E 3178

LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 78

General Discovery

February 2002
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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New Zealand. Law Commission.
General discovery.
(Report (New Zealand. Law Commission) ; 78.)
ISBN: 1-877187-85-2
1. Discovery (Law)—New Zealand. I. Title.
347.93072—dc 21

Report/Law Commission, Wellington, 2002
ISSN 0113–2334 ISBN 1–877187–85–2
This report may be cited as: NZLC R78
Also published as Parliamentary Paper E 3178

Presented to the House of Representatives pursuant to section 16 of the Law Commission Act 1985

This report is also available on the Internet at the Commission's website: http://www.lawcom.govt.nz

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28 February 2002

Dear Ministers

I am pleased to present to you Report 78 of the Law Commission *General Discovery*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

J Bruce Robertson
President

The Hon Margaret Wilson
Minister Responsible for the
Law Commission
Parliament Buildings
Wellington

Preface

WITH THE CONCURRENCE OF THE RULES COMMITTEE (which in this matter is the legislator) the Law Commission has examined the law of general discovery. In September 2001 it published a discussion paper (*Reforming the Rules of General Discovery* NZLC PP45). The essential issue addressed by that paper was whether and how the virtues of the existing rules as to general discovery could be preserved while at the same time eliminating waste and extravagance from the process. We were assisted by comments on the discussion paper and on the topic generally from:

Auckland District Law Society Courts Committee
David JA Cairns, Associate, B Cremades Y Asociados, Madrid, Spain
Chapman Tripp, Barristers & Solicitors, Wellington
District Court Civil Litigation & Case Processing Committee
Justice Doogue
JG Fogarty, QC, Christchurch
Andru Isac, School of Law, University of Canterbury
National Council of Women of New Zealand
New Zealand Law Society Civil Litigation and Tribunals Committee
Cheryl Y Simes, Barrister, Hamilton
Telecom New Zealand Limited
Duncan Webb, School of Law, University of Canterbury
Justice Hugh Williams

In chapters 1, 2 and 3 we set out our recommendations and the reasons therefor. Appendix A contains the relevant High Court Rules (Rules 293–312 and Rule 317A). Appendix B reproduces part 4 of our discussion paper made up of the comparative material which we have considered. In appendix C, by way of summarising our recommendations, we indicate the changes to the rules that we propose.

It became clear at a meeting held on 11 February 2002 with the Rules Committee to discuss a draft of this report that the Committee now contemplates substantial changes to the High Court Rules. The purpose of those changes is in broad terms the imposition of more intrusive case management requirements. It was

put to the Law Commission (correctly we think) that the precise mechanics that we propose in this report do not entirely fit with those as yet unfinalised changes.

Matters being in that state of flux, we have thought it our most appropriate course to publish this report as it stands. The Rules Committee can then sort out the mechanics and decide the extent to which the substance of our recommendations is acceptable when it has made up its mind about the larger changes to civil processes that it currently has under discussion.

DF Dugdale was the Commissioner having the carriage of this project and Kerry Davis the researcher.

1
The existing law

BACKGROUND

1 THE HIGH COURT RULES (which regulate the civil procedure of the High Court) and the District Court Rules 1992 (which have the same function in relation to the District Courts) both provide for discovery and inspection of documents.[1] This is the method by which each party to a civil litigation can obtain access to documents in the possession or control of the other party or parties.[2] Although the subject of discovery may seem unattractively technical and arid, in fact it is of substantial practical importance. Ours is an adversarial system under which each party to proceedings is required to procure its own bullets. Great injustice could be done if the rules failed to provide a method by which party A could obtain access to documents on which party B was sitting, and which party A needed to:

- prove party A's case; or
- be properly informed of the documentation to be relied on at trial by party B.

2 We set out the relevant High Court Rules in appendix A. Their effect is that each party has the right to compel every other party to provide a list of all documents "relating to any matter in question in the proceedings" which are, or have been, in the possession, custody or power of the party providing the list.[3] The words quoted, "relating to any matter in question in the proceedings" are traditional words. They descend from the corresponding expression "relating to any matter in question in the action" used in the English Supreme Court Rules 1875,[4] and copied in New Zealand

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1 The District Court Rules, being in all essential respects identical to the High Court Rules, will not be discussed separately in this report.

2 There is a process to enable access to a third party's documents which is outside the scope of this report.

3 High Court Rules, rule 293.

4 Order XXXI Rule 12.

in 1882.[5] It was in that year that *Compagnie Financiere du Pacifique v Peruvian Guano Co*[6] Brett LJ in the English Court of Appeal described the effect of the formula in words that have ever since been treated as authoritative.

> 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 …

3 In 1882, the documents required under the *Peruvian Guano* formula to be listed would (unless printed) have been hand-written. For this reason they were few in number. The problem with which this report is concerned results from the enormous increase in the number of discoverable documents that has resulted from the invention during the intervening 12 decades of new techniques for creating and reproducing documentation and of new methods of communication. Typewriters, photocopiers, computers and electronic mail are obvious examples.[7] The concern that has led the Law Commission to embark upon this project is that, under

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[5] Rule 161 of the Code of Civil Procedure annexed as the Second Schedule to the Supreme Court Act 1882.

