



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 45

REFORMING THE RULES OF
GENERAL DISCOVERY

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

These should be forwarded to the Law Commission
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Preface

WITH THE CONCURRENCE of the Rules Committee (which in this matter is the legislator), the Law Commission is examining the law of general discovery. In the preparation of this discussion paper the Committee has been consulted, but it is the Commission's paper. We would be most grateful for submissions on this paper by 30 November 2001. The Commissioner having the carriage of the project is DF Dugdale. The researcher on this stage of the project is Kerry Davis.

1

The existing law

INTRODUCTION

1 ANY PARTY WHO HAS filed a pleading in a civil proceeding is entitled, under rules 293 and 298 of the High Court Rules, to compel any other party to provide a list of all the documents “relating to any matter in question in the proceeding” which are or have been in the possession, custody, or power of the party making the list. Coupled with that entitlement is a right to inspect and procure copies of any of the documents currently in the possession, custody or power of the party making the list and which are not protected by privilege.¹ There are corresponding provisions in the District Court Rules.² The precise term for this procedural process is “general discovery”.³ Where the obligation is to list not *all* documents but only those in specified categories the technical term is “particular discovery”.

2 This is an approach alien to civil law jurisdictions. The contrast between jurisdictions based on civil law and those based on common law may be seen as a corollary of the common law court’s lack of inquisitorial powers. But if justice is to depend on such evidence as the parties put before the court, the rules need to ensure that the parties, in conducting their cases, have access to the documentary evidence controlled by the opposing party. The difference in approach can lead to genuine difficulty in seeking agreement on procedure in arbitrations between parties represented by lawyers in different jurisdictions.

HISTORY

3 Discovery was an invention of equity. In a culture of what would today be described as trial by ambush, the litigant at common law although entitled to particularised pleadings could obtain discovery of unpleaded documents only by seeking a bill of discovery in separate Chancery proceedings.⁴ Statutory provisions in the mid-nineteenth century improved the position a little by conferring on the common law courts some powers to order limited discovery. It was not, however, until the

¹ High Court Rules, rules 306 and 309.

² District Court Rules 1992, rules 315, 319, 328 and 331. In this paper we will not make further separate reference to the District Court Rules which largely follow those of the High Court.

³ The term “discovery” can be used to embrace such other pre-trial devices to extract information or admissions from an opposing party as interrogatories and (in North American jurisdictions) deposition hearings, but its meaning is confined in this paper to discovery of documents.

⁴ A procedure invoked to obtain third party discovery in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

Judicature Acts of 1873 and 1875 and the Supreme Court Rules made thereunder that general discovery was made available in all divisions of the English High Court.⁵

THE SCOPE OF GENERAL DISCOVERY

- 4 The words quoted in paragraph 1 “relating to any matter in question in the proceedings” are the traditional words descended from the expression “relating to any matter in question in the action” employed in Order XXXI rule 12 of the English Supreme Court Rules 1875. This rule was copied in New Zealand by rule 161 of the Code of Civil Procedure annexed as the Second Schedule to the Supreme Court Act 1882. Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Co* said of this formula in words frequently quoted since:

We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, “a document relating to any matter in question in the action”. I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action; and the practice with regard to insurance cases shews, that the Court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause.

The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly”, because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ...⁶

In some imprecisely defined circumstances, the obligation will extend to documents evidencing similar fact situations from which inferences as to systems might be drawn.⁷

THE REQUIREMENT TO LIST ONLY WHAT IS IN ISSUE

- 5 The significance of the words “in question” in the excerpt from the Rules quoted in paragraph 1 should not be overlooked. There is no obligation to list documents relating to matters which are not in issue:

I now turn to the pleadings to determine what are the matters at issue between the parties, because discovery is a procedure directed towards obtaining a proper

⁵ Jack IH Jacob *The Fabric of English Civil Justice* (Stevens & Sons Ltd, London, 1987) 93; 13 *Halsbury's Laws of England* (4 ed) para 1, n 3.

⁶ (1882) 11 QBD 55, 62–63.

