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RULES COMMITTEE CONSULTATION PAPER

PROPOSALS FOR REFORM OF THE LAW OF DISCOVERY INCLUDING ELECTRONIC DISCOVERY AND INSPECTION

Date of issue: 13 December 2010
Date submissions due: 14 March 2011

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Preliminary

1. Since its previous consultation on discovery and the High Court Rules in 2009, the Committee has been considering the topic throughout this year, and this second consultation paper and draft rules have been prepared. The consultation paper sets out the background and provides a commentary on the draft rules.

2. The draft rules are the product of many months of effort and thought, consulting with other jurisdictions and learning from them what has been effective, then taking general principles and applying them to a New Zealand context. The Committee has worked directly with members of the profession with particular expertise in electronic discovery.

3. Comment is sought on proposals for reform of the test for discovery, and rules and protocols regarding electronic discovery. Please return comment to the Clerk to the Committee, Ms Caroline Anderson, by 14 March 2011, to the address above.

4. Rules Committee members will have open meetings with the profession at dates and times to be arranged in Auckland, Wellington and Christchurch where it is hoped there will be feedback and frank interchanges of ideas.

Background

5. In September 2009 the Rules Committee released a consultation paper with proposals for reform of the law of discovery.

6. The September 2009 paper provided several options for reform of the test and procedures for discovery, including retention of the status quo (Option 1), disclosure of documents adverse to a party's case (Option 2), initial discovery followed by particular discovery (Option 3), or different options being applicable to specific categories of litigation (Options 4a and 4b).

7. Submissions received indicated a divergence of views among the profession. Some submissions supported one or other of the Rules Committee's proposed options, in particular Option 2, disclosure of adverse documents, and Option 3 (initial disclosure followed by particular discovery). The New Zealand Law Society supported Option 3, with some amendments.

8. A number of submissions did not endorse any of the proposed changes. Many supported the retention of the current approach including the *Peruvian Guano* test (i.e. Option 1). They considered *Peruvian Guano* to be right in principle and that departure from that standard could result in injustice. The majority favoured the retention of some default test to apply in the standard discovery situation, whether that was Peruvian Guano or adverse documents.

9. Most submissions acknowledged that discovery can be an expensive and burdensome process. However a number of submissions argued that the cause of excessive expense and delay is not the *Peruvian Guano* test, but rather the procedures for discovery. This included problems with electronic discovery, a misapplication of the *Peruvian Guano* test, the requirement to list and describe documents individually, and the reluctance of the judiciary to utilise the options for modifying discovery orders that are currently available in the Rules.

10. Regarding Option 2, disclosure of documents adverse to a party's case, there were concerns that this would difficult to apply, that it was a subjective test, and opposing parties may have different ideas about what harms their case.

11. Regarding Option 3, initial disclosure followed by particular discovery, several submissions argued that applications for particular discovery would increase cost and delay. There were also concerns that the particular discovery process would not be effective and the opposing party would not receive all of the documents it needed. Some submissions suggested that this process could be available as an alternative to general discovery, for example in relation to larger, more complex cases.

12. Several alternatives to the Rules Committee's options were proposed, including variations on option 3, a practice note or manual on discovery, parties submitting a discovery plan, increased use by Judges of the Rules currently available to modify discovery orders, and changing the requirements for listing of documents.

13. Since the last consultation, the Committee has been considering the submissions as well as other key developments overseas, including Lord Justice Jackson's report in England, entitled *Review of Civil Litigation Costs: Final Report*, completed in December 2009 and released in January 2010. In relation to discovery, Lord Justice Jackson proposed that some proceedings be classified as a 'substantial case', with a 'menu' of options available

for disclosure in those cases. This approach has to an extent been reflected in the proposed draft rules.

Electronic discovery

14. A recurring theme in submissions was that electronic documents and emails created a particular problem for discovery. The Committee agreed that discovery of electronic documents needed to be addressed. A sub-group was formed including several members of the profession experienced in the issues and practical aspects of electronic discovery.

15. The subgroup has worked to modernise the rules and directly address issues that arise from the exponential growth in the volume of electronic documents, the general use of computers to create documents, and the development of specialist discovery software programmes which are now widely in use. The sub-group has produced a set of draft rules, approved by the Committee, including a new schedule with a discovery checklist and a detailed listing and exchange protocol.

16. Most documents that are presented in the course of litigation have an electronic source. Almost all written exchanges between persons are now prepared on a computer, and they are generally sent by email or attachment. Just about all contracts and formal documents are prepared on a computer, and most of them are then sent electronically by attachment, sometimes following scanning. Most invoices and receipts, and all bank records and accounting documents are prepared electronically. The effort involved in listing documents from their original format and exchanging electronically is less burdensome than printing the documents.

