral evidence is then usually permitted to patch up what remains of the affidavit – a process which often leads to the same objection to the oral evidence. This is not an effective use of the court's time and results in an unsatisfactory "patchwork" of evidence in chief, which may reflect unfairly on the witness.

10.14 The circumstance that an affidavit will stand as the evidence of a witness (subject to objection and cross-examination) and the fact that it is prepared at leisure has given rise to a practice where affidavits in reply (*ad infinitum*) deal, by way of denial, admission or otherwise, sequentially with all of the issues raised in the preceding affidavits. Although such a process can be useful in identifying a more detailed picture of the events in question, it more commonly results in a set of quasi pleadings.

10.15 As Emmett J, writing extra-judicially as long ago as 2000[85] pointed out, "*further, after rulings on objections, it is often very difficult to determine what is in evidence and what is not. Such complexity usually results from the use of affidavits in proceedings where they are quite inappropriate. Where there is a real dispute that has to be resolved by the court, affidavit evidence is clearly undesirable."*

10.16 It is suggested that, except in matters already covered by the rules, such as interlocutory proceedings, or other matters where the facts are not substantially in dispute and where there is not likely to be cross examination, affidavits should not be the preferred vehicle for the adducing of evidence in chief in contested matters.

(iii) Witness Statements

10.17 As noted above, typically a witness statement is an unsworn written statement from the witness which, with certain exceptions, will in due course stand as the evidence in chief of that witness. In jurisdictions subject to s 21 of the *Evidence Act*, similar processes to those discussed below can be adopted in respect of affidavits or witness statements prepared in response to a direction pursuant to O 10 r 1(2)(a)(xvii) of the Old FCR (r 5.04(3) Item 21). On the face of it, the witness statement process may give rise to an apprehension that a witness statement will suffer from the same defects as an affidavit – indeed, uncontrolled, it may well do so.

10.18 An expedient which has been adopted in the Federal Court in respect of affidavits and has been adopted in other jurisdictions which allow for witness statements is to direct that parties may request that those parts of the affidavit or witness statement which are disputed must be the subject of oral evidence.

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85 "Practical Litigation in the Federal Court of Australia: Affidavits" (2000) 20 Australian Bar Review 28 @ 32

10.19 Most judges will expect a running-in period during which the more aggressive practitioners will put everything in issue, but it may be observed that:

(a) in practice, this seems to die down quickly;

(b) the ability to require oral evidence is always subject to the court's control – the parties can and should be prepared to defend requests in this respect before the hearing or at least before the witness gives evidence;

(c) the parties can be warned of a costs consequence if frivolous requests cause delay.

10.20 It is suggested that this procedure is within the powers of the court referred to in paragraph 10.4 above. It is suggested further that there will be many cases in which the adoption of this process will:

(a) allow the written proof of uncontroversial matters of historical narrative which it would be tedious to extract orally;

(b) reduce the burden on witnesses of the "memory test" involved in recollecting inaccurate historical order, all of that historical narrative and accordingly reduce the degree to which they are made defensive about any failings in that regard;

(c) give the judge the advantage of seeing the witness' evidence about those parts of the case which are genuinely in dispute first hand and reducing the cross examination about those issues to a challenge to that witness' actual evidence, rather than someone else's formulation of it;

(d) preserve the ability of counsel to challenge the evidence that the judge needs to see tested. It may be acknowledged that witnesses may feel a certain degree of pressure in the process of recalling, live, the important events of the case and even more so when cross-examined about their version of events – but it is suggested that the point of this exercise is the elimination of techniques and processes that waste time, not the elimination of processes which have, over the years, been demonstrated to be as a useful tool in the establishment and testing of a witness' evidence.

10.21 Views may differ, but it may be prudent to provide, for all the reasons already discussed, that once successful in requiring that part of a witness statement or affidavit be excluded on the basis that it should be given orally, the cross-examiner is not at liberty to cross-examine on the differences between what has been thus excluded and what evidence in chief is given orally.

(iv) Outlines of Evidence

10.22 These are unsworn and unsigned written statements of what a party expects a witness will say and have been used for many years in circumstances where a party is unable to procure an affidavit or witness statement. Some jurisdictions have specific provisions in their rules about such outlines – see *United Kingdom Civil Procedure Rules 32.9*.

10.23 It is common to include in such outlines not only the evidence expected to be given but, in circumstances where that evidence is not known, details of the matters about which the party serving the notice propose to question the witness.

10.24 It is often the case that directions requiring the production and service of such outlines also provide that the witness is not to be cross examined on the contents of the outline without leave of the court.

10.25 There is no question as to the continuing utility of the outline of evidence process in the case of recalcitrant witnesses. However, consideration should also be given to whether the evidence of any or all of the lay witnesses in a case could or should be given in this

manner. (It is suggested that it is unlikely that this process would be of great utility in connection with expert evidence.)

10.26 The procedure has the advantage that, to the maximum extent possible, whilst preserving the objective of informing the parties before hearing of the evidence to be deployed against them, it reduces the impact of third parties on the evidence of the witness.

10.27 The procedure also has the advantage that it at least offers the prospect of reducing the time taken by objections. Experience shows that, once a particular subject matter or type of evidence is successfully objected to, the examiner in chief moves on to other matters.

10.28 It is not suggested that one approach should be adopted for all cases. Quite apart from the sorts of matters discussed above, different judges may have different personal preferences in such matters. It is suggested that there is no unfairness or inefficiency in this – given that the judge is and should be in control of the court's processes, and that it is that judge who must decide the contested matters, it would be odd to insist on a form of evidence which that judge finds unhelpful. It may be that one judge adopts a different process to another in similar matters, but given that for the most part, the same judge is in control of Federal Court matters from the beginning to the end, the parties are not exposed to changing procedures in the same matter.

10.29 There may be a range of factors which impact on the choice of means of adducing evidence – the capabilities of the witness; the nature of the evidence to be adduced; the extent to which it is likely that there will be large amounts of uncontroversial evidence; the extent to which it is necessary to deploy diagrams and charts. Parties should expect that the court will enquire of them as to these matters at the first directions hearing. In the event and to the extent that it is not possible then to engage in a meaningful discussion on these matters, that is a position which should be explained, not merely asserted.

10.30 Although strictly outside the ambit of this chapter, a problem common to all the various forms of adducing evidence in chief is the practice of urging witnesses to give evidence of conversations in direct speech. This is a rule of practice (followed more in the some States than in others, but certainly still found in NSW) rather than one of law and it may be time to give the practice a respectful farewell, given that witnesses almost never (if they are honest) recall any such thing. Nor is the common expedient of interpolating the phrase "*words to the effect of*" much better, as it preserves the underlying problem and adds to that problem the fact that the witness is thereby being encouraged to do something which is normally objectionable – that is, to form a conclusion by reformulating what they actually remember into terms more acceptable to lawyers. Common experience suggests that the way in which people recall events tends to be in a form more amorphous, ambiguous and ill-constructed than is convenient for lawyers. It is suggested that practitioners and the court should endeavour to find a way to adapt their rules and practices to the way that people recall things, rather than insisting upon the reverse. Although it will no doubt lead to an increase in the number of submissions as to the weight of evidence, such an approach would at least avoid the unfortunate circumstance that, for most witnesses, their first experience of the process of giving evidence is that they are encouraged, no doubt implicitly and perhaps with the best will in the world, to be dishonest.

10.31 It must nevertheless be acknowledged that there is still considerable support amongst practitioners for the view that, in the case of disputed conversations, it is a useful discipline for witnesses to be asked to try to give their evidence in a form of direct speech (e.g., "to the best of my recollection A said words to this effect, and I replied in words to that effect") and that lawyers should be expected to seek to elicit the evidence in that form (e.g., in oral examination in chief) and that when this is done, such direct speech evidence assists to ensure that the no doubt imperfect recollection of the witness is as

clearly stated as it can be, and that witnesses with a fair recollection of a conversation can generally express their evidence in that form without making it up.