[6] (1882) 11 QBD 55, 62–63.

[7] See the observations of Priestley J in *Air New Zealand Limited v Auckland International Airport Limited* HC Auckland, M1634-SD/00.

existing procedural rules, the cost of discovery can be disproportionately high when measured against its benefits. Moreover:

> 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.[8]

We described the effect of the existing rules in our preliminary paper in these words:

> 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.[9]

We concluded this passage in our preliminary paper with this quotation from Lord Woolf:

> 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, 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.[10]

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8 Law Commission *Reforming the Rules of General Discovery* NZLC PP45 (Wellington, 2001), para 12.

9 Law Commission, above n 8, para 11. The comment of Telecom New Zealand Limited on this passage was:

> … Telecom's experience is that the time required to complete the discovery process of major commercial litigation can run into years, not months, at a cost at times in excess of $100,000 per month. The discovery costs alone of major commercial litigation may exceed $1 million. Almost invariably, only a tiny proportion of that cost, perhaps as little as 10%, represents discovery of documents of any material benefit to *any* party.

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

4 In our preliminary paper we acknowledged that the existence of the mischief that we identified, namely that the cost of general discovery was excessively and disproportionately high, was unsupported by empirical evidence, and that we were reliant on the generally accepted beliefs held by legal practitioners. We pointed out that:

> In New Zealand the number of lawyers practising at all extensively in the field of civil litigation is sufficiently small for the knowledge of the workings of a widely employed procedural process to be general.[11]

We said "If we have our facts wrong no doubt we will be told in submissions that this is so".[12] In the event, while submitters did not agree on a solution, all except one accepted that there was such a mischief as we had identified and that it required addressing. We turn to a consideration of appropriate remedies.

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[11] Law Commission, above n 8, para 7.

[12] Above n 11.

2
Dealing with the mischief

AVOIDING EXTRAVAGANCE

5 IN OUR PRELIMINARY PAPER we said:

> 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. …
>
> 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. The question for the reformer is whether this should be changed and if so in what way?
>
> 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. It is the approach favoured by litigants themselves when allowed to make the relevant decision. …[13]

6 The object of any reform to the law of general discovery must be to try to ensure access to all the documents that might affect the outcome of proceedings by means of processes that are not more costly than is demanded by what is at stake in the litigation. The aim is to be sparing and thrifty rather than wasteful. The basic matters calling for consideration seem to be these:

[13] Law Commission, above n 8, paras 12, 13 and 14.

- the width of the *Peruvian Guano* test;
- the availability of general discovery as of right;
- the extent of the obligation to list documents;
- the need for a more precise definition of the issues in the proceeding; and
- the need for provision for ad hoc variations.

Although it assists analysis to identify these five elements, they are in fact intertwined. The solution preferred in relation to any one is dependent on the solution adopted for each of the others.

SHOULD THE *PERUVIAN GUANO* TEST BE NARROWED?

7 When considering, as we do in this report, the law as to *general* discovery, it is necessary to keep in mind that the court has an additional power to order *particular* discovery, that is to say discovery of some specific document or class of documents.[14] Currently an applicant for an order for particular discovery must establish necessity.[15]

8 The *Peruvian Guano* formula requires discovery of:
- the documents on which a party relies;
- documents adversely affecting the case of that party or supporting the case of another party;
- documents that do no more than provide background to the case; and
- documents that may lead to a train of inquiry enabling a party to advance that party's case or damage the case of that party's opponent.

Jurisdictions that have abandoned the *Peruvian Guano* formula have done so by confining the obligation on general discovery to the first two of these classes.[16] The reason for the change in Queensland (which was the model for that in other Australian jurisdictions and in England and Wales) has been described by the Chairman of the Litigation Reform Commission that proposed the reform in these terms:

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[14] High Court Rules, rule 300.

[15] High Court Rules, rule 312.

[16] Uniform Civil Procedure Rules 1999 r 211(1)(b) (Queensland), Australian Federal Court Rules O15 r 2(3), Civil Procedure Rules 1998 r 31.6 (England and Wales) all of which are to be found in Appendix B.

> Direct relevance is now the test for disclosure of documents under the rules adopted in all courts in Queensland in the middle of last year. The main reason for the adoption of that test was the high and often disproportionate cost of discovery pursuant to the *Peruvian Guano* test. But it will also make for a fairer contest, eliminating the opportunity to oppress or conceal by overdiscovery.[17]

9 We recommend the adoption of this change, the wording to be employed being that of Rule 31.6 of the English Civil Procedure Rules 1998. There will be, however, cases in which discovery of background material and train of inquiry information will be appropriate (cases, for example, in which an allegation as to some such mental element as intention is an issue). In those cases it will be necessary to supplement Rule 300 with a provision entitling the court, at any stage after an order for general discovery has been complied with, to order particular discovery if the court is satisfied that:

- compliance with such an order will not unreasonably delay the expeditious disposal of proceedings; and
- the cost of compliance is not disproportionate to what is at stake in the proceedings.

The new rule should make it clear that its purpose is to provide discovery in addition to that which would be furnished on general discovery and that it is not intended as a remedy for non-compliance with general discovery obligations.