⁷ *McGechan on Procedure* (Brooker's, Wellington, 1988) para HR 293.08(3); *Laws NZ Discovery* para 35.

examination and determination of these issues – not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of inquiry which would, either advance a party's own case or damage that of his adversary.⁸

A “fishing expedition” is the metaphor commonly employed to describe (and should in its use be confined to) endeavours by a party to ascertain facts on which to base a claim or defence *additional to the claim or defence pleaded*.⁹ A matter is not in question if it is either pleaded and admitted or not pleaded at all: “The pleadings both identify and limit the issue in the case”.¹⁰ So, for example, where the issue is one of interpretation of a contract only those documents surrounding the creation of the contract, which under current doctrine are relevant to its construction, are discoverable.¹¹ It is because the pleadings define the extent of the list-maker's obligation that discovery may not be required without the assistance of the Court before the pleadings are complete. This is also why in the ordinary case, claim and defence should be properly particularised before discovery is ordered. (As an exception to this, discovery, usually only particular discovery, may be ordered when without it a party is unable to specify an allegation made in general terms.)¹²

RELIEF AGAINST OPPRESSIVE DISCOVERY

- 6 To prevent unnecessary discovery, under rule 295 of the High Court Rules, the Court may in its discretion order that a party from whom general discovery has been required under rule 294 shall not be required to provide it. Alternatively, the Court may substitute a requirement of particular discovery. One ground for such an order is that compliance would be oppressive. One type of oppression relevant to the subject matter of this paper is where the cost of providing discovery is disproportionate to the likely assistance to the case of the party seeking discovery. In practice, it is likely to be possible for the party resisting discovery to establish this class of oppression only where the discovery sought relates to similar facts stretching back over a long period of time.¹³ Rule 295 applications are not

⁸ *Mulley v Manifold* (1959) 103 CLR 341, 345 per Menzies J.

⁹ A point not properly understood by those Judges who assert that all discovery involves an element of fishing (see for example Barker J in *T D Haulage Ltd v New Zealand Railways Corporation* (1986) 1 PRNZ 668, 673 and Giles J in *M v L* [1997] 3 NZLR 424, 442). See the definition in *Black's Law Dictionary* (6 ed, West Publishing Co, St Paul, Minnesota, 1990) 637 “Using the courts to find out information beyond the fair scope of the lawsuit. The loose, vague, unfocused questioning of a witness or the overly broad use of the discovery process. Discovery sought on general, loose, and vague allegations, or on suspicion, surmise, or vague guesses”.

¹⁰ *New Zealand Rail Ltd v Port Marlborough NZ Ltd* [1993] 2 NZLR 611, 644 (CA) Richardson J.

¹¹ *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* (1994) 8 PRNZ 69, 71–72; *Attorney-General v Shell (Petroleum Mining) Co Ltd* (1994) 8 PRNZ 135, 143.

¹² *McGechan on Procedure*, above n 7, para HR 297.11.

¹³ *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 190; *Christchurch City Council v Christchurch Gas Ltd* (1988) 2 PRNZ 609; *Mao-Che v Armstrong Murray* (1992) 6 PRNZ 371.

fashionable or common. The same philosophy underlies the power of the Court under rule 312 to decline an order for general discovery where the party resisting discovery satisfies the Court that such an order would not be necessary.¹⁴

¹⁴ *McGechan on Procedure*, above n 7, paras HR 312.04–312.07.

2

Current practice

THE ABSENCE OF EMPIRICAL EVIDENCE

- 7 **I**N THIS PART of our discussion, we are reliant on the generally accepted beliefs held by legal practitioners as to how the rules of discovery work in practice, as no sound empirical evidence exists. It would be possible for us to recommend some sort of poll or survey, but we have not done so. One reason is that in New Zealand the number of lawyers practising at all extensively in the field of civil litigation is sufficiently small for knowledge of the workings of a widely employed procedural process to be general. A second is that the only antipodean survey of which we are aware, one conducted by the Australian Institute of Judicial Administration Incorporated, seems to have run up against practitioner opposition or apathy and its results do not inspire confidence.¹⁵ We are not certain that a New Zealand survey would do any better. And thirdly, this is no more than a discussion paper and if we have our facts wrong no doubt we will be told in submissions that this is so. We agree with the robust approach of the Law Reform Commission of Western Australia which on this subject has taken the stand that the absence of empirical evidence “does not mean that one ought not contemplate reform and the benefits that might confer”.¹⁶

ARE DISCOVERY OBLIGATIONS HONESTLY COMPLIED WITH?