10.32 An alternative or additional approach to the proof of facts to those outlined above is to require the applicant to serve (probably after discovery) a detailed list of facts (not conclusions) which it will seek to prove at trial and to oblige the respondent to identify which of those facts it will dispute at trial. The respondent should be required to serve its own list if there are additional matters it wants to prove, and the applicant should respond by indicating its position. There should be requirements that solicitors or counsel certify that there is a proper basis for disputing the facts in question. There should also be cost consequences for disputing matters later proved (as with a notice to admit). Following that process, all of the undisputed matters can be set out in an agreed statement of facts binding on the parties. Everything else has to be proved by documents or oral testimony and there is no need for affidavits or witness statements because each side knows the disputed matters that the other will seek to prove at trial. Perhaps all that is necessary is a list of witnesses with an indication of which disputed fact each witness will be called to prove.

(v) The Problem of Documents

10.33 Once the hurdles of discovery and inspection are cleared, the parties are still, even in moderately complex litigation, in possession of a very large number of potentially relevant documents. Inevitably, in cases where recollections are disputed (or where "*what happened"* is a live issue for any reason), judges will wish to have recourse to the objectively verifiable contemporaneous record – i.e. documents.

10.34 Ideally, the documentary record should be presented to the judge:

(a) in one place;

(b) without duplication;

(c) in chronological order;

(d) without the inclusion of documents not in evidence;

(e) without the inclusion of documents not referred to by witnesses or counsel;

(f) without the inclusion of documents which are only there "in case";

(g) without the inclusion of documents which are not self explanatory but which are unaccompanied by any explanation;

(h) in the case of lengthy documents of which only a small part is relevant – without the inclusion of lengthy irrelevant parts.

10.35 In practice, what the court is frequently confronted with are:

(a) pleadings, which refer to some, but not all documents in circumstances where the pleading is usually unaccompanied by any documents;

(b) affidavits or written statements which variously annex and/or exhibit some, but not all, of the documents relevant to the witness's involvement in the case. The judge is often unable to see the exhibited documents until the start of the case or later. To the extent that documents are annexed, they invariably do not form a complete record of the events being described by that witness;

(c) affidavits or witness statements from subsequent witnesses which refer to some, but not all, of the documents referred to by previous witnesses, but refer to different copies of those documents;

(d) applicant's tender bundles, which may or may not replicate their own exhibits and annexures together with other documents which they wish to tender;

(e) respondent's tender bundles, which do the same thing;

(f) sundry bundles in response;

(g) cross examination bundles, which contain some documents previously annexed, exhibited or bundled together with other documents not so favoured;

(h) documents incorporated into all of the above which replicate other documents in other of these bundles for no apparent reason;

(i) a Court Book, which may incorporate all of the above and which is added to by separate incremental volumes as the case goes on;

(j) indices and cross indices to all of the above.

10.36 The resulting blizzard of paper:

(a) makes it very difficult and time consuming for the judge to answer simple questions – What do the documents say happened next? What do the documents say was happening just before?

(b) is not, as a matter of advocacy, persuasive;

(c) makes the process of compiling an accurate record of the facts for the purposes of writing a judgment much more difficult;

(d) is very costly and wasteful, given that most of the documents and all of the duplications are not performing any function.

10.37 Not all of these ills can be cured by recasting the approach to adducing evidence in chief in the various ways previously discussed, but a number of objectives are worth addressing at the first directions hearing:

(a) There is usually no good reason to annex or exhibit a document. At the conclusion of discovery and inspection, all potentially relevant documents should have a discrete number. Any form of written evidence, assuming there is a good reason to refer to a document at all, should refer to it by that discrete number. It can then be located in the document bundle described further below. The same approach can be taken to document references in pleadings. Where documents are referred to before discovery takes place (e.g., in cases where the filing and service of written evidence precedes discovery or where no discovery is ordered), the first party to refer to a document can still give it a discrete number using the same system of numbering as would be applied to its discovered documents.

(b) Any subsequent written statement (which expression will be used hereafter to mean any form of written evidence) which refers to a document already in the growing bundle should refer to <u>that</u> discrete number. Only if there is a real need to refer to a different version of a document should that be done. There is simply no good reason to have successive versions of a contract in evidence, one blank, one signed by the applicant, one signed by the respondent, one signed by both parties and another with irrelevant hand writing on it in evidence. In such matters, the parties should be encouraged to agree upon the version of the relevant document to be incorporated into the bundle.

(c) The document bundle should then grow incrementally, but by addition rather than replication. It should be in chronological order. Where it is provided electronically, it should be possible to examine it chronologically.

(d) Documents which are going to be tendered without benefit of a reference in a witness statement may be added in the same way. The court, in longer cases, would usually be assisted by an index telling the judge where each document in the bundle is referred to, but this is a matter for discussion. Care must be taken not to adopt processes apt for very large cases to smaller cases, but there is no apparent reason why the same objectives – i.e. no annexures or exhibits, no duplications and a single source bundle of documents arranged chronologically, should not be achieved in most cases.

(e) The parties must also be prepared to adapt to the preferences of individual judges. It may be that some judges have found that an efficient way of reducing the volume of the document bundle is to avoid "bulk tenders" entirely and to deal with the tender of documents incrementally at a time when counsel is prepared to justify the tender.

(f) At the close of the case (or along the way in longer cases) documents which are rejected or not pressed should be physically removed from the bundle.

(g) It may be acknowledged that some types of documents (notoriously, email chains which not only are replicated but usually run backwards) will need some care to achieve these aims, but the savings in photocopying costs should more than offset the costs involved in taking that care.

(h) The parties should be urged to consider whether and why it is necessary to file witness statements which simply annex or refer to documents without comment. The parties should be required to consult to seek to consent to the tender of such documents. The court should warn parties that costs consequences, regardless of the outcome of the case, may follow unreasonable refusal to give consent.

10.38 The result of the discussion set out above is that it is suggested that at the first directions hearing, or as soon thereafter as the nature of the evidence to be called is apparent, the court will make directions as to the manner and form in which evidence is to be adduced. Also, at the first directions hearing, the court will require the parties to have taken steps to agree upon a protocol for the tender of documents with a view to ensuring that, *inter alia*:

(a) Witness statements refer to documents by a discrete document number;

(b) To the extent possible all references to a particular document should be to the same document;

(c) Witness statements do not annex or exhibit documents;

(d) All documents should be incorporated into one chronological bundle;

(e) The court has an opportunity, once the extent and nature of the documents to be tendered is apparent, to make directions as to the time and manner in which documents will be tendered and at which the bundle should be delivered to the court.

B Dealing with Objections

10.39 As is apparent from the discussion above, the manner in and time at which objections will be dealt with will vary considerably, depending upon how the evidence is to be adduced and the trial judge's own preferences. Again, care needs to be taken to avoid protocols apt for large cases which may unreasonably add to costs in small cases. However, even in the smallest of cases, there appears to be utility in establishing a protocol for objections which has the effect that those objections are known well before the hearing,

so that practitioners can give real consideration to whether they should press the matter, not press the matter, or not press and seek leave to adduce further evidence in another form. For the same reasons, some consideration should be given to a protocol which allows the parties to know, in advance of the hearing, the judge's ruling (or draft rulings) on the objections.

(i) Confining objections to matters of consequence

10.40 The court is frequently confronted with very long schedules of objections including many as to "form", which have been drafted by a diligent and enthusiastic junior, many of which are not pressed when the matter comes before the court. There is perhaps nothing wrong with this, except that the inevitable judge's question – "Does it matter?" – should be asked and answered before the matter comes to court. It is possible that the court does not need to make any express directions about this topic, but solicitors and counsel (including, if possible, senior counsel) should not get to court without having asked and answered questions such as:

(a) Why are we objecting?

(b) Don't the documents establish this point anyway?

(c) Does it matter that the conversation is not in direct speech?