17. There are still some documents such as hand written file notes or short contracts that are not created in electronic form. This increasingly limited category of documents can be easily scanned and converted into electronic form by a scanner/printer/photocopier obtainable for less than $150.00, and usually present in law offices.

18. Discovery is at present time consuming and expensive, for all the reasons traversed in the earlier discussion paper. This is accepted by the profession. Delay and cost can be reduced by moving to an electronic discovery regime, while the efficiency of the discovery process, and the ability to achieve a just outcome can be improved. There are a number of reasons for this:

- First, parties will be expected to cooperate with each other at an early stage to narrow the scope and reduce the burden of discovery. The parties will discuss the methods they are going to use to conduct a reasonable search for documents that is proportionate to the issues that matter. This process involves electronic interchanges with the other parties and a degree of cooperation, but no more than should occur presently in any event. A compulsory electronic discovery regime requires the parties to adopt this efficient cost-saving process.

- Second, to use technology more efficiently and effectively. Technology can provide more accurate solutions which can assist in identifying the most important documents more quickly.

- Third, a move to electronic discovery does no more than reflect what is happening in the profession in any event. Many firms now follow the practice of preparing an electronic list at the outset of litigation, and using it as the future basis of discovery inspection and

the preparation of the bundle of documents. The listing and exchange protocol will introduce even greater uniformity and achieve reciprocity in the discovery process.

- Fourth, the adoption of electronic discovery rules will bring us into line with the electronic discovery regimes in other common law jurisdictions. There is now provision for electronic discovery in both the Federal Court of Australia and most Australian State Courts, in England, in Singapore, and in the Canadian Courts and the USA. Hong Kong and New Zealand appear to be the only larger common law jurisdictions who have not yet gone down this route.

Current proposals

19. The Rules Committee's current proposals are contained in the draft rules that accompany this paper.

20. Key features of the proposals include:

- A requirement that parties cooperate with each other in discovery and inspection; *See paragraph 22*
- Initial disclosure of principal documents that the party relies on with the pleadings; *See paragraph 25*
- Classification of discovery orders into standard and non-standard types; *See paragraph 30*
- Reform of the test for standard discovery from *Peruvian Guano* to the narrower test of documents adverse to a party's case; *See paragraph 31*
- A category of non-standard discovery for several defined categories of case; *See paragraph 33*
- A 'menu' of options for non-standard discovery; *See paragraph 39*
- Provision for electronic discovery and inspection processes including:
    - All documents to be exchanged and inspected electronically; *See paragraphs 48 and 51*
    - A new schedule (Schedule 9) containing a discovery checklist and a listing and exchange protocol. *See paragraph 54*

Commentary on the draft rules

Rule 8.16 – Interpretation

21. This rule is equivalent to current rule 8.16 (Contents of discovery order). Definitions of 'standard discovery' and 'pleading' have been added. Subclauses (3) and (4) have been removed as they relate to the discretionary options available to the court in ordering discovery, which are addressed later in the draft rules.

Rule 8.17 – Cooperation

22. Rule 8.17 is a newly inserted rule that requires parties to cooperate in the processes of discovery and inspection. It is intended to promote out of court discussion between parties on discovery and to reduce the input that is needed from the court.

23. The rule states that the parties must cooperate to ensure that the processes of discovery and inspection are proportionate to the sums in issue or the value of the rights in issue, and facilitated by agreement on practical arrangements. The parties must consider options to reduce the scope and burden of discovery, achieve reciprocity in electronic format and processes, ensure technology is used efficiently and effectively, and use a format compatible with preparing a bundle of documents for trial.

24. This requirement for parties to cooperate will apply in respect of both standard and non-standard proceedings. Non-standard discovery is likely to require a higher degree of cooperation between parties than standard discovery.

Rule 8.18 – Initial disclosure

25. Rule 8.18 is a newly inserted rule that provides for initial disclosure. It is based on the draft rule released with the consultation paper in September 2009.

26. It provides that a party must serve with the pleading, all of the documents referred to in that pleading and any additional principal documents on which that party intends to rely at trial. There is an exception to this requirement if the circumstances make it impossible or impracticable to comply; if seeking to use this exception, a party must file with the pleading a certificate signed by counsel, setting out the reasons why compliance is impossible or impracticable.

27. It is intended that initial disclosure of principal documents on which the party intends to rely would assist the other side in understanding the case they face at the outset and may perhaps contribute to settlement in appropriate cases.

Rule 8.19 – Composition of bundle

28. Rule 8.19 provides the following:
    - A party must not include in their bundle any document contained in a bundle that has already been filed;
    - A version of a document containing a modification or other marking must be treated as a separate document;
    - The bundle of documents may be served electronically or in hard copy form;
    - This rule is subject to any claim to privilege or confidentiality;
    - A party may apply to a Judge for an order setting aside or modifying any claim to privilege or confidentiality.