- 8 A nineteenth century Master of the Rolls described the obligations of parties required to make discovery in these terms:

However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question.¹⁷

¹⁵ *The Use of Discovery and Interrogatories in Civil Litigation* (The Australian Institute of Judicial Administration, Carlton South, Victoria, 1990). For example, although before the survey its author believed (surely correctly) that “an affidavit of documents may extend to several hundred pages and enumerate several thousand documents” (BC Cairns “An Evaluation of the Function of and Practice of Discovery” (1987) 61 ALJ 78, 79), the cost of preparing an affidavit is recorded in the results of the survey as ranging in Queensland commercial cases from \$60–\$2000 and in New South Wales to be “less than a \$1000, a few exceeded this figure” (p 51) and the number of documents listed in those two categories ranged from 12–498 in the case of Queensland and from 13–999 in the case of New South Wales (pp 41–42).

¹⁶ Law Reform Commission of Western Australia *Review of the Criminal and Civil Justice System in Western Australia: Consultation Drafts Volume 1* (Perth, 1999) 378; and see Final Report (1999) para 13.7.

¹⁷ *Flight v Robinson* 1844 (8) Beav 22, 34; 50 ER 9, 13.

It is no doubt remarkable that litigants should be required to disclose documentary smoking guns and that they in practice comply with this requirement. Often no doubt they do so only on the insistence of their solicitors.¹⁸ Although withholding discovery is hard to detect, the received but perhaps over-sanguine view is that generally speaking there is honest compliance. If anything, solicitors are over-assiduous in the performance of their obligations. And of course if there is in fact a smoking gun, an efficient way of concealing it while still complying with the rules is to bury it under a mountain of other documents in the hope that it will be overlooked.

- 9 There is general acceptance that whatever may be written in the relevant procedural code, the functioning of discovery rules is highly dependent on the culture prevailing among legal practitioners and judicial officers in any particular jurisdiction. This, as mentioned in paragraph 2, can be a problem where there is a complete absence of any such culture:

The right is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted “cards face up on the table”. Some people from other lands regard this as incomprehensible. “Why”, they ask, should I be expected to provide my opponent with the means of defeating me? The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have *all* the relevant information, it cannot achieve this object.¹⁹

We are told by the leading English text on commercial arbitration that:

This means, in practice, that an order for discovery will often be useless unless the parties are represented by English solicitors. Many foreigners view with incredulity a system which requires them to produce (for example) documents passing within their own organisation, which were never intended for general distribution; and they point out with justice that the possibility of disclosure must serve to inhibit their freedom to express themselves frankly in writing. This can have the practical consequence that unless an experienced English lawyer is at hand, full discovery may be withheld.²⁰

We need to keep this consideration in mind when we seek to draw conclusions from arbitration practice.

¹⁸ Who in this context are subject to disciplinary sanctions. A solicitor must be personally satisfied with the adequacy of the list of documents (*Woods v Martins Bank Ltd* [1959] 1 QB 55, 60):

The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter; and if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. (*Myers v Elman* [1940] AC 282, 292 per Viscount Maugham.)

For a more discursive statement of the duty of solicitors to make their clients toe the line, see *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 2 All ER 98, 99.

¹⁹ *Davies v Eli Lilly & Co* [1987] 1 All ER 801, 804 per Sir John Donaldson MR.

²⁰ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2 ed, Butterworths, London and Edinburgh, 1989) 325.

HOW USEFUL IS GENERAL DISCOVERY?

- 10 Sir Jack IH Jacob, whose lifetime speciality was civil procedure, in his Hamlyn Lecture said this:

The process of discovery operates as a powerful procedural instrument to produce fairness, openness and equality in the machinery of English civil justice. It enables each party to be informed or to be capable of becoming informed of all the relevant material evidence, whether in the possession of the opposite party or not; it ensures that as far as possible there should be no surprises before or at the trial; it reveals to the parties the strength or weakness of their respective cases, and so produces procedural equality between them; and it encourages fair and favourable settlements, shortens the lengths of trials and saves costs.²¹

But such panegyrics aside, if general discovery is not available as of right, what in practical terms is the risk of valuable evidence not coming to light as a consequence? A right to seek particular discovery is likely to be of no use to a party who neither knows of nor suspects the existence of the crucial document. There is only anecdote to rely on. In a collection of essays published in 1995 David Mackie the head of litigation of Allen & Overy, the London solicitors, wrote:

I therefore conducted a survey, by questionnaire, of the experiences of 45 solicitors in my firm's litigation department, drawn from all levels of age and experience (from newly qualified solicitors to partners), to produce a view of the value of discovery in commercial litigation. . . . In 17 of the 86 cases considered in our survey, the initial discovery process yielded significant documents which solicitors believed would not have otherwise come to light. These documents were significant in that they made a difference to the outcome or the way in which the case was put. In 69 cases discovery yielded nothing useful.²²

This sounds about right, but New Zealand legal practitioners and former practitioners reading this paper will no doubt have their own war stories.