THE AVAILABILITY OF GENERAL DISCOVERY AS OF RIGHT

10 In jurisdictions with an active regime of case management more sophisticated than is available in New Zealand, there can be observed a move away from an entitlement to general discovery as of right. An example is the Australian Federal Court Practice Note to be found in appendix B.[18] However, it seems to the Commission that, in New Zealand conditions, it is better for general discovery to be available as of right than for entitlement to general discovery to be a matter of contention, and for reform to concentrate on the narrower issues of what is to be discovered and how.

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[17] GL Davies "A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale" (1993) 5 J Jud Admin 201, 213.

[18] Similarly in the District Court the Practice Note provides, in the case of "Swift Track" actions (that is, "cases which are quite uncomplicated or have a modest amount at stake"), for no more than an informal exchange of documents.

THE EXTENT OF THE OBLIGATION TO LIST

11 Submitters pressed on us, and we accept, the view that the major cost of discovery is the need to compile a written list of documents. This dispiriting task involves culling the discoverable from the irrelevant and assigning a description to documents in the former category. It was said that it would be sufficient and cheaper:

- to produce documents for inspection or provide copies of documents without the need to list them at all; or
- to number documents sequentially without describing them and to certify that documents numbered 1–*x* comprise all discoverable documents; or
- where documents comprise a file, to number without describing either documents or pages, listing the file by its description followed by some such words as "comprising *x* documents [pages] numbered for the purposes of discovery from 1–*x*".

On this last point Rule 298(4) already permits a group description of documents "of the same nature" but it has been held to be confined to situations where it is possible to provide an accurate global description of the individual documents in a group for example:

> Correspondence between the defendant and its solicitors between [earliest date] and [latest date] prepared by solicitors/counsel for the party and addressed and forwarded to [eg managing director] of client, all such documents being headed with or referring to this proceeding and requesting or giving legal advice in relation to it and assisting in the conduct of litigation.[19]

12 The difficulty with all these proposals is the possibility that they create for time consuming arguments at trial as to whether a particular document has or has not been discovered. The likelihood of such arguments will increase if, as we suggest later in this report, Rule 305, excluding reliance at trial on undiscovered documents, is strengthened. Some submitters suggested that the cost of discovery is greatly increased by over-discovery, resulting from either a reluctance by list-making solicitors properly to turn their minds to culling the discoverable from the non-discoverable, or their delegating the task to staff members not qualified to do the job. If this is correct (and we believe it may very well be) such proposals as those set out in the previous paragraph are unlikely to improve matters.

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[19] This model is taken from the decision of Master Williams QC in *Attorney-General v Wang NZ Limited* (1980) 2 PRNZ 245, 252. See also *Hunyady v Attorney-General* [1968] NZLR 1172 (CA) and *Endeavour Productions Limited v Petersen* (1990) 2 PRNZ 366.

13 We are not prepared to recommend any blanket change along the lines of the proposals recorded in paragraph 11, but we will refer again to these matters when we come to discuss ad hoc variations.

14 It would seem sensible to put an end to the pedantry of listing:
- copies of pleadings and other documents filed in court in the proceedings; and
- additional unmarked copies of listed documents.

THE NEED FOR A MORE PRECISE DEFINITION OF ISSUES

15 In our preliminary paper we emphasise the significance of the words "in question" in Rule 293.[20] The obligation is to list documents "relating to any matter *in question* in the proceedings". 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. The view was expressed to us in submissions, and we agree, that fuzzy and imprecise pleadings unnecessarily widen the scope of discovery and so add wastefully to its cost. It should be a ground for resisting an order enforcing a discovery obligation that the pleadings of the party seeking enforcement fail adequately to define the issues. Moreover, although it does not change what the law would be if there were no such rule, we believe that (following the Queensland provision to be found in appendix B in paragraph B2) it would be a useful reminder to include in the rules a provision that an allegation remains in question until it is admitted, withdrawn, struck out or otherwise disposed of.

AD HOC VARIATIONS

16 We have already mentioned in paragraph 9 our view that an appropriate trade off for narrowing the general discovery obligation is to supplement Rule 300 with a provision for particular discovery in appropriate cases. We are of the view that there will also be converse situations in which the burden of compliance with general discovery obligations, even when limited as we propose, will be excessively burdensome. Rule 295 empowers the court to make such orders "as are necessary to prevent unnecessary discovery". We recommend that Rule 295 be recast to empower the court to relieve the list-maker of some part of the general discovery obligation or to limit such obligation if the court is satisfied that, if it does not do so the expeditious disposal of the proceedings will

[20] Law Commission, above n 8, para 5.

be unreasonably impeded or disproportionate cost will be imposed on the list-maker. It will be noted that this proposal is the counterpart of that advanced in paragraph 9.

17 In both the particular discovery rule that we propose in paragraph 9, and the new Rule 295, the court's discretion should extend beyond determining the ambit of discovery to prescribing the manner of compliance. It may be, for example, that in appropriate cases, the court will direct the adoption of one of the methods of avoiding itemised listing that we discussed in paragraph 11.