(d) If we object and leave is given to adduce further evidence, what will have been achieved?

(ii) Schedules with Suggested Rulings

10.41 As suggested above, there is little doubt that there is utility in parties exchanging, well before the hearing date, schedules of objections. As a means of encouraging agreed positions, there is usually utility in attaching to such schedules suggested rulings with which the objecting party would be content. In many cases, this process disposes of the majority of the objections.

10.42 Judicial attitudes to such schedules vary widely, and it is not suggested that any general rule will or should be applied by judges regardless of personal preference. Nevertheless, experience has shown in recent years a considerable willingness on the part of practitioners to reach agreed outcomes when suggested rulings are sensibly drafted. This process reduces the time necessary to be taken by the judge in dealing with outstanding objections.

10.43 Judicial attitudes also vary widely when it comes to making rulings in response to such schedules prior to the date of the hearing. Nevertheless, it is suggested that it is at least worth considering setting out a timetable pursuant to which such schedules should be exchanged, subsequent to which draft rulings will be handed down prior to the hearing date, so that the parties can decide whether to press the matters. Even if draft rulings are not handed down prior to the hearing, a large amount of time may be saved if the handling of objections at the hearing commences with the delivery of draft rulings, with counsel then free to argue for a departure from any or all of them, rather than by the traditional approach of hearing submissions and then ruling on each objection seriatim.

10.44 Individual judges will have different attitudes as to whether objections to all witnesses should be taken at the start of the hearing or whether they should be done incrementally, but many judges have observed that an incremental approach not only saves time but allows later objections to be dealt with at a time when more is known of the nature of the case.

(iii) The Relevance Problem

10.45 Except in relatively short cases, judges will often be in some difficulty dealing with relevance objections, as not all of the detail or nuance of the issues or of the evidence will have been made apparent at the start of the case. This problem applies both to witness statements and to documents. The incremental approach to dealing with objections referred to above is one method of dealing with this problem.

10.46 An obvious expedient, often adopted, is to simply defer rulings on relevance. Many judges do not favour this process and a number of practitioners observe that it means that, until excluded, the evidence is in and must be, for example, cross examined upon until it is excluded.

10.47 In most cases, it may be observed that if a judge is of the view that he or she is not yet sufficiently informed of the nature of the case to assess relevance, then there is a perfectly proper basis for deferral – indeed making a ruling upon relevance notwithstanding that state of mind would furnish grounds for complaint. In practice, it is suggested that it is relatively rare for an item of evidence to be so productive of delay if admitted (or in some usages, admitted "provisionally" – which seems to mean merely that the parties are warned that the order admitting the evidence may be vacated) that it cannot be admitted on that basis.

10.48 It may be acknowledged that there are some theoretical and practical difficulties concerning the state of evidence where rulings are deferred in this way particularly in circumstances where the evidence is subsequently rejected, including what to do about any cross examination referring to such evidence – but these are practical difficulties which once recognised, can be dealt with on a case by case basis according to the individual judge's preference.

10.49 The result of the discussion above is that it is suggested that, always subject to the personal preferences of the individual judge, there is utility in adopting a process, even in smaller cases, of directing schedules of objections with suggested rulings culminating in the judge handing down draft rulings prior to the commencement of the hearing. A frequent variant of this process will be that the schedules with the suggested rulings are exchanged and the judge deals incrementally with the rulings as they become necessary.

C Judicial Control – The Scope of the Discretions

10.50 The power of the court to make the kinds of directions and exercise the types of control referred to in this section have already been referred to.

10.51 By way of general summary:

(a) The court, as a superior court of record, has inherent power to control its own processes which will include the manner in which evidence may be adduced and the protocols to be adopted in respect of dealing with objections.

(b) The FCA s 23 provides as follows:

> *"**Making of Orders and Issue of Writs***
>
> *The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."*

(c) The FCA s 37P(1), (2) and (3) provides:

> *"**Power of the Court to give directions about practice and procedure in a civil proceeding***

(1) This section applies in relation to a civil proceeding before the Court.

(2) The Court or a Judge may give directions about the practice and procedure to be followed in relation to the proceeding, or any part of the proceeding.

(3) Without limiting the generality of subsection (2), a direction may:

(a) require things to be done; or

(b) set time limits for the doing of anything, or the completion of any part of the proceeding; or

(c) limit the number of witnesses who may be called to give evidence, or the number of documents that may be tendered in evidence; or

(d) provide for submissions to be made in writing; or

(e) limit the length of submissions (whether written or oral); or

(f) waive or vary any provision of the Rules of Court in their application to the proceeding; or

(g) revoke or vary an earlier direction."

(d) It may be observed that the scope for directing that there should be a limit to the number of witnesses who may be called is more likely to be exercised in connection with expert witnesses than in connection with lay witnesses.

(e) The *Evidence Act* ss 11(1) and 21(1) provide as follows:

"11. General powers of a court:

(1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

...

21. Sworn evidence of witnesses to be on oath or affirmation

(1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence… ."

Section 21 of the *Evidence Act* will produce no difficulty where the witness is to be called for cross examination, but if a witness statement process has been adopted and the witness statement is not objected to and there is no occasion for cross examination, consideration will need to be given by the parties for the need to comply with s 21. It may be that the witness statement is tendered, without a hearsay objection being taken, and admitted as documentary evidence, without its author becoming a witness in the proceeding for the purpose of s 21.

(f) A number of provisions of the rules are also relevant:

(i) Order 10 Rule 1(1) of the Old FCR[86] provides variously as follows:

*"**Directions Hearing – General***

1. On a directions hearing the Court shall give such directions with respect to the conduct of the proceeding as it thinks proper. …

2. Without prejudice to the generality of subrule (1) or (1A) the Court may:

(a) …

(xi) the filing of affidavits; …

[86] Rule 5.04 FCR.

(xiii) the place, time and mode of hearing;
(xiv) the giving of evidence at the hearing, including whether evidence of witnesses in chief shall be given orally or by affidavit, or both;

….

(xvii) the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing;"

(ii) Order 32 Rule 4 of the Old FCR[87] which provides:

"Conduct of the trial

(1) The Court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial."

(iii) Order 32 Rule 4A of the Old FCR[88] provides as follows:

"**Limitation on time etc to be taken for trial**

(1) At any time before or during a trial, the Court or a Judge may make a direction limiting:

(a) the time for examining, cross-examining or re-examining a witness; or
(b) the number of witnesses (including expert witnesses) that a party may call; or
(ba) the number of documents that may be tendered in evidence; or
(c) the time for making any oral submissions; or
(d) the time for a party to present the party's case; or
(e) the time to hear the trial.

(2) The Court or Judge may amend a direction made under this rule."

D *Browne v Dunn*

(i) Limits of the Rule

10.52 Judges are frequently confronted with the task of listening to a cross examination which, exhaustively and *seriatim* puts to the witness every aspect in which the opponent's case is at variance with the witness' evidence. This practice stems from a misunderstanding of the rule in *Browne v Dunn* (1893) 6R 67. In *Scalise v Bezzina* [2003] NSWCA 362 at [98] Mason P (Santow JA with Brownie AJA agreeing) said:

> *"The rule does not undermine the adversary nature of proceedings or make one party the other's keeper. Thus, a party who proves facts sufficient to establish a cause of action or a defence upon which that party bears the onus does not have to confront the other side's witnesses with the issue if they do not address it in their own evidence. To require this would invert that aspect of the rule grounded in what I have described as judicial economy. There is no unfairness in letting the sleeping dog lie and also invoking Jones v. Dunkel (1959) 101 CLR 298 so long as the moving party has by pleadings or otherwise signalled the matter sought to be proved and led necessary evidence on the topic. There is no need to confront an opponent's witnesses by cross examination if they fail to contradict*

87 No new rule.
88 Rule 30.23 FCR.

evidence earlier called by the moving party in support of an issue raised in the pleadings or otherwise …"

(ii) Avoiding Inefficiency

10.53 An expedient commonly adopted is that counsel inform the court of an agreement reached between them as to the extent to which the rule in *Browne v Dunn* will or will not apply. It is suggested that, in the event and to the extent that a witness simply fails to deal with a subject matter, the parties should be mindful of the remarks of Mason P set out above. In the event and to the extent that a witness does deal with a previous witness' treatment of a matter in issue, it is suggested that there is no need slavishly to put the opposing version to that witness, who has already considered it when postulating his or her own version.