THE COST OF GENERAL DISCOVERY

- 11 General discovery requires the compilation of a list of documents by one party (which dispiriting task involves culling the discoverable from the irrelevant and assigning a description to documents in the former category) and inspection by the other. The cost includes the time of the parties (meaning in the case of corporations, their executives and other employees) and the time (for which the client pays) of the solicitors involved in the process. It is sufficient for present purposes to note that in large commercial and intellectual property cases, the number of documents requiring consideration can be huge, the time required can run into months, and the cost to the parties of the whole process can be enormous. Lord Woolf has summed up the position in these words:

The result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read,

²¹ Jack IH Jacob, above n 5, 94.

²² David Mackie "Discovery in Commercial Litigation" in AAS Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on "Access to Justice"* (Clarendon Press, Oxford, 1995) 137, 139.

against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.²³

²³ Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London, 1995) 167.

3

The mischief and approaches to reform

THE MISCHIEF

- 12 THE FIRST PURPOSE of the discovery rules is to avoid ambush. In New Zealand that matter is taken care of by the provisions of rule 305 prohibiting reliance at trial on an undisclosed document. The second purpose may be stated in different ways, but essentially it is to ensure that a document that might affect the outcome of proceedings and that is or has been in the possession or control of one party should be available to the other party or parties. The mischief suggested, and to the discussion of which this paper is directed, is that under the existing procedural rules the cost of achieving this purpose can be disproportionate to the benefit. A connected problem is the ability of a defendant bent on either exhausting a plaintiff's war chest or obstructing proceedings for some other purpose to achieve these ends by making contrived and inordinate discovery demands.

THE APPROACH TO REFORM

- 13 There is a spectrum of possibilities for rules governing discovery. At one extreme there is no discovery (as in civil law jurisdictions) or minimal discovery (as in the arbitration codes discussed) and at the other, an entitlement as of right to general discovery of *Peruvian Guano* width. Current New Zealand law very nearly approaches this latter extreme, falling short only to the extent of the oppression exception.²⁴ The question for the reformer is whether this should be changed and if so in what way?

A COST-EFFECTIVE APPROACH

- 14 In most contemporary civil litigation, the parties seek either to gain an economic advantage or to avoid an economic disadvantage. The law should not impose or permit procedures that result in expense or delay disproportionate to what is at stake. A compromise has to be struck between perfection and cost. This is the rationale for summary judgment and other fast-track procedures.²⁵ It is the approach favoured by litigants themselves when allowed to make the relevant decision. It can be only rarely that a client will insist that senior counsel be

²⁴ Discussed in para 6.

²⁵ AAS Zuckerman "Quality and Economy in Civil Procedure" (1994) *Oxford J Legal Stud* 353; "A Reform of Civil Procedure – Rationing Procedure rather than Access to Justice" (1995) *22 Journal of Law and Society* 155. For a dauntingly recondite law and economics analysis see RA Posner "An Economic Approach to Legal Procedure and Judicial Administration" (1973) *2 J Legal Stud* 399.

retained to contest liability for a parking violation. A more prosaic example is to be found in the rules of the various organisations that exist to conduct commercial arbitrations. These rules (while they sometimes give the arbitrator power to determine procedure so that discovery remains theoretically possible) commonly require exchange of documents intended to be relied on but otherwise make no provision for discovery at all.²⁶ These codes, particularly those where there is an international element, are no doubt influenced by the hostility in non-common-law countries to the concept of discovery.²⁷ But the more important reason is that the absence of a discovery requirement contributes to the speed and cost efficiency of the arbitration process; so the codes provide a valuable guide to what the commercial community itself believes is necessary for effective dispute resolution.²⁸ The consideration that there needs to be some relation between cost and the amount at stake is particularly important under the current New Zealand practice of having virtually identical rules in both the High Court and the District Courts. In the latter, the amount being fought over can be so small as to make general discovery an absurd luxury.

²⁶ For example Article 3 of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration provide only for discovery of documents to be relied on plus a procedure roughly equivalent to particular discovery. The Rules of the London Court of International Arbitration are to the same effect (Article 15.6 and 22.1(e)). There is no reference to discovery in the ICC Rules. (See the discussion in Y Derains and EA Schwartz *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International, The Hague/London/Boston, 1998) 261.) Under the UNICTRAL Rules there is presumption that the parties have agreed to empower the arbitral tribunal to order discovery (2nd Schedule, Article 3(f)).