CONCLUSION ON THIS PART

18 The shape then of the general discovery rules that we are proposing is that, although general discovery will continue to be available as of right, the extent of the obligation will be narrowed:

- by limiting the obligation to matters directly in issue and by withholding the entitlement to general discovery until the state of the pleadings sufficiently defines the issues;
- by making it easier in appropriate cases to obtain a Rule 295 order limiting the width of the discovery obligation or prescribing the manner in which in the particular circumstances it is to be performed; and
- (a minor point) by the exclusion of any obligation to list such documents as pleadings and unmarked copies.

But, Rule 300 will be supplemented by a rule not subject to the Rule 312 necessity test making it easier, in appropriate cases, to obtain particular discovery. The court will have jurisdiction to tailor the manner in which the obligation to provide such particular discovery is to be performed to the circumstances of the case.

19 It seems to us that the approach we advance in this part will, in run-of-the-mill cases without the need for anything in the nature of an interlocutory hearing, confine the general discovery obligation to documents likely to be of real importance to the ultimate disposal of the case. It will provide a sufficiently flexible mechanism to enable the court, in appropriate cases, either to limit even further the general discovery obligation or to supplement it with particular discovery, and in each case in doing so to prescribe a mode of compliance that fits the situation.

3
Additional matters

MODE OF INSPECTION

20 THERE ARE PROVISIONS in Queensland and New South Wales (reproduced in paragraphs B5 and B9 at appendix B) governing the manner in which the obligations of a party required to permit inspection of discovered documents are to be performed. One purpose of the rules is to attack the practice of burying a documentary smoking gun in a haystack of unsorted documents. One submitter urged that:

> Practical, modern measures to facilitate inspection should be encouraged, or even made mandatory. For instance, if documents are listed using a database format, the list can be produced in the traditional file/document order, but it can also be re-sorted into chronological order without requiring more than a few minutes' additional time. The list in traditional file/document order is necessary to reveal the context and provenance of the documents. However, a list in chronological order is much easier to check for duplicates, and also to compare holdings across files. The rules ought to require the provision of a list in chronological order as well as a list in the traditional file/document order. If each party converted its database to a generic format, the parties could also exchange electronic versions of their respective lists and then be free to sort and re-sort to their own needs.

The general view of submitters was that a mandatory generalised provision was inappropriate. We agree with this. But we recommend that Rule 307 should be amended to empower the court to remove impediments to efficient inspection. We propose that a court (when ordering inspection or subsequently) may make such order as it thinks fit to regulate the manner and order in which documents are to be arranged when produced for inspection, and to require the party producing the documents for inspection to assist in locating and identifying particular documents and classes of documents. While one would hope that ordinarily solicitors to the parties will resolve such matters between themselves, it seems sensible to give the court this power in case they do not.

ENFORCEMENT

21 Defaults are likely to fall into one of two classes:

- total failure to comply within stipulated time limits, or at all, with orders to furnish lists or make documents available for inspection; or
- purported compliance with the obligation to furnish a list, but the list being in fact non-complying. Such non-compliance may be the result either of the maker's carelessness or of the maker's wilful decision to conceal or destroy relevant documents.

22 The sanctions available in respect of default are these:

- If the list is verified by affidavit, the person swearing the affidavit may have committed perjury.
- The default may amount to contempt of court.[21]
- Where there has been a Rule 297 order there are wide powers under Rule 277, clauses 1 and 2 of which provide as follows:

  277 Enforcement of Interlocutory Order

  (1) Where a party makes default in complying with any order made on any interlocutory application, the Court may, subject to any express provision of these rules, make such order as it thinks fit.

  (2) In particular, but without limiting the generality of subclause (1), the Court may—
  - (a) If the party in default is a plaintiff, order that the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by him in the proceeding:
  - (b) If the party in default is a defendant, order that his defence be struck out and that judgment be sealed accordingly:
  - (c) Order that the party in default be committed:
  - (d) If the property in dispute is in the possession or control of the party in default, order that such property be sequestered:
  - (e) Order that any fund in dispute be paid into Court:
  - (f) Appoint a receiver of any property or of any fund in dispute.

- There are obligations imposed on solicitors, enforceable by way of costs orders or by way of disciplinary sanctions that, in practice, probably provide the most effective protection against non-compliance.[22] (They are not of course available where a litigant conducts proceedings in person.)

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[21] High Court Rules, rule 317A.

- Rule 305 prevents a party relying at trial on an undiscovered document.

23 We do not and cannot know the extent to which litigants cheat in the preparation of discovery lists by concealing or destroying potentially damaging documents. Submitters suggested to us that observations in our preliminary paper that "the received but perhaps over-sanguine view is that generally speaking there is honest compliance"[23] recorded an unduly cosy assumption too shaky to serve as an adequate foundation for rule making. It was suggested that experienced litigants, aware of their discovery obligations, may conceal inconvenient documents from their own lawyers. It was asserted, moreover, that the ongoing shift away from professionalism towards a more business oriented approach to lawyering meant that it can no longer be assumed that solicitors will continue to respect their obligations. We are unpersuaded by this last point. It would be a remarkably foolish lawyer who would risk the disciplinary sanctions (which could include striking off) that would result if it were found out that the lawyer had been a party to discovery abuse. We agree, however, that the sanctions need strengthening.