10.54 Again, as with many other issues of this type, it does not seem necessary to suggest the imposition of one rule to apply to all parties in all different types of cases. It is only where there is an incomplete contest between witnesses on a particular point that there is practical scope for the rule to have operation.

(iii) Dealing with Breach

10.55 The practical problem in dealing with a *Browne v Dunn* point is that a potential breach of the rule often does not appear until final submissions, when some or all of the witnesses may have left the court, although occasionally one sees objections taken to cross-examination of a witness on the basis that a previous witness' recollection on the same topic was not challenged. The usual consequence of breach is that the party in breach will not be permitted to advance the proposition which depends upon the matter in question – although it should be observed that in New South Wales at least, there is also authority for the proposition that a failure (by a Defendant) to challenge evidence-in-chief may disentitle the Defendant from calling contrary evidence. (see *Hull v Thompson* [2001] NSWCA 359 at [24]*).*

10.56 Very occasionally, it can be agreed that if a witness had been asked a particular question, there would have been a particular answer. Given the requirements of the admissibility of evidence, it may be that this process really operates by way of admission. Another option which is possible, but rarely encountered, is for the Court to give the party in breach a chance to correct the error. Although such an approach looks at first glance as if it would advance the cause of just outcomes accompanied by as little technicality as possible, a number of problems may arise in this connection. First, the witness may be out of reach for any number of reasons. Second, the party which has the "benefit" of the breach may have taken forensic decisions of its own based upon the failure to put certain propositions, such that it would be difficult to unwind the state of play to the position it would have been in had the breach not occurred. In the circumstances, there do not appear to be good grounds for departing from the traditional means of dealing with breach of the rule – rather, there appear to be good reasons for clearly establishing the extent to which, either generally or for each witness, the parties wish to be governed by the rule.

11. DOCUMENTARY EVIDENCE

A Identification of Key Documents

11.1 This issue has been discussed in Chapter 5 at paragraphs 5.78 to 5.80.

11.2 It is likely that the parties will, by the time of the hearing, already have determined to incorporate such key documents into the tender bundle, either pursuant to references in witness statements or as stand-alone documents. It will be a matter for individual judges to decide whether it is of utility for them to be provided (either at the commencement of the hearing or earlier) with copies of or at least a list of such key documents – experience suggests that it may be that asking parties to agree upon a such list (particularly at an early stage) will simply produce a lengthy "just in case" list.

B Dealing with Objections

11.3 This issue has been discussed in Chapter 10 at paragraphs 10.33 to 10.49. It may be emphasised that this is an area where practices vary greatly within the court. It is not suggested that this variation is problematic – some judges, for a number of reasons, do not encourage the bulk tender of documents at the outset of the hearing (or at any other stage of the hearing) and prefer to attempt to limit the number of documents in the case by requiring counsel to deal with each tender incrementally. The process of objection will generally be governed by the preferred process of tender, but it may still be useful for the parties in all cases to be directed to exchange lists of proposed tender documents and proposed objections to such documents, so that when the time does arrive for tender, the objections have, to the maximum extent possible, been resolved.

C Electronic Documents

11.4 This issue has been discussed in Chapter 7 at paragraphs 7.41 to 7.65. Once an electronic document is tendered, it will be a matter for individual judges to decide whether they prefer it to be printed and added to the physical tender bundle (as to which process see Chapter 10 at paragraph 10.37), or whether they are content simply to have it listed as an exhibit with a hypertext link to the document database.

11.5 An issue which will need early resolution in this connection (and which is best resolved at the discovery stage) is the establishment and maintenance by the parties of compatible electronic storage, retrieval and numbering protocols. A number of cases, large and small, have proceeded on the basis that a common commercially available document management program is used by all parties (and the court) to ensure that, from discovery up to and past the time of tender;

(a) a discrete document numbering system is maintained;

(b) documents can be tendered from the database, if necessary, without producing a physical copy;

(c) documents can be searched and;

(d) documents can be read remotely.

The documents placed on such a system commonly include the pleadings, witness statements and transcripts. It is relatively simple then to attach hyperlinks to each document reference in any of those documents.

D Summaries

11.6 This issue has been discussed in Chapter 7 at section I.

12 EXPERT EVIDENCE

A Scope of the Court's Powers

12.1 In addition to the inherent power of the Federal Court to control its own processes and the general power of the Court to make orders of such kinds as it thinks appropriate (FCA, s 23), the Court has a number of specific powers of utility in connection with the giving of expert evidence.

12.2 The Court may give directions about the practice and procedure to be followed in relation to the proceeding, or any part of the proceeding (FCA, s 37P(2)).

12.3 Those directions may include:

(a) requiring things to be done (FCA, s 37P(3)(a));

(b) setting time limits for the doing of anything or for the completion of any part of the proceeding (FCA, s 37P(3)(b));

(c) limiting the number of witnesses who may be called to give evidence (FCA, s 37P(3)(c)).

12.4 The Court, in the event that these directions are not complied with, has a range of powers including, most relevantly, to strike out, amend or limit any part of a party's claim or defence, and to disallow or reject any evidence (s 37P(6)).

12.5 Specific powers to give directions include:

(a) that expert witnesses confer (O 34A r 3(2)(a) of the Old FCR[89]);

(b) that expert witnesses produce for use by the Court a document identifying the matters and issues about which they agree or differ (O 34A r 3(2)(b)of the Old FCR[90]);

(c) that expert witnesses give evidence after all or certain factual evidence relevant to the question has been led (O 34A r 3(2)(c)(i) of the Old FCR[91]);

(d) that parties close their case in relation to evidence relevant to an expert question, subject to preserving the ability to call their expert on that question (O 34A r 3(2)(c)(ii) of the Old FCR[92]);

(e) that after all or certain factual evidence has been led, each expert indicate whether, in light of that factual evidence, he or she adheres to or wishes to modify any opinion earlier given (O 34A r 3(2)(d) of the Old FCR[93]);

(f) that each expert be sworn one immediately after the other (O 34A r 3(2)(e)(i) of the Old FCR[94]);

(g) that an expert when giving evidence occupy any position in the court room that is appropriate to the giving of his or her evidence (O 34A r 3(2)(e)(ii) of the Old FCR[95]);

(h) that each expert give an oral exposition of his or her opinions on the question (O 34A r 3(2)(f) of the Old FCR[96]);

(i) that each expert give his or her opinion about the opinion given by another expert witness on the question (O 34A r 3(2)(g) of the Old FCR[97]);

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89 Rule 23.15(a) FCR.
90 Rule 23.15(b) FCR.
91 Rule 23.15(d) FCR.
92 Rule 23.15(d) FCR.
93 Rule 23.15(e) FCR.
94 Rule 23.15(f) FCR.
95 No new rule.
96 Rule 23.15(c) FCR.
97 Rule 23.15(h) FCR.

(j) that the expert witnesses be cross examined in a certain manner or sequence (O 34A r 3(2)(h) of the Old FCR[98]);

(k) that cross-examination or re-examination of expert witnesses be conducted by completing the examination of one before starting the examination of another or by putting to each expert witness in turn questions relevant to one subject or issue at a time, until the cross-examination or re-examination of all experts is completed (O 34A r 3(2)(i) of the Old FCR[99]).