²⁷ We have touched on this matter in paras 2 and 9.

²⁸ There is a precedent for the courts adopting arbitration procedural practice in the rule permitting judgment to be expressed in a foreign currency established by *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 463.

4

Comparative material

INTRODUCTION

- 15 **I**N THIS CHAPTER we discuss changes recently made or contemplated in other jurisdictions, consideration of which we believe is of most assistance to our discussion of discovery.

QUEENSLAND

- 16 As from 1 May 1994 there were adopted in Queensland new rules now to be found in Chapter 7 of Part I of the Queensland Uniform Civil Procedure Rules 1999.²⁹ They are concerned with what was once called discovery but is in those rules rechristened “disclosure”.

- 17 Rule 211 carves down the width of the *Peruvian Guano* test and usefully spells out what is meant by “in issue”:

- 211.(1) A party to a proceeding has a duty to disclose to each other party each document—
- (a) in the possession or under the control of the first party; and
 - (b) directly relevant to an allegation in issue in the pleadings; and
 - (c) if there are no pleadings—directly relevant to a matter in issue in the proceeding.
- (2) The duty of disclosure continues until the proceeding is decided.
- (3) An allegation remains in issue until it is admitted, withdrawn, struck out or otherwise disposed of.

- 18 Rule 212(1)(b) usefully clarifies that documents relevant only to credit do not need to be discovered. Rule 212(1)(c) removes the obligation to discover identical copies. Rule 212(2) makes a policy change irrelevant to the current discussion:

- 212.(1) The duty of disclosure does not apply to the following documents—
- (a) document in relation to which there is a valid claim to privilege from disclosure;
 - (b) a document relevant only to credit;
 - (c) an additional copy of a document already disclosed, if it is reasonable to suppose the additional copy contains no change, obliteration or other mark or feature likely to affect the outcome of the proceeding.

²⁹ There is a discussion of the rationale for the new rules in GL Davies and SA Sheldon “Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale” (1993) 3 J Jud Admin 111, 117, and GL Davies “A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale” (1996) 5 J Jud Admin 201, 213.

- (2) A document consisting of a statement or report of an expert is not privileged from disclosure.

19 Rule 217 may be thought useful in requiring disclosure of documents in a user-friendly fashion rather than lumped together in an unsorted haystack:

... by offloading an avalanche of unsorted files on the party demanding discovery, hoping that the searcher will be so exhausted that the damaging items will be overlooked or never reached.³⁰

as Ipp J of the Supreme Court of Western Australia once described it.

217.(1) This rule applies if a party discloses documents by producing them.

- (2) The documents must be—
 - (a) contained together and arranged in a way making the documents easily accessible to, and capable of convenient inspection by, the party to whom the documents are produced; and
 - (b) identified in a way enabling particular documents to be retrieved easily on later occasions.
- (3) The party producing the documents must—
 - (a) provide facilities (including mechanical and computerised facilities) for the inspection and copying of the documents; and
 - (b) make available a person who is able to explain the way the documents are arranged and help locate and identify particular documents or classes of documents; and
 - (c) provide a list of the documents for which the party claims privilege.
- (4) The arrangement of the documents when in use—
 - (a) must not be disturbed more than is necessary to achieve substantial compliance with subrule (2); and
 - (b) if the party to whom the documents are produced for inspection so requires—must not be disturbed at all.
- (5) For subrule (2), the documents may—
 - (a) be contained by files, folders or in another way; and
 - (b) be arranged—
 - (i) according to topic, class, category or allegation in issue; or
 - (ii) by an order or sequence; or
 - (iii) in another way; and
 - (c) be identified by a number, description or another way.
- (6) The person made available under subrule (3)(b) must, if required by the person inspecting the documents—
 - (a) explain to the person the way the documents are arranged; and
 - (b) help the person locate and identify particular documents or classes of documents.

NEW SOUTH WALES

20 Part 23 of the New South Wales Supreme Court Rules was significantly amended in July 1996.

21 Rule 23.2 provides for limited discovery as of right:

23.2.(1) A party (party A) may by notice served on another party (party B) require party B to produce for the inspection of party A:

³⁰ DA Ipp “Reforms to the Adversarial Process in Civil Litigation – Part II” (1995) 69 ALJ 790, 793.