24 We recommend that, where the court is satisfied that there has been wilful discovery abuse, an order should be made under Rule 277(2)(a) or (b) unless the party in default satisfies the court that there are special reasons why such an order should not be made. In relation to Rule 305 we agree with the view of Justice (and former Master) Williams that the leave of the court "is not too difficult to obtain but can cause difficulty in the management of a trial

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[22] 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.

[23] Law Commission, above n 8, para 8.

through requests for adjournments following unexpected disclosure".[24] It was the view of the Committee of District Court Judges that assisted us with submissions that:

> By far the majority of "lately discovered" document applications at trial come from parties wishing to rely upon them and who with proper attention to their case and obligations would have made them available in discovery in the first place.

We recommend that the rule be modified to provide for leave to be granted only if the omission is explained to the satisfaction of the court and if the granting of the leave will not unduly delay the completion of the trial or unduly prejudice the party or parties not at fault.

25 As to the practice of "swamping", of discovering an excessive number of documents, we recommend an express provision to the effect that where the court is satisfied that a list contains documents substantially in excess of the list-maker's obligation, the list-maker should be liable to be penalised in costs.

THE TWO-STEP PROCESS

26 Justice Williams observed to us:

> In my view, the altered process brought in by the High Court Rules in 1986 requiring discovery to be given on notice by one party to another with the Court only making an order in event of default, has not been an unqualified success. Application for orders for discovery (or for particular discovery or further and better discovery) are still common and I think consideration could be given to reverting to the previous process where a Court order for discovery was made automatically by the Registrar.[25]

We agree. A reversion to the Code of Civil Procedure provision will have the additional advantage of putting an end to the position where the Rule 277 sanctions are unavailable in respect of a Rule 293 notice. In practice, the Rule 293 notice procedure has been largely supplanted by the making of an order for discovery at a directions conference pursuant to Rule 437(7)(a).

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[24] Justice Williams, letter to the Commission dated 7 November 2001.

[25] Above n 24.

VERIFYING THE LIST

27 We think it preferable to restore the Code of Civil Procedure requirement that lists be verified by affidavit. Because compliance with discovery obligations is difficult or impossible to police, and is heavily dependent on the list-maker's sense of obligation, it seems to us that a formal affidavit adds a solemn and personal requirement that is appropriate.

PROPOSALS NOT PURSUED

28 Finally, we refer to some proposals (derived from the comparative material) in our discussion paper on which we invited comment, and in respect of which we do not recommend change (the paragraph references are to the portion of our discussion paper reproduced in appendix B):

- Defining the extent of search required and disclosing, as part of the verification of the list, the extent of the search in fact carried out (paragraph B13). Although this proposal received some support, most submitters believed the requirement to be excessively cumbrous and so do we.
- Defining relevance (paragraph B11). The view of submitters, with which we agree, was that the New South Wales rule referred to added nothing.
- Rechristening "discovery" as "disclosure". This has occurred in Queensland and in England and Wales. Some submitters were of the view that New Zealand should follow suit and others were of a contrary view. There are various difficulties about using the word "disclosure" in this context. One is that it means, or at least has the flavour of, making known that which was previously unknown to the person to whom the statement is made,[26] whereas discovery as a legal term of art is wider in its meaning than this. Unnecessary tinkering with nomenclature is not to be encouraged. It is better to let things be.

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[26] On this see Latham CJ in *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606, 615.

APPENDIX A

High Court Rules (Rules 293–312 and Rule 317A)

293 Notice For Discovery

(1) After a statement of defence has been filed any party who has filed a pleading may, by notice for discovery in form 25 filed and served on any other party who has filed a pleading, require that party to give discovery of the documents which are or have been in his possession or power relating to any matter in question in the proceeding, with or without verification.

(2) A party may require another party to give discovery with verification notwithstanding that he has previously required the same party to give discovery without verification.

294 Compliance With Notice

Subject to rule 295, a party required by notice under rule 293 to give discovery shall—

(a) Give discovery within such time, not being less than [28 days] (or, if he be resident out of New Zealand, [42 days]) after the day on which the notice for discovery is served on that party, as may be specified in the notice:

(b) If verification is not required, give discovery by filing and serving on the party giving the notice a list in accordance with rule 298 of documents relating to any matter in question in the proceeding:

(c) If verification is required, give discovery by filing and serving on the party giving the notice an affidavit verifying such a list as is mentioned in paragraph (b), together with the list so verified, unless the list has already been filed and served on the party giving the notice.

295 Limitations of Discovery On Notice

(1) The Court may, before or after any party has been required under rule 293 to give discovery, order that discovery under rule 294 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 subclause (1) as are necessary to prevent unnecessary discovery.

296 Multiple Parties

Where there are more than 2 parties to a proceeding, any party who is required to give discovery to any other party shall give discovery not only to that party but also to every other party who has given an address for service.

297 Order For General Discovery

(1) The Court may, at any stage of any proceeding, order any party to file and serve on any other party—

(a) A list in accordance with rule 298 of documents relating to any matter in question in the proceeding; or

(b) A list as mentioned in paragraph (a), verified by affidavit.