12.6 The new FCR makes provision for similar powers and directions – see rr 1.31-1.33; r 5.04, Items 14-22 and; rr 23.11-23.15. It should be observed that these rules provide for the making of a number of directions not specifically mentioned in the old rules, for example:

(a) a direction that the parties jointly instruct an expert to provide a report of the expert's opinion in relation to a particular issue in the proceeding (r 5.04, Item 17) and;

(b) a direction that an expert's report be received by way of submission, and the manner and form of that submission, whether or not the opinion would be admissible as evidence (r 5.04, Item 19).

B Defining Issues

12.7 In practice, most of the useful work which will be done in connection with the definition of issues is that part of the process discussed in Section F below – "Refining Issues – Expert Conferencing and Joint Reports". Nevertheless, there are still occasions upon which the Court is found asking "Is this really a matter for expert evidence?"

12.8 The first directions hearing will in some cases be too early a stage to address the question of which, if any, of the issues in the case ought to be the subject of expert evidence, but the parties should come to that directions hearing prepared for a direction that they are to consider, prior to revisiting these issues at a case management conference of the type contemplated by r 5.04, Item 32 or a subsequent directions hearing convened for that purpose:

(a) which issues in the case may be the subject of expert evidence;

(b) what type of expert evidence is envisaged;

(c) whether or not the appointment of a single joint expert is possible or whether the Court should appoint an expert or assistant;

(d) how many experts are to be called and whether more than one expert from parties in the same interest ought to be permitted; and

(e) the manner in which the experts should give their evidence.

The parties should expect any party wishing to retain an expert to be directed to provide to the other party or parties, the name of the proposed expert and a copy of that person's resume together with a list of the materials to be shown to the expert and a list of the questions proposed to be asked of the expert. The opposing party or parties will be given an opportunity to review those matters, to object and/or to suggest additional matters. In the event of any inability to agree, the matter can be relisted (for the sake of efficiency, a telephone conference should be sufficient) so that the court can resolve any outstanding issues.

12.9 The parties should not expect that the Court will simply accept the views of the parties concerning which issues may be the subject of expert evidence. Accordingly, parties should ensure that a practitioner of sufficient seniority and familiarity with the issues in the case is retained to debate the question of why an expert is necessary in connection with a particular issue. Quite apart from saving time in court, the limitation of issues in this way has the

98 Rule 23.15(i) FCR.
99 Rule 23.15(g) FCR.

potential to save clients substantial amounts of money in connection with the preparation of expert evidence which normally goes through a lengthy and expensive process of drafting and clarification only to end up being rejected.

C How Many Experts?

12.10 Probably because of the very high costs of retaining experts and of the forensic undesirability of conflicting opinions, it is relatively rare for a party to seek to call multiple experts on the same question. What is more common is that a party engages a number of experts, including one or more "dirty" experts – who are asked to work the problem up, to cast about for solutions, to talk about possible solutions with lawyers, to consult about the assumptions which should be proffered to the "clean" expert and to advise during the cross-examination of the opposing expert – who are then not called for fear of being exposed to what is expected to be damaging cross-examination about their involvement in those respects. It is suggested that, for the most part, these fears are ill-founded – that having done this work does not constitute them a mere "hired gun" and that "knowing where the bodies are buried" is not a bad thing, as long as there is a reasoned approach to support the view now adopted by that expert. It is also commonly feared that calling the "dirty" expert may result in the waiver of sensitive privileged information. Whilst it is not suggested that this problem is illusory, it should be borne in mind that if the facts which give rise to this perception are relevant, it is usually prudent to deal with them up front, rather than waiting for them to be revealed or discovered by the other side, and that if they are referred to in documents, they should already have been disclosed in the course of discovery. In any event, it may help to reduce the expense of engaging "dirty" experts if judges (assuming that they agree with the foregoing) raise the matter and their attitude to it at an early stage. It may also be observed that it has already become apparent that the utility of the practice diminishes greatly if the technique of concurrent examination (discussed below) is adopted.

12.11 The question of the number of experts more commonly arises in connection with cases where there are multiple parties – usually respondents – who have what appear to be similar interests. There is no doubt that the Court has the power to require, as an extreme example, that such parties (even taken together) be limited to one expert per issue. In practice, a couple of examples may serve to show that such a direction should not lightly be made, as it may be attended by difficulties which are almost impossible to resolve. First, even respondents who appear to have similar issues often have very different views about how to answer those issues, including the precise nature of the question to be put to the expert, what sort of expert to brief and the identity of the expert thought best qualified to assist them. Second, there may be real difficulties in such an expert maintaining viable Chinese walls when respondents (as is often the case) are themselves at logger heads.

12.12 It is suggested that it is likely to be a less fraught exercise if the Court, in most cases, confines itself first to requiring a convincing explanation of why a party requires more than one expert (assuming that they need one at all) on an issue and then to enquire whether it is possible for parties in similar interests (or even parties with opposing interests) jointly to instruct a single expert on particular issues. In any event, it may be observed that if different parties genuinely believe that different answers to expert questions can be given, and if they have instructed experts who, complying with their obligations (as set out in Practice Note CM 7) are able to assist in that respect, it is difficult to see why those parties should be prevented from ventilating those answers merely in the name of efficiency. Adopting processes such as the concurrent evidence approach described below will usually be a better means of achieving that efficiency – even and perhaps especially when there are a large number of experts on the question.

12.13 There have been a number of attempts to reduce the number of experts by expressly providing for the use of "joint" experts – in this connection it may be observed that the FCR provide that a direction may be made that the parties jointly instruct an expert to provide an opinion on a particular issue – r 5.04, Item 17. In the United Kingdom, CPR Part 35 (and the associated Practice Direction 35) provides that, where possible, matters requiring expert evidence should be dealt with by a single expert. Contemporary experience suggests that much effort (and, of course, expense) is expended by parties in persuading the Court not to make such orders.

12.14 Notwithstanding the remarks set out above, it is suggested that the question of whether there is scope for a joint expert report on one or more of the issues in the case remains a useful one which may be asked at the case management conference or at a directions hearing dealing with expert evidence. The matters in paras 12.8 to 12.10 above should also be addressed.

D Court Experts

12.15 Although it is rare to see the Court appointing its own expert in modern litigation, it is worth summarising the procedure involved, perhaps to highlight why other techniques are now more popular. Order 34 r 2 of the Old FCR provides that the Court may, at any stage of a proceeding, appoint an expert as Court expert to inquire into and report upon a question for an expert and any facts relevant to that inquiry[100].

12.16 The Court's expert's report is sent to the Registrar and each party interested in the question (O 34 r 3(1), (2) of the Old FCR[101]). The report is, unless the Court otherwise orders, admissible in evidence, but it is not binding on any party except to the extent that such a party agrees (O 34 r 3(3) of the Old FCR[102]).

12.17 The Court expert may be cross examined by any party, and it is provided that the Court may order that such cross-examination take place before an examiner, or before the Court, either at the trial or at some other time (O 34 r 4 of the Old FCR[103]).

12.18 Despite the fact that the parties do not have control over who the expert is (or even what he or she reports into) they are jointly and severally liable to pay the expert's remuneration, which is fixed by the Court (O 34 r 5 of the Old FCR[104]).

12.19 Where a Court appointed expert has made a report, any party may adduce evidence of one expert on the same question, provided that reasonable notice has been given to the other parties. Any additional expert evidence on the question (beyond the "one each" contemplated by the Rule) may not be adduced without the leave of the Court (O 34 r 6 of the Old FCR[105]).

12.20 It is suggested that there are a number of readily observable reasons why the procedure of appointing a Court expert is not often used, amongst them being:

(a) it involves the Court choosing a witness (or at least, being involved in the choice). There is no reason to expect the Court to be particularly well-equipped to do this – and having done it, even relatively sophisticated litigants may think that the Court has reason to favour its own choice;

(b) similarly, there is no reason why a particularly able expert should not appear regularly before a judge when instructed by parties (indeed in some areas, such as valuation, the field of regular experts is quite small) – it would on the other hand look unfortunate if the same expert witness was repeatedly nominated by a judge;

(c) given that each party may call its own expert on the question, it is very likely that the process simply adds one witness (the Court appointed expert) to an already expensive witness list; and

(d) a simpler expedient is for the judge to indicate, if it is apparent that the parties have missed an expert question, that that question should be addressed by the experts to be called by the parties.