Rule 8.20 – Discovery orders to be made at case management conferences

29. This is equivalent to current rule 8.17. Discovery orders will continue to be made at case management conferences, and will be mandatory in all cases. Subclause (4) of the current rule has been removed as variations from standard discovery are addressed in the proposed rules 8.22 and 8.24.

Rule 8.21 – Standard discovery

30. The proposed rules create a system classifying discovery into standard and non-standard types. Rule 8.20 addresses standard discovery. The terms in subclause (2) apply unless non-standard discovery is ordered under rule 8.22.

31. Subclause (2) provides that each party must make an affidavit of documents that lists the documents on which the party relies, or that adversely affect that party's own case, or adversely affect another party's case, or support another party's case.

32. The Rules Committee considers that it is desirable to move to this so-called 'adverse documents' test for standard discovery. This is the test currently used in the United Kingdom Civil Procedure Rules (rule 31.6). The Committee considers that the narrower adverse documents test is preferable to the current test based on *Peruvian Guano*. The wording is modelled on the Australian Federal Court rule rather than the English rule (as the English rule still uses the male gender).

Rule 8.22 – Non-standard discovery

33. Rule 8.22 addresses circumstances in which the Judge must make a non-standard discovery order.

34. These circumstances include proceedings on the commercial list or the swift track, cases involving fraud or dishonesty, proceedings in which the sums in issue or the value of the assets in issue exceed $2,500,000, where the number of documents to be discovered is reasonably anticipated to exceed 200, where the costs of standard discovery would be disproportionate to the sums in issue or the value of the rights in issue (see the discovery checklist in Schedule 9, below), or where the parties agree that there should be non-standard discovery.

35. The Committee considers that it is necessary to use categories that are as clearly defined as possible, and which will not give rise to uncertainty and debate. It is necessary also to keep the non-standard proceeding as an exception rather than to make it the rule through the use of very wide categories.

Rule 8.23 – Preparation for first case management conference

36. Rule 8.23 gives the procedure for both standard and non-standard discovery. At least 14 days before the first case management conference, the parties must discuss and endeavour to agree on an appropriate discovery order (having addressed matters in the discovery checklist (see Schedule 9 below)).

37. If the parties agree they must file a joint memorandum setting out the discovery order sought at least 7 working days before the case management conference.

38. If the parties fail to reach an agreement, each of them must file a memorandum at least 7 working days before the case management conference, setting out the directions sought and the party's reasons in support. The issue may be whether the discovery should be standard or non-standard because of disproportionate costs, or, if the discovery is non-standard, what particular type of discovery should be selected from the 'menu' (see rule 8.24 below).

Rule 8.24 – Deciding the type of discovery

39. Rule 8.24 sets out the options for discovery orders that a Judge may make, upon considering proposals for a non-standard discovery order at a case management conference. This is the 'menu' of options for discovery, a concept which emerged from Lord Justice Jackson's report (see *Review of Civil Litigation Costs: Final Report* at 370).

40. The 'menu' in rule 8.24 includes an order for standard discovery, an order dispensing with discovery, an order for non-standard discovery, setting out the subject headings and date periods of the documents to be discovered, or any other order the court considers appropriate.

Rule 8.25 – Each party's discovery obligations

41. Rule 8.25 requires that each party must give discovery of relevant documents electronically in accordance with Part B Schedule 9, the Listing and Exchange Protocol (see below).

42. The Rules Committee considers that there are significant advantages in discovery being conducted entirely electronically. Today most discovered documents are already in electronic form, whether they are in the private or public sector. Those that are not can be converted into electronic form by being scanned, a facility which is widely available.

43. Subclause (2) provides that a party not represented by a lawyer may apply to a Judge for an exemption from the requirement to give discovery of documents electronically. The Judge may grant such an exemption if it is not practicable for that party to give discovery electronically, or if justice so requires.

44. Subclause (3) provides that a party must still give discovery of a document that has been initially disclosed under rule 8.18.

45. Subclause (4) provides that a version of a document containing a modification, obliteration or other marking must be treated as a separate document.

46. Subclause (5) provides that a plan or other document which is wholly or partly coloured must be discovered in a way that reproduces the colour, unless this is technically impracticable in which case the party giving discovery must make the original plan original plan or document available for inspection in hard copy form.

47. Subclause (6) provides that each party must comply with a discovery order within such time as the court directs, or within 20 working days after the order is made (if a direction as to time is not given).

Rules 8.26 – 8.27

48. Rules 8.26 (Solicitor's obligations on discovery) and 8.27 (Affidavit of documents) are equivalent to current rules 8.19 and 8.20 respectively and are unchanged, aside from new subclause (2)(d) of rule 8.27 which requires that the parties must list the documents required to be discovered in a schedule complying with rule 8.28 and Schedule 9.