- (a) any document (other than a privileged document) referred to in any originating process, pleading, affidavit or witness statement filed or served by party B;
- (b) any other specific document (other than a privileged document) clearly identified in the notice, relevant to a fact in issue.
- (2) The maximum number of documents which party A may require party B to produce in reliance on subrule (1) (b), whether by one or more notices, is 50.
- (3) Party B, upon being served with a notice under subrule (1), shall within a reasonable time:
 - (a) produce for the inspection of party A such of the documents as are in the possession, custody or power of party B;
 - (b) in respect of any document which is not produced, serve on party A a notice stating in whose possession the document is, to the best of the knowledge, information and belief of party B, or that party B has no knowledge, information or belief as to that matter.
- (4) A notice under subrule (1) may specify a time for production of all or any of the documents required to be produced. If the time specified is 14 days or longer after service of the notice it is to be taken to be a reasonable time for the purpose of subrule (3) unless the contrary is shown. If the time specified is less than 14 days after service of the notice it is to be taken to be less than a reasonable time unless the contrary is shown.

22 Rule 23.3 provides for court-ordered specific discovery:

- 23.3.(1) The Court may, on the application of a party or of its own motion, order that any party (party B) give discovery to any other party (party A) or parties (each of which is included in the expression “party A”) of:
 - (a) documents within a class or classes specified in the order;
 - (b) one or more samples (selected in such manner as the Court may specify) of documents within such a class.
- (2) A class of documents shall not be specified in more general terms than the Court considers to be justified in the circumstances.
- (3) Subject to subrule (2), a class of documents may be specified:
 - (a) by relevance to one or more facts in issue;
 - (b) by description of the nature of the documents and the period within which they were brought into existence;
 - (c) in such other manner as the Court considers appropriate in the circumstances.
- (4) The effect of an order for discovery under subrule (1) is that the parties involved are required to comply with the succeeding provisions of this rule.
- (5) Party B must, within 28 days of the order being made (or of notice of the order being received by party B, if party B was not present or represented when the order was made) or such other period as the Court may specify, serve on party A:
 - (a) a list, complying with subrule (6), of all the documents or samples specified in the order (other than excluded documents) which:
 - (i) are in the possession, custody or power of party B; or
 - (ii) are not, but were later than 6 months prior to the commencement of the proceedings, in the possession, custody or power of party B;
 - (b) an affidavit made in accordance with subrule (7) stating:
 - (i) that the deponent has made reasonable enquiries and:
 - (A) believes that there are no documents (other than excluded documents) falling within any of the classes specified in the order which are, or were later than 6 months prior to the commencement of the proceedings, in the possession,

- custody or power of party B other than those referred to in the list of documents;
- (B) believes that the documents in part 1 of the list are within the possession, custody or power of party B;
- (C) believes that the documents in part 2 of the list are within the possession or power of the persons (if any) respectively specified in that part;
- (D) as to any document in part 2 in respect of which no such person is specified, that the deponent has no belief as to whose possession or power the document is in; and
- (ii) in respect of any document which are claimed to be privileged documents, the facts relied on as establishing the existence of the privilege; and
- (c) where party B is represented by a solicitor, a certificate by that solicitor stating:
 - (i) that the solicitor has advised party B as to the obligations arising under an order for discovery (and where party B is a corporation, which officers of party B have been so advised); and
 - (ii) that the solicitor is not aware of any documents within any of the classes specified in the order (other than excluded documents) which are, or were later than 6 months prior to the commencement of the proceedings, in the possession, custody or power of party B, other than those referred to in the list of documents.

23 Rule 23.3(9) and (10) make provision for facilitating inspection:

- (9) Party B shall ensure that the documents described in part 1 of the list (other than privileged documents) are:
 - (a) at the time the list of documents is served on party A and for a reasonable time thereafter, physically kept and arranged in a way that makes the documents readily accessible, and capable of convenient inspection by party A; and
 - (b) at the time the list of documents is served on party A and until completion of the trial of the proceedings, identified in a way that enables particular documents to be readily retrieved.
- (10) Within 21 days after service of the list of documents, or within such other period or at such other times as the Court may specify, party B shall, on request by party A:
 - (a) produce for inspection by party A the documents described in part 1 of the list (other than privileged documents);
 - (b) make available a person who is able to, and does on request by party A, explain the way the documents are arranged and assist in locating and identifying particular documents or classes of documents;
 - (c) provide facilities of the inspection and copying of such of the documents (other than privileged documents) as are not capable of being copied by photocopying;
 - (d) subject to an undertaking being given by the solicitor for party A to pay the reasonable costs thereof (or if party A has no solicitor, subject to party A providing to party B an amount not less than a reasonable estimate of the reasonable costs of the use thereof), provide photocopies of, or photocopying facilities for the copying of, such of the documents as are capable of being copied by photocopying.