12.21 Some of the difficulties with the process are perhaps ameliorated in the FCR providing for the appointment of court experts (FCR rr 23.01-23.04) where, for example, parties will need leave

100 Rule 23.01 FCR.
101 Rule 23.02 FCR.
102 Rule 23.03 FCR.
103 Rule 23.03 FCR.
104 Rule 23.01(2) FCR.
105 Rule 23.04 FCR.

to adduce the evidence of even one of their own experts. This change, together with a change in the method of appointment (now to be done upon application by a party) reduces the severity of some, but not all of the points identified in paragraph 12.20 above.

E Expert Assistant

12.22 A procedure seen even more rarely than the court appointed expert is the expert assistant. It is suggested that there are few reasons for the procedure to become more common. Indeed, that part of the Old FCR dealing with expert assistance does not appear in the FCR – although the Court's wide powers would still enable the use of the procedure.

12.23 Order 34B r 2 of the Old FCR provides that the Court may at any stage of the proceeding and with the consent of the parties appoint an expert as an expert assistant to the Court on any issue of fact or opinion other than a question of law.

12.24 The assistant must give the Court (and the parties) a written report on the issues identified by the Court and may, at the direction of the Court and with the consent of the parties, make other comments in the report (O 34B r 3 of the Old FCR).

12.25 The Court will give each party a reasonable opportunity to comment on the report and may allow a party to adduce evidence on the question – but there will be no examination or cross-examination of the expert assistant (O 34B r 3(4) of the Old FCR).

12.26 Crucially, the expert assistant does not give evidence in the proceeding (O 34B r 3(6) Of the Old FCR).

12.27 Courts have used expert assistants for many years. Judges sitting in admiralty matters in England have sat with experts in marine matters since the 16th century. In Australia, Courts of Marine Inquiry have adopted similar practices, as have courts sitting in valuation matters – for instance concerning the valuation of land in the Western Lands Division in New South Wales.

12.28 Notwithstanding this long history, and without suggesting that the procedure could or should be eliminated, it is suggested that there remains something troubling about a process (particularly where the parties are not given leave to adduce evidence on the question) which expressly is put in place to assist the Court in writing a judgment, but is yet not evidence and not able to be tested in cross-examination. Again, it is suggested that here, if the parties cannot agree upon a joint expert report, a better solution is for the judge to preside over a process which identifies the issues upon which separate experts can opine.

F Refining Issues – Expert Conferencing and Joint Reports

12.29 It is now common for the Court to exercise the powers referred to above and to direct that experts on similar issues confer (usually before but occasionally during the hearing) with a view to producing a report – sometimes in the form of a schedule – setting out the issues on which they agree and disagree. It is often useful, if possible, for the report to contain a short statement of the reasons for these views. It is suggested that the production of such a joint report will prove useful no matter what technique is to be adopted for the testing of the expert evidence.

12.30 It is usually prudent to ensure (by way of instruction if not by way of direction) that the experts are to be left alone for the purposes of producing the joint report, except perhaps for whatever word processing assistance is necessary. It is fair to say that many clients and lawyers do not, at least initially, relish the loss of "control" involved in this restriction, but given that the purpose of the exercise is to identify what is really in dispute between the experts, as opposed to what others would like to dispute, there is no doubt that such conferences are better held without client or lawyer assistance. This is not to say that, once the report is produced, there cannot be suggestions from the parties or from the Court as to further issues which might usefully be addressed.

12.31 A difficulty which arises from time to time is that the differences between the experts arise more from the assumptions which they are asked to make than from their approach to the

expert question. The experts should specifically be asked to consider whether this is the case – in which circumstance they can then identify the assumptions in question and the reasons why the different assumptions affect the analysis. Unless the assumptions are themselves informed by further expert analysis, it may then be clear that there is no need for further testing of the expert evidence, and that the resolution of the questions of fact underlying assumptions can be seen as the real task for the Court.

12.32 A possibility which is sometimes overlooked is that there may be utility in directing that there be an expert conference and joint report even between experts who are not giving evidence on precisely the same issue. For example, in cases involving the HEROC Act, there may be experts across a range of disciplines who may be able to identify areas where their individual specialities or recommended courses of action overlap or interact, where it would be helpful to know if there were positive or negative aspects of these possibilities.

12.33 It is common experience for the factual underpinning of assumptions to change during the course of a hearing. If and when that happens, there is nothing to stop the Court requiring the experts to confer again to consider the ramifications of assumptions different to those informing their earlier report.

12.34 A further benefit of a pre-trial expert conference and report is that it allows a precise identification of the factual questions relevant to the expert analysis before the lay witnesses (whose evidence, together with documents and other evidence will presumably establish the relevant facts) are examined.

12.35 Individual approaches may vary, but it is often observed that preparation for the expert conference should not necessarily involve the posing of precise questions because the framing of those questions may involve misconceptions or prejudgments about the nature of the issues to be considered. If, by agreement, the experts can be presented with a list of issues defined at a relatively high level of generality and if they are instructed to add to that list if they feel it necessary, with an overriding instruction to identify all issues upon which they agree and disagree, then there is usually a solid foundation for the free exchange of views between the experts.

12.36 Accordingly, parties should expect that the Court may make directions, either at the first directions hearing or so soon thereafter as the experts are identified, that an expert conference should occur, to be held in the absence of clients and lawyers, with a view to producing a joint report, to be signed by all participants, identifying all matters upon which there is agreement or disagreement, accompanied by short reasons for those views.

G Testing the Evidence – Traditionally, Serially or Concurrently?

12.37 A traditional approach to eliciting expert evidence involves, in broad summary:

(a) asking the expert to address a number of questions;

(b) providing the expert with assumptions upon which to base his or her analysis;

(c) the expert providing (usually after a lengthy process of redrafting and fine tuning) a written report including reports in response to earlier expert reports and reports in reply;

(d) calling the expert, usually at the conclusion of the lay evidence given on behalf of a party, so that in longer cases it may be weeks or months between the times when the two sets of experts (assuming there to be only two parties) give evidence;

(e) the experts being cross examined by counsel for the opposing party, with little intervention from the judge (although usually more so than when a lay witness is being examined), and no intervention by the opposing expert – except, in many cases, by way of whispered instructions to cross examining counsel;

(f) re-examination of the expert by the party calling the expert;

(g) the possibility of limitation on cross-examination to topics not agreed upon in any joint expert report.

12.38 In longer cases, it is inevitable that, by the time the second party's expert is called, not only has the evidence in the case developed, but the detail and impact of the evidence of the first expert has faded.

12.39 Even more importantly, the adversarial atmosphere and techniques associated with the rest of the hearing are present throughout the expert evidence part of the hearing.

12.40 There can be no doubt that for many years there has been growing dissatisfaction, both amongst judges and, perhaps more importantly, amongst experts, with this traditional process of eliciting expert evidence and in particular with traditional cross-examination of experts. The following particular concerns have been identified[106]:

(a) each expert is taken tediously through all his or her contested assumptions and then is asked to make his or her counterpart's assumptions;

(b) considerable court time is absorbed as each expert is cross-examined in turn;

(c) the expert issues can become submerged or blurred in a maze of detail;

(d) the experts feel artificially constrained by having to answer questions that may misconceive or misunderstand their evidence;

(e) the experts feel that their skill, knowledge and, often considerable, professional accomplishments are not accorded appropriate respect or weight;

(f) the Court does not have the opportunity to assess the competing opinions given in circumstances where the experts consider that they are there to assist it – rather experts are concerned, with justification, that the process is being used to twist or discredit their views, or by subtle shifts in questions, to force them to a position that they do not regard as realistic or accurate;

(g) often the evidence is technical and difficult to understand properly; and

(h) juries, judges and tribunals frequently become concerned that an expert is partisan or biased.