[(2) Where a party who has filed and served a notice under rule 293, files—

(a) An affidavit of service in respect of the service of that notice on any other party who has filed a pleading; and

(b) An affidavit deposing that the party on which that notice was served has failed to comply with paragraph (a) or paragraph (b) of rule 294,—

that party may, without any application to the Court, issue as of course, as the case may require, an order under subclause (1)(a) or subclause (1)(b) of this rule, which order shall include a provision requiring the costs of the order to be paid by the party ordered to file and serve a list of documents [and shall, for the purposes of rule 277, be deemed to be an order made on an interlocutory application].]

298 Contents of List

(1) A list of documents required by or under rule 294 or rule 297 shall, unless the Court otherwise orders, conform to the requirements of this rule.

(2) The list may be in form 26.

(3) The list shall enumerate the documents which are or have been in the possession, custody, or power of the party making the list.

(4) The list shall enumerate the documents in a convenient sequence and as shortly as possible, but shall describe each document or, in the case of a group of documents of the same nature, shall describe the group, sufficiently to enable the document or group to be identified.

(5) Where the party making the list claims that any document in his possession, custody, or power is privileged from production, he shall, in the list, sufficiently state the grounds of the privilege.

(6) The list shall distinguish those **documents** which are in the possession, custody, or power of the party making the list from those that have been but are no longer in his possession, custody, or power.

(7) The list shall, as to any document which has been but is no longer in the possession, custody, or power of the party making the list, state when he parted with the document and what has become of it.

(8) The list shall further enumerate any other relevant documents known to the party making the list to exist and shall state the name of the person (whether a party or not) in whose possession he believes such documents respectively to be.

(9) The party making the list shall, unless the list is verified, certify on the list that the list and the statements in the list are correct and comply with the requirements of this rule. Where, however, the party has a solicitor on the record in the proceeding the solicitor may give such certificate and may qualify it by stating that these particulars are correct according to his instructions.

299 Order For Particular Discovery Before Proceeding Commenced

(1) Where it appears to the Court that any person (hereinafter in this rule referred to as the intending plaintiff) is or may be entitled to claim in the Court relief against another person (hereinafter in this rule referred to as the intended defendant) but that it is impossible or impracticable for the intending plaintiff to formulate his claim without reference to a document or class of documents and that there are grounds for a belief that such document or one or more documents of that class may be or may have been in the possession, custody, or power of a person (whether the intended defendant or not), the Court may, on the application of the intending plaintiff made before any proceeding is brought, order the last-mentioned person—

(a) to file an affidavit stating whether that document or (as the case may be) any document of that class is or has been in his possession, custody, or power and, if it has been but is no longer in his possession, custody, or power, when he parted with it and what has become of it; and

(b) to serve the affidavit on the intending plaintiff.

[(2) An application under subclause (1) shall be by interlocutory application made on notice—

(a) to the person from whom discovery is sought; and

(b) to the intended defendant.]

300 Order For Particular Discovery Against Party After Proceeding Commenced

Where at any stage of the proceeding it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for a belief that some document or class of document relating to any matter in question in the proceeding may be or may have been in the possession, custody, or power of a party, the Court may order that party—

(a) to file an affidavit stating whether that document or (as the case may be) any document of that class is or has been in his possession, custody, or power and, if it has been but is no longer in his possession, custody, or power, when he parted with it and what has become of it; and

(b) to serve the affidavit on any other party.

301 Order For Particular Discovery Against Non-Party After Proceeding Commenced

(1) Where, in the circumstances referred to in rule 300, it appears that the document or class of document may be or may have been in the possession, custody, or power of a person who is not a party, the Court may order that person—

(a) to file an affidavit stating whether that document or (as the case may be) any document of that class is or has been in his possession, custody, or power and, if it has been but is no longer in his possession, custody, or power, when he parted with it and what has become of it; and

(b) to serve the affidavit on any party.

(2) An application for an order under subclause (1) shall be made on notice to the person from whom discovery is sought and to every other party who has filed an address for service.

302 Expenses

Where an order is made under rule 299(1) or rule 301(1), the Court may, if it thinks fit, order the applicant to pay to the person from whom discovery is sought his expenses (including solicitor and client costs) of and incidental to the application and in complying with any order made thereon.

[303 Who May Swear Affidavit Verifying List of Documents

(1) An affidavit verifying a list of documents under a notice or order given or made under any of the provisions of rules 293 to 304 may be made as follows:

(a) By the person required to make the list:

(b) If the person required to make the list is a minor or a mentally disordered person, by the person's next friend, guardian *ad litem*, or manager:

(c) If the person required to make the list is a corporation or a body of persons empowered by law to sue or be sued (whether in the name of the body or in the name of the holder of an office), by a person who meets the requirements of rule 517:

(d) If the person required to make the list is the Crown, an officer of the Crown who sues or is sued in an official capacity, or as representing a Government department, by an officer of the Crown.

(2) Despite subclause (1), where paragraph (c) or paragraph (d) of that subclause applies, and the affidavit is to be filed and served in accordance with an order, the Court may—

(a) Specify by name or otherwise the person to make the affidavit; or

(b) Specify by description or otherwise the persons from whom the person required to verify the list may choose the person to make the affidavit.]

304 Incorrect List to Be Amended

If, by reason of any change of circumstances or from the discovery of any error or omission, any list of documents filed pursuant to any notice given or order made under any of the provisions of rules 293 to 304 appears to the party giving discovery to be defective or erroneous, he shall forthwith file and serve an amended list or, if the amendment is necessary solely to remedy an omission, at his option, a supplementary list, and shall, if the original list has been verified, verify the amended or supplementary list.