24 The obligation under rule 23.3 to list documents does not extend to “excluded documents” defined in rule 23.1(b) as follows:

- (b) “excluded documents” means in relation to proceedings, subject to any order of the Court to the contrary:
 - (i) any document filed in the proceedings and any copy thereof;
 - (ii) any document served on party A (as described in rule 3 (1)) after the commencement of the proceedings and any copy thereof;
 - (iii) any document which wholly came into existence after the commencement of the proceedings;
 - (iv) any additional copy of a document included in a list of documents under rule 3 (5), which contains no mark, deletion or other matter, relevant to a fact in issue, not present in the document so included; and
 - (v) any document comprising an original written communication sent by party B prior to the date of commencement of the proceedings of which a copy is included in a list of documents under rule 3 (5);

25 There is in rule 23.1(d) a definition of relevance as follows:

- (d) a document or matter is to be taken to be relevant to a fact in issue if it could, or contains material which could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.

AUSTRALIAN FEDERAL COURT

26 Order 15 rule 2 narrows the scope of what must be discovered by way of general discovery:³¹

Discovery on notice

- (1) A party required to give discovery must do so within the time specified in the notice of discovery (not being less than 14 days after service of the notice of discovery on the party), or within such time as the Court or a Judge directs.
- (2) A party must give discovery by filing and serving:
 - (a) a list of documents required to be disclosed; and
 - (b) an affidavit verifying the list.
- (3) Without limiting rule 3 or 7, the documents required to be disclosed are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given:
 - (a) documents on which the party relies; and
 - (b) documents that adversely affect the party’s own case; and
 - (c) documents that adversely affect another party’s case; and
 - (d) documents that support another party’s case; and
 - (e) documents that the party is required by a relevant practice direction to disclose.
- (4) However, a document is not required to be disclosed if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given.

³¹ There is a discussion by the Australian Law Reform Commission of the functioning of the Federal Rules in *Managing Justice: A Review of the Federal Civil Justice System* (ALRC No 89, Australian Law Reform Commission, Sydney, 1999) 416–418.

- (5) In making a reasonable search for subrule (3), a party may take into account:
 - (a) the nature and complexity of the proceedings; and
 - (b) the number of documents involved; and
 - (c) the ease and cost of retrieving a document; and
 - (d) the significance of any document likely to be found; and
 - (e) any other relevant matter.
- (6) If the party does not search for a category or class of document, the party must include in the list of documents a statement of the category or class of document not searched for and the reason why.

27 In addition Order 15 rule 3 empowers the Court to prevent “unnecessary discovery”:

Limitation of discovery on notice

- (1) The Court may, before or after any party has been required under rule 1 to give discovery, order that discovery under rule 2 by any party shall not be required or shall be limited to such documents or classes of documents, or to such of the matters in question in the proceeding, as may be specified in the order.
- (2) The Court shall, on application, make such orders under subrule (1) as are necessary to prevent unnecessary discovery

The prevailing culture is best understood by reference to the terms of Practice Note No.14 issued on 3 December 1999:

1. Practitioners should expect that, with a view to eliminating or reducing the burden of discovery, the Court:
 - a. will not order general discovery as a matter of course, even where a consent direction to that effect is submitted;
 - b. will mould any order for discovery to suit the facts of a particular case; and
 - c. will expect the following questions to be answered:
 - i. is discovery necessary at all, and if so for what purposes?
 - ii. can those purposes be achieved:
 - by a means less expensive than discovery?
 - by discovery only in relation to particular issues?
 - by discovery (at least in the first instance – see (iii)) only of defined categories of documents?
 - iii. particularly in cases where there are many documents, should discovery be given in stages, eg initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
 - iv. should discovery be given in the list of documents by general description rather than by identification of individual documents?
2. In determining whether to order discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.
3. To prevent orders for discovery requiring production of more documents than are necessary for the fair conduct of the case, orders for discovery will ordinarily be limited to the documents required to be disclosed by Order 15, rule 2(3).