12.41 It may be observed that, in practice, a number of these concerns are caused by or at least thrive in the sometimes aggressively adversarial atmosphere of the traditional form. This is not to say that all or any of the concerns listed above necessarily or inevitably arise when traditional techniques are adopted – the judge may deploy a number of strategies to reduce or eliminate them as and when they become apparent. Nevertheless, the increased degree to which a judge must intervene to ensure that outcome sits somewhat uneasily with the maintenance of the traditional form, particularly of cross examination, and some areas of concern will be difficult to address with any amount of judicial intervention.

12.42 One technique which has been adopted with success is for the experts to give evidence serially. The usual steps up to the commencement of the hearing (including the preparation of a joint expert report if that be ordered) are followed, but the expert evidence is then deferred until the end of the case when they are examined and cross-examined one after the other. This approach has a number of advantages including:

(a) the lay evidence has usually closed – and indeed there may well be a direction to that effect – so that the necessary factual foundation can be observed more accurately than is the case when proceeding upon assumptions about evidence which may not come up to scratch;

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106 These concerns, together with the summary of techniques of giving concurrent expert evidence set out below, are taken from "Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues", a paper presented by Justice Rares at the New South Wales Bar Association Continuing Professional Development seminar held on 23 August 2010.

(b) the judge has the opportunity to hear and consider the expert evidence in one segment of the hearing, when the detail and impact of each expert's evidence remains fresh;

(c) the ability to test the evidence in cross-examination is unaffected; and

(d) the step of requiring the experts to confer and produce a report on issues upon which they agree or disagree remains of utility.

12.43 One reason why further efforts have gone into developing techniques beyond serial examination is that this technique does little to resolve the more serious of the concerns listed in paragraph 12.39 above – particularly those produced by the manner in which adversarial techniques tend to or at least may obscure rather than reveal the real positions of the expert. Those efforts have resulted in the rapid growth, particularly in Australian courts and tribunals, which lead the world in this respect, of the concurrent, or "hot tub", technique of eliciting expert evidence.

12.44 It may be acknowledged that some judges and many counsel are, initially at least, dubious about the benefits of concurrent evidence. There are a number of reasons for this, but two important concerns are the potential for evidence given by a number of people at once to develop into an ill-controlled rabble, and the perceived diminution in the role of traditional cross examination in the testing of expert evidence. In practice, it is suggested that, particularly if the exercise is conducted along the lines summarised below, not only is there little reason for these concerns, but it has been observed that the evidence tends to come out in a more focussed way than is usual in traditional techniques and the necessity for aggressive cross-examination (whilst still available) diminishes, particularly because "position taking" seems to reduce.

12.45 The following outline of a typical "hot tub" process is taken from Justice Rares' paper referred to in paragraph 12.40 above, which may be consulted by practitioners for a detailed description of the process and for a guide to further reading. In addition, practitioners should take steps to review "*Concurrent Evidence – New Methods With Experts*", a joint production of the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, in which Justice McClellan (CJ at CL, NSW Supreme Court) presides over a re-enactment of an actual hearing using the technique. The production is available on DVD and on the internet (on the website of the Judicial Commission of NSW) and is a valuable resource for both counsel and experts.

12.46 The process commences in a traditional way with the preparation of expert reports. Even at this stage, concurrent evidence techniques can have a beneficial effect, because if experts know that their views will be subject to a process of live peer review in the witness box, there is less incentive to take extreme positions designed to withstand a less well informed challenge by counsel in cross-examination.

12.47 There should then be a direction for a pre-trial conference between experts to produce a joint report in the manner already described, listing the areas of agreement and disagreement together with a short statement of reasons in each case. Again, lawyers and clients should be excluded from this conference. Although, as suggested above, it may be useful for lawyers to suggest additional issues if they have been missed, it is suggested that it is prudent to direct that the initial report should be signed by the experts before any such suggestions have been made, which can then be adopted if there is agreement. It is of course possible that parties are so at odds that they disagree even on any such additional issues – one solution is then to ask the experts to opine on each party's requested additions.

12.48 Very occasionally, the experts agree on the approach to be adopted, leaving only the differing assumptions to be dealt with. In those circumstances, there is usually no need to call the experts at all, as the assumptions will be established (or not) by witnesses of fact and/or documents in the manner described above.

12.49 Once the joint expert report has been prepared, identifying the issues about which there is a contest, the Court is in a position to consider the making of (if it has not already made) a concurrent evidence direction. This will usually occur at a directions hearing well prior to the hearing. It may be convenient at the same hearing to set the agenda for the concurrent evidence process – although some judges defer this until the actual hearing. The agenda

usually consists of the disputed issues identified in the joint report, together with such other issues as the Court considers relevant, presented in a logical order. At the same hearing, consideration should be given to the physical layout of the Court. If there are, for example, four experts involved, there will usually not be room at or near the witness box for all of the experts. It is prudent to direct, ahead of time, that convenient arrangements be made – often by the provision of a table set up at the end of the bar table, or in the jury box if there is one, for the seating of the experts, ensuring that they have access to such presentational aids as they may require. Some judges like to provide for one microphone to be handed about between experts (to assist in reducing the chance of all speaking at once), but this is a matter of personal preference.

12.50 At the hearing, all experts are called, sworn and take their places. The judge will then give a short overview of the process and what he or she expects to happen. Particular attention should be given to reassuring the experts about their ability to comment on the evidence of others in the ways summarised below.

12.51 The first step is to confirm that the agenda sets out all the issues which the experts wish to address together with such other issues as the parties may have persuaded the Court ought to be the subject of expert evidence. Each of the items in the agenda is then addressed in turn.

12.52 Each expert is asked (by the judge) to identify and explain the issue as they see it. There is no magic in the order of play – if no particular expert wishes to start, the process can go according to party order. Once each expert has finished, the other experts can then comment on what has just been said, to agree, disagree, amplify or whatever. That process continues until all experts have had a chance to state their view on the issue.

12.53 Each expert is free to ask questions of the other experts during this or indeed any other part of the hearing. Although one may fear excessive zeal in connection with this exercise, the process of live peer review seems to reduce both the incidence of extreme "position taking" and the tendency of experts to become advocates. It often occurs that judges intervene to obtain explanation or amplification during this stage of the process. This is not very different from the approach which most judges take to expert evidence in traditional forms of eliciting evidence, but it allows the judge to get input from all the experts on a particular issue at the same time and in the same place.

12.54 This process can continue until the judge is clear in his or her own mind that they have a grasp of what the experts say on each issue. Counsel usually (some with difficulty) stay relatively quiet during this process – although interjections to clarify or correct may well be appropriate. Some judges request counsel, at the outset, to identify the issues upon which they will seek to cross-examine, others simply ask at the conclusion of the initial session whether anyone seeks to ask any questions.

12.55 Approaches will vary from judge to judge, but it is often convenient, once the judge feels they have a grasp of the point, to invite cross examination. This too can be done in party order if there is no agreement to the contrary. Counsel can then ask questions of any of the experts. There is still room for searching and if need be, robust questioning, including questioning as to matters of credit, but there is less room for questions which are artificially constructed or involve the positing of assumptions which are unrealistic, because these defects will quickly be revealed in the exchanges between the experts or between the experts and the judge, which are likely to follow such questioning. Counsel will need to become more flexible in their cross-examination techniques. It is suggested that this is no bad thing, as whole new techniques of cross-examination will now become common. For example, to engage the process of live peer review, if an unfavourable answer is obtained to a particular question, counsel can (if they are brave enough) ask other experts immediately whether or not they agree.

12.56 It is possible that the apparent reduction in the number of opportunities to take forensic advantage of expert witnesses is one reason for the reluctance of some to embrace concurrent evidence – but it is suggested that such a reason does not carry much weight.

12.57 Other counsel may then follow, asking questions of their own and other experts. The judge can continue to ask questions as and when he or she thinks fit. Some judges like to "wrap up" on an issue, with a request that any misconceptions be cleared up then and there.