305 Effect of Failure to Include Document

No document which should have been included in a list filed by a party may, without the consent of the other party or parties or the leave of the Court, be produced in evidence at the trial unless it has been included in his list of documents.

306 Notice to Produce For Inspection

(1) Where a pleading, list, or affidavit filed by a party or any other person refers to a document, any party or the intending plaintiff (as the case may be) on whom it is served may, by notice to produce served on the party or other person who has filed the pleading, list, or affidavit, require him to produce the document for inspection.

(2) Where a notice to produce a document is served on a party or any other person under subclause (1), he shall, within 4 days after that service, serve on the party requiring production a notice—

(a) Appointing a time within 7 days after service of the notice under this subclause when, and a place where, the document may be inspected; or

(b) Claiming that the document is privileged from production and sufficiently stating the ground of the privilege; or

(c) Stating that the document is not in his possession, custody, or power and stating to the best of his knowledge, information, and belief, where the document is and in whose possession, custody, or power it is.

307 Order For Production For Inspection

(1) Where it appears to the Court—

(a) From a pleading, list, or affidavit filed by a party or any other person, that any relevant document is in the possession, custody, or power of that party or person; or

(b) From the evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that any relevant document is in the possession, custody, or power of a party or any other person—

the Court may, unless the document is privileged from production, order that party or other person to produce the document for inspection by any party or intending plaintiff at a time and place specified in the order, or to serve on any party or intending plaintiff a copy of the whole or any part of the document, with or without an affidavit verifying the copy by a person who has examined the document and the copy.

(2) An affidavit made pursuant to an order under subclause (1) shall, unless the Court otherwise orders, state whether there are in the document copied any and, if so, what erasures, interlineations, or alterations.

308 Costs of Production By Non-Party

The Court may, if it thinks fit, order that the expenses (including solicitor and client costs) incurred by any person who is not a party to a proceeding already commenced of or incidental to compliance with a notice under rule 306 or an order under rule 307 be paid by the party to whom the document or copy, as the case may be, is produced.

309 Right to Make Copies

(1) A party to whom a document is produced for inspection under rule 306 or rule 307 may make copies of the document.

(2) On the application of a party to whom a document is produced for inspection under rule 306 or rule 307, the Court may order that the party having the document in his possession, custody, or power shall furnish the applicant with a legible copy.

(3) An order under subclause (2) may be made on such terms as the Court thinks fit, and in particular the Court may order the applicant to pay the reasonable expenses of the other party, and may order that the document be marked to the effect that it is a copy furnished for purposes of inspection only.

(4) A party who obtains a copy under this rule—
   (a) Shall make use of that copy only for the purposes of the proceeding; and
   (b) Except for the purposes of the proceeding, shall not make it available to any other person.

310 Production to the Court

The Court may, at any stage of any proceeding, order any party or person to produce to the Court any document in his possession, custody, or power relating to any matter in question in the proceeding, and on production of such document the Court may deal with it in such manner as the Court thinks fit.

311 Inspection to Decide Objection

(1) Where an application is made for an order under rule 307 for the production of any document for inspection by another party or for an order under rule 310, for the production of any document to the Court, and a claim is made that the document is privileged from production or an objection to production is made on any other ground, the Court may inspect the document for the purpose of deciding the validity of the claim or objection.

(2) It shall not be a valid claim of privilege that the document relates solely to the case of the party claiming privilege or that the fact or otherwise of the existence of the document is a substantial issue in the proceeding.

312 Order Only If Necessary

The Court shall not make an order under any of the provisions of rules 297 to 310 for the filing or service of any list of documents or affidavit or other document or for the production of any document unless satisfied that the order is necessary at the time when the order is made.

[317A Contempt of Court

(1) Every person is guilty of contempt of Court who,—
   (a) Being a person from whom discovery is sought by an order made pursuant to rule 299(1) or rule 301(1), wilfully and without lawful excuse disobeys the order or fails to ensure that the order is complied with; or
   (b) Being a person who is not a party to the proceeding and who is required by an order made under rule 307 to produce for inspection the whole or part of a document, wilfully and without lawful excuse disobeys the order or fails to ensure that it is complied with; or

(c) Being a person who is not a party to the proceeding and who is required by an order made under rule 310 to produce a document, wilfully and without lawful excuse fails to produce the document or thing in accordance with the order.

(2) Nothing in this rule limits or affects any power or authority of the Court to punish any person for contempt of Court.]

APPENDIX B

Part 4 of Law Commission *Preliminary Paper 45*

INTRODUCTION

B1 IN 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

B2 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.[27] They are concerned with what was once called discovery but is in those rules rechristened "disclosure".

B3 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.

B4 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:

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[27] 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.

212.(1) The duty of disclosure does not apply to the following documents—

(a) 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.

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

B5 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.[28]

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

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[28] DA Ipp "Reforms to the Adversarial Process in Civil Litigation – Part II" (1995) 69 ALJ 790, 793.

(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

B6 Part 23 of the New South Wales Supreme Court Rules was significantly amended in July 1996.