Rule 8.28 – Schedule appended to affidavit of documents

49. Rule 8.28 is the same as current rule 8.21.

Rules 8.29 – 8.39

50. Rules 8.29 to 8.39 are equivalent to current rules 8.22 to 8.32 and are unchanged.

Rule 8.40 – Inspection of documents

51. Rule 8.40 is the same as current rule 8.33 aside from the insertion of three new subclauses. Subclause (2) states that documents must be exchanged in accordance with Part B Schedule 9, the Listing and Exchange Protocol (see below). Subclause (7) states that a party who has received a document electronically may, on giving reasonable notice in writing, require the person giving discovery to produce the original document for inspection. Subclause (8) provides that rule 8.40 also applies to documents listed in an affidavit under rule 8.31 (particular discovery against party after proceeding commenced) or rule 8.33 (particular discovery against non-party after proceeding commenced).

52. Having all documents in electronic form means that the process of inspection can be done entirely electronically. It is anticipated that this would lead to considerable cost savings.

Rule 8.41 – Rule 8.48

53. Rules 8.41 to 8.48 are equivalent to current rules 8.34 to 8.42.

Schedule 9

54. Schedule 9 contains the discovery checklist and the listing and exchange protocol. These have been developed by reference to practice notes and practice directions in other jurisdictions, particularly the United Kingdom Practice Directions regarding disclosure of electronic documents and the Federal Court of Australia Practice Note CM6 (Electronic Discovery in Litigation).

Schedule 9: Part A – Discovery checklist

55. Before the first case management conference, parties are obliged by rule 8.23 to discuss and endeavour to agree on an appropriate discovery order having addressed the matters in the discovery checklist contained in Part A of Schedule 9.

56. Paragraph 1 of the discovery checklist directs parties to assess the proportionality of discovery by considering the categories of documents required in terms of standard discovery orders as set out in rule 8.21, identifying where those documents are likely to be located, what methods should be used to locate electronic material efficiently, ensuring that the client is taking steps to preserve the documents involved, and estimating the likely volume and cost of discovering the material.

57. If the estimated cost is disproportionate to the sums in issue or the value of the rights in issue in the proceeding, or if any other paragraph of rule 8.22 applies then paragraph 2 of the checklist should be consulted.

58. Paragraph 2 concerns non-standard discovery. Under rule 8.23 parties are obliged to seek to agree a proposal in relation to the discovery order to be made. Aspects to be considered are categories of documents, the method to be taken for locating the documents, and whether any different deadlines are appropriate (i.e. staged discovery).

59. Paragraph 3 concerns listing and exchange. Parties are required by rule 8.25(1) to use the listing and exchange protocol unless they agree otherwise or an order otherwise requires.

Parties must consider whether the protocol is appropriate and seek to agree any modifications, and consider any special arrangements necessary for inspection.

Schedule 9: Part B – Listing and Exchange Protocol

60. Parties are required to list documents, providing for each document a document ID, date, type, author, recipient, parent document ID, and privilege category.

61. Parties must exchange documents electronically by way of a single, continuous table or spreadsheet, with one detail in each column, and multipage images.

62. Requirements for the descriptions in the list of documents are set out in paragraph 2, to ensure consistency for listing and exchange. Parties must endeavour to apply the specific formats set out in paragraph 2.

63. Certain specific treatments of documents are required by paragraph 3, including duplicate documents (3.1), emails (3.2), attachments (3.3), and consistency of names (3.4).

64. Privilege is addressed in paragraph 4. Parties must agree any specific privilege requirements for listing and exchange.

65. Redactions are addressed in paragraph 5. Redacted sections must be blanked out; parties may agree that a label or note must be provided explaining the grounds for the redaction.

66. The format for exchange is set out in paragraph 6, including requirements for the format of the spreadsheet. Documents must be provided as multipage pdfs (or another format if agreed). If a document has relevant metadata, parties may request its provision in native format.

67. Paragraph 7 contains a glossary of technical terms.

Draft discovery documents

68. To demonstrate the form and content of the proposed discovery list and joint memorandum for the first case management conference, attached to this consultation paper is a sample of each document.

69. The joint memorandum is an example of what might be used for non-standard discovery. The same level of detail would not be expected for standard discovery.

Conclusion

70. The Rules Committee considers that the proposed rules would be a valuable tool in modernising the rules of procedure for civil litigation. They are necessary in order to take advantage of developments in technology and facilitate efficient and cost-effective discovery and inspection of documents.

71. Comment is now sought on the points set out in this paper and the proposed rules, via email or post to the contact details on page 1. Alternative suggestions are welcome.

72. Attendance and contribution at the upcoming open meetings referred to at paragraph 4 are encouraged.