12.58 Each of the issues in the agenda is dealt with in the same way. Once all of the issues have been dealt with, it is common to ask whether any outstanding matters have come up during the session which any expert wishes to comment upon.

12.59 Quite apart from the effect on the sorts of concerns outlined in paragraph 12.40 above, it has already been observed that technique of concurrent evidence can save a great deal of time and accordingly expense, because it has been found that the expert evidence is concluded much more quickly than is the case with traditional techniques.

H Survey Evidence

12.60 Parties should not be put to the expense of commissioning and carrying out surveys only to find out at the hearing that the survey is inadmissible or unpersuasive. The risk of this happening is reduced if parties take care to adopt the practice set out in Practice Note CM 13, which sets out the steps that the Court expects will be followed in this connection. In particular, CM 13 provides as follows:

> *"1. Notice should be given in writing by the party seeking to have the survey conducted to the other parties to the proceeding.*
> *2. The notice should give an outline of:*
> *a. the purpose of the proposed survey;*
> *b. the issue to which it is to be directed;*
> *c. the proposed form and methodology;*
> *d. the particular questions that will be asked;*
> *e. the introductory statements or instructions that will be given to the persons conducting the survey;*
> *f. other controls to be used in the interrogation process.*
> *3. The parties should attempt to resolve any disagreement concerning the manner in which the survey is to be conducted and any of the matters mentioned in 2 above.*
> *4. The matter of the survey should be raised with the Court at the directions hearing as soon as possible after the steps mentioned above have been taken."*

I Other Matters

12.61 Parties should ensure that they have particular regard to the requirements of O 33 r 20 of the Old FCR[107], as to the form of the expert report and Practice Note CM 7 as to the obligations of the expert and the form of their evidence. It is unnecessary to set out the content of these matters here.

[107] Rule 23.02, 23.13 FCR.

APPENDIX A - EXAMPLE CONFIDENTIALITY REGIME

EXAMPLE CONFIDENTIALITY ORDERS

THE COURT ORDERS THAT:

1. Until further order of the Court, each of the Documents, Affidavits and Exhibits (and parts thereof) identified in annexure "A" ("**Confidential Material**") be kept confidential and not be provided or disclosed to any person except as indicated in Order 2.
2. Access to the Confidential Material is granted only to the following persons for the sole purpose of the conduct of these proceedings:
   2.1 the solicitors and counsel (including their relevant office staff) engaged by the parties for the purpose of the conduct of the proceeding;
   2.2 representatives of the parties who are involved in the conduct of the proceeding; and
   2.3 representatives of the Respondent who have access to the information contained in the Documents, Affidavits and Exhibits (and parts thereof) identified in annexure "A" as part of the usual course of their employment with the Respondent.
3. Prior to receiving Confidential Material the persons identified in Order 2 (a) and (b) above are to sign an undertaking in the form of annexure "B" which must be served on the [Plaintiff or Defendant] prior to the Confidential Material being provided to that person.
4. Orders 1 and 2 do not restrict access to the Confidential Material to the Court and staff of the Court.
5. The Confidential Material must be endorsed with a prominent stamp or watermark indicating that the documents are subject to a Federal Court confidentiality order and kept in safe custody by the Associate to the Honourable Justice [insert name of judge] and not made available to any person for inspection other than those persons referred to in Order 2 or other staff of the Court.
6. In the event that either party wishes to show any part of the Confidential Material to any witness during the giving of evidence at the hearing of the proceeding, then that witness must be told of this order and ordered to comply with its terms.

EXAMPLE CONFIDENTIALITY UNDERTAKING

I, of undertake to [Disclosing Party] and the Federal Court, in respect of all documents filed or produced in these proceedings over which a claim for confidentiality is made by [Disclosing Party] and which are marked as confidential (**Confidential Documents**) and in relation to the information identified as confidential in the Confidential Documents (**Confidential Information**) (such Confidential Documents and Confidential Information are listed in **Schedule 1** to this undertaking) that:

1 Subject to the terms of this undertaking, I will keep the Confidential Documents and the Confidential Information confidential at all times.

2. I will not use the Confidential Documents or the Confidential Information or any part of either of them, for any purpose other than the sole purpose of the conduct of Federal Court proceedings [insert proceedings number], and any proceedings which are joined to, or to be heard with, these proceedings (the **Proceedings**), except with [Disclosing Party]'s prior written approval.

3. Subject to clause 4 below, the Confidential Documents and the Confidential Information and any part of either of them will not be disclosed by me either directly or indirectly to any person, including other witnesses in the Proceedings unless:

(a) such disclosure is expressly authorised by the Federal Court or [Disclosing Party];

(b) such part of the Confidential Documents or Confidential Information is already known to [Party giving undertaking] otherwise than in contravention of this or a similar confidentiality undertaking;

(c) such part of the Confidential Documents or Confidential Information is already generally and publicly available otherwise than in contravention of this or a similar confidentiality undertaking; or

(d) such disclosure is required by law (and then only to the extent that, and to the persons, required by law and in accordance with clause 6).

4. The Confidential Documents and the Confidential Information may be disclosed by me to:

(a) any Judge of the Federal Court of Australia and his or her staff in connection with the Proceedings;

(b) [Disclosing Party], its staff, consultants and legal advisers; and

(c) any one or more of the following persons:

(i) [name solicitors for the party giving the undertaking] providing that they signed an undertaking in terms substantively identical to this undertaking;

(ii) [name relevant in house counsel of the party giving the undertaking] providing that they signed an undertaking in terms substantively identical to this undertaking;

(iii) [name counsel of party giving the undertaking] providing that they signed an undertaking in terms substantively identical to this undertaking; and

(iv) any other person specifically approved by [Disclosing Party] in writing and who has signed an undertaking in terms substantively identical to this undertaking;

(v) a secretary or legal assistant employed by [solicitors and counsel for the party giving the undertaking] for the sole purpose of providing clerical or administrative assistance to the persons listed in paragraphs (i) to (iv) in relation to the Proceedings.

5 If I disclose the Confidential Documents or the Confidential Information to any of the persons listed in clause 4(c) above, I will use my best endeavours to protect the confidentiality of the Confidential Documents and the Confidential Information and ensure that the confidentiality is maintained.

6 If I am required by law to disclose any Confidential Documents or Confidential Information

to a third person, I agree that before doing so I will, to the extent permitted by law:

(a) notify [Disclosing Party];

(b) give [Disclosing Party] a reasonable opportunity to take any steps that it considers necessary to protect the confidentiality of that information; and

(c) notify the third person that the information is confidential information of [Disclosing Party] and must be kept confidential.

7 I will:

(a) promptly notify [Disclosing Party] of, and will take all reasonable steps to prevent or stop, any breach of confidentiality in relation to the Confidential Documents or the Confidential Information; and

(b) provide all assistance which is reasonably requested by [Disclosing Party] in relation to any proceedings which that person may take against any person for

unauthorised use of disclosure of the Confidential Documents or Confidential Information.

8 If the Confidential Documents or the Confidential Information, or any part of them, are to be referred to or otherwise used in the Proceedings, I will take all reasonable steps within my power to ensure that such Confidential Documents or Confidential Information are not disclosed openly in Court and are only used or reproduced as part of a confidential submission.

9 Upon the conclusion of the Proceedings, or my ceasing to have any involvement in the Proceedings, I will:

(a) at the election of [Disclosing Party] return to [Disclosing Party] or destroy paper copies of the Confidential Documents;

(b) destroy or remove any references to the Confidential Information in any documents created and held by me;

(c) take whatever reasonable steps are specified by [Disclosing Party] to prevent access to, or recovery or retrieval of:

(i) any electronic copies of the Confidential Documents held by my or under my control; and

(ii) any references to the Confidential Information in any documents created and held by me or under my control.

Schedule 1

[*List or otherwise identify confidential documents*]