B7 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:
  (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.

B8 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.

B9 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.

B10 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);

B11 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

B12 Order 15 Rule 2 narrows the scope of what must be discovered by way of general discovery:[29]

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

[29] 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.

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.

(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.

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

B13 A new code for England and Wales came into force on 26 April 1999. It was preceded by an interim[30] and a final[31] 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:

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[30] See above n 10.

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

6.6 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.

THE WESTERN AUSTRALIAN PROPOSALS

B14 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.[32] 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 report[33] 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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[32] Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Consultation Drafts Volume 1* (Perth, 1999), 103.

[33] See above n 32, ch 2.6, 369–414.

APPENDIX C

Changes recommended to the High Court Rules

C15 Replace Rule 293 by the following:

General Discovery—

(1) After a statement of defence has been filed, any party who has filed a pleading may issue, as of course without any application to the Court, an order for discovery.

(2) The Court may, at any stage of the proceeding, make an order for discovery addressed to any party.

(3) An order for discovery shall direct the party to whom it is addressed to give discovery on oath of the documents—

(a) which are or have been in that party's possession or power; and

(b) which are directly relevant to any matter in question in the proceeding.

(4) A document is directly relevant to a matter in question in the proceeding if it is one—

(a) on which the party giving discovery relies; or

(b) which adversely affects either that party's own case or another party's case or supports another party's case.

(5) An allegation remains in question until it is admitted, withdrawn, struck out or otherwise disposed of.

(6) An order made under this rule is an order to which Rule 277 applies.

(7) A party to whom an order for discovery made under Rule 293(1) is addressed may apply to set such order aside on the ground that it is insufficiently clear from the pleading of the party who has issued the order what are the matters in question in the proceeding.

C16 Replace Rule 294 by the following:

Compliance with Order—

A party required to give discovery by an order for discovery under Rule 293 must give discovery within not less than 28 days (or if

he be resident out of New Zealand 42 days) after the day on which the order for discovery is served on that party by filing and serving a list in accordance with Rule 298 verified by affidavit.

C17 Replace Rule 295 by the following:

Modification of general discovery obligation—

(1) The Court may on the application of a party required by an order for discovery under Rule 293 to give discovery, make an order varying that party's obligation—
  (a) by excusing such party from giving discovery of a specified class or classes of document; or
  (b) by authorising modes of discovery less expensive or time-consuming than providing such a list enumerating the documents as Rule 298 requires; or
  (c) by directing that discovery take place in stages.

(2) The Court may make an order under this rule only if it is satisfied that if it does not do so—
  (a) the expeditious disposal of the proceedings will be unreasonably impeded; or
  (b) the cost to the party giving discovery of so doing will not be proportionate to the importance of the proceedings or the amount of money involved in the proceedings.

(3) Each party may, at any time, without the need for leave so to do being reserved, apply for an order varying the terms of an order made under this rule on the ground that compliance or attempted compliance with the original terms of the order has revealed a need for reconsideration or that there has been a change of circumstances justifying reconsideration.

C18 Delete Rule 297 and substitute:

Enforcement of order for general discovery—

(1) On an application made under Rule 277 on the ground of default in complying with an order made under Rule 293 the Court, if satisfied that the default was wilful, must make such an order as is contemplated under Rule 277(2)(a) or (b) unless satisfied that there are special reasons why such an order should not be made.

(2) It is a defence to an application made under Rule 277 on the ground of default in complying with an order made under Rule 293 that it is insufficiently clear from the pleading of the party making the application what are the matters in question in the proceeding.

C19 Rule 298(1) delete the words "or Rule 297". Delete 298(9) and substitute:

(9) The list need not include unmarked copies of listed documents or copies of documents filed in Court.

(10) If a party includes in a list of documents, documents that are not required to be included and the number of such documents is so great as to impede the process of discovery and inspection, the Court may order the party making the list to pay costs to any other party or parties.

C20 Insert new Rule 298A.

Order for particular discovery where general discovery insufficient—

(1) Where it appears to the Court that, notwithstanding compliance by a party with an order under Rule 293, there are in the possession or power of such party further documents that may assist in the just determination of a matter in question in the proceedings, the Court may either order that party to file an additional list of documents in accordance with Rule 298 verified by affidavit or direct a mode of discovery of such documents less expensive or time consuming than providing a list.

(2) The Court may make an order under this Rule only if it is satisfied that if it does so—

(a) the expeditious disposal of proceedings will not be unreasonably impeded; and

(c) the cost to the party giving discovery of so doing will be proportionate to the importance of the proceedings or the amount of money involved in the proceedings.

C21 Rule 305. Add new subclause (2).

(2) Such leave may be granted only if the omission of the document from the list is explained to the satisfaction of the Court and the granting of the leave will not delay the completion of the trial or unduly prejudice the party or parties not at fault.

C22 Rule 307. Add new subclause (3).

(3) The Court may at any time make such order as it thinks appropriate to facilitate efficient inspection, and without limiting the generality of the foregoing may make such order as it thinks fit regulating the manner and order in which documents are to be arranged when produced for inspection and requiring the party producing the documents for inspection to assist in locating and identifying particular documents and classes of documents.

C23 Rule 312. Substitute "299 to 310" for "297 to 310".

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