THE ENGLISH CIVIL PROCEDURE RULES 1998

- 28 A new code for England and Wales came into force on 26 April 1999. It was preceded by an interim³² and a final³³ report by Lord Woolf to the Lord Chancellor. Part 31 deals with what is called (in imitation of the Queensland innovation) “disclosure”. Part 31 is of limited use to New Zealand as a precedent because its provisions form part of a set of rules explicitly designed to tailor the procedure in each case to fit the complexity and the amount at stake in the particular piece of litigation and to further that objective by the machinery of a regime of active case management far stronger than anything to be found in the New Zealand High Court Rules. It is, however, useful to note the language of Civil Procedure Rules 31.6 and 31.7. The first sets out a substitute for the *Peruvian Guano* test. The second contains an interesting definition of the extent of a discovering party’s search obligation:

- 31.6 Standard disclosure requires a party to disclose only—
- (a) the documents on which he relies; and
 - (b) the documents which—
 - (i) adversely affect his own case;
 - (ii) adversely affect another party’s case; or
 - (iii) support another party’s case; and
 - (c) the documents which he is required to disclose by a relevant practice direction.
- 31.7(1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).
- (2) The factors relevant in deciding the reasonableness of a search include the following—
- (a) the number of documents involved;
 - (b) the nature and complexity of the proceedings;
 - (c) the ease and expense of retrieval of any particular documents; and
 - (d) the significance of any document which is likely to be located during the search.
- (3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.

³² Above n 23.

³³ Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London, 1996).

THE WESTERN AUSTRALIAN PROPOSALS

- 29 The Law Reform Commission of Western Australia in September 1999 published its final report on a review of that State's criminal and civil justice system.³⁴ Its present procedural code in relation to discovery is at much the same stage as that of New Zealand. It is not proposed to discuss the recommendations concerning discovery contained in the final report which are very much dependent on case management proposals that do not readily fit the current New Zealand position. Our purpose in mentioning the work done in Western Australia is to acknowledge that the treatment of discovery in the consultation paper preceding its final report³⁵ is quite the best survey that we came across in our research and one that we relied on in preparing the present discussion paper
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³⁴ Law Reform Commission of Western Australia, above n 16, 103.

³⁵ Above n 16, ch 2.6, 369–414.

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The issues

- 30 THE PURPOSE of this discussion paper is to invite expression of views on reform of the law of general discovery. We do not wish to seem to be restricting expressions of opinion to the matters listed in this paragraph, but it may be thought that specific matters that obviously call for consideration include:
- (a) whether there should be a reduction in the width of the *Peruvian Guano* test as there has been in the various jurisdictions discussed in the previous chapter;
 - (b) if so, what is an appropriate formulation of a substitute test?
 - (c) whether general discovery on a *Peruvian Guano* or some narrower basis should continue to be available as of right;
 - (d) whether, if general discovery is to continue to be available as of right, rule 295 should be amended to make *ad hoc* orders restricting the width of general discovery more easily obtainable;
 - (e) if so, what is the appropriate test (for example, necessity as in Federal Court Rules Order 15 rule 3 (paragraph 27));
 - (f) whether there is merit in defining the extent of search required (as in Federal Court Rules Order 15 rule 2 (5) (paragraph 26) Civil Procedure Rule 31.6 (paragraph 28));
 - (g) if so, whether the statement verifying the list of discovered documents should disclose the extent of the search carried out (as in Federal Court Rules Order 15 rule 2 (6) (paragraph 26) Civil Procedure Rule 31.7 (paragraph 28);
 - (h) whether there is merit in the rules defining what is meant by “in issue” as in Queensland 211(3) (paragraph 17);
 - (i) whether there is merit in the rules spelling out that it is unnecessary to list:
 - documents relating only to credit (Queensland 212(1)(b) (paragraph 18);
 - unmarked additional copies of discovered documents (Queensland 212(1)(c) (paragraph 18)), New South Wales 23.1(b)(iv) and (v) (paragraph 24); and
 - other documents of the types referred to in New South Wales 23.1(b)(i), (ii) and (iii);
 - (j) whether there should be rules spelling out the manner in which documents should be made available for inspection as in Queensland 217 (paragraph 19) and New South Wales 23.3(9) and 23.3(10) (paragraph 23);

- (k) whether there should be such a definition of relevance as in New South Wales 23.1(d) (paragraph 25);
- (l) whether it would be an acceptable method of reform to have different discovery rules according to the amount claimed; and
- (m) whether the Rules Committee should succumb to the trend of renaming discovery “disclosure”.

31 We look forward to receiving submissions.

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