

High Court Amendment Rules (No 1) 2011

Governor-General

Order in Council

At Wellington this day of 2011

Present:
in Council

Pursuant to section 51C of the Judicature Act 1908, His Excellency the Governor-General, acting on the advice and with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee (of whom at least 1 was a Judge of the High Court), makes the following rules.

Contents

		Page
1	Title	3
2	Commencement	3
3	Principal rules amended	3
4	Discovery and inspection of documents	3
	Subpart 3—Discovery and inspection	
	8.16 Interpretation	3
	8.17 Cooperation	3
	8.18 Initial disclosure	4
	8.19 Composition of bundle	4

High Court Amendment Rules (No 1) 2011

8.20	Discovery orders to be made at case management conferences	5
8.21	Standard discovery	5
8.22	Non-standard discovery	5
8.23	Preparation for first case management conference	6
8.24	Deciding the type of discovery	6
8.25	Each party's discovery obligations	7
8.26	Solicitor's discovery obligations	7
8.27	Affidavit of documents	8
8.28	Schedule appended to affidavit of documents	8
8.29	Variation of discovery order	9
8.30	Challenges to claims to privilege or confidentiality	9
8.31	Order for particular discovery against party after proceeding commenced	9
8.32	Order to discover particular documents before proceeding commenced	10
8.33	Order for particular discovery against non-party after proceeding commenced	10
8.34	Expenses	11
8.35	Incorrect affidavit of documents to be amended	11
8.36	Where process impeded by discovery of irrelevant documents	12
8.37	Who may swear affidavit of documents	12
8.38	Challenge to privilege or confidentiality claim	12
8.39	Crown documents and public interest	13
8.40	Inspection of documents	13
8.41	Order facilitating inspection	14
8.42	Cost of production by non-party	14
8.43	Right to make copies	14
8.44	Effect of failure to include document	15
8.45	Admission about documents discovered	15
8.46	Restricted effect of admission	16
8.47	Notice to produce documents or things	16
8.48	Contempt of court	16
5	Schedule 9 inserted	16
	Schedule	17
	New Schedule 9 inserted	

Rules

1 Title

These rules are the High Court Amendment Rules (No 1) 2011.

2 Commencement

These rules come into force on 1 April 2011.

3 Principal rules amended

These rules amend the High Court Rules set out in Schedule 2 of the Judicature Act 1908.

4 Discovery and inspection of documents

Subpart 3 of Part 8 of the High Court Rules (Discovery) is revoked and the following subpart substituted:

“Subpart 3—Discovery and inspection

“8.16 Interpretation

“(1) In this subpart,—

“**discovery order** means an order that requires each party to a proceeding to discover the existence of documents to every other party

“**standard discovery** means discovery complying with rule 8.21(2).

“(2) Despite rule 1.3, in this subpart **pleading** means a statement of claim, a statement of defence, reply, third party notice, subsequent party notice or a cross-notice.

“8.17 Cooperation

“(1) The parties must cooperate to ensure that the processes of discovery and inspection are—

“(a) proportionate to the sums in issue or the value of the rights in issue; and

“(b) facilitated by agreement on practical arrangements.

“(2) The parties must, when appropriate—

“(a) consider options to reduce the scope and burden of discovery;

“(b) achieve reciprocity in the electronic format and processes of discovery and inspection;

- “(c) ensure technology is used efficiently and effectively;
- “(d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.

“8.18 Initial disclosure

- “(1) When filing a pleading, a party must, unless subclause (2) applies, serve with it a bundle consisting of true copies of all the documents referred to in that pleading, and of any additional principal documents in the party’s control on which that party intends to rely at the trial or hearing.
- “(2) A party need not comply with subclause (1) if—
 - “(a) the circumstances make it impossible or impracticable to comply with subclause (1); and
 - “(b) a certificate to that effect, setting out the reasons why compliance is impossible or impracticable, and signed by counsel for that party, is filed and served at the same time as the pleading.
- “(3) A party acting under subclause (2) must serve the bundle referred to in subclause (1) within 10 working days from the filing of the pleading.
- “(4) If a party who is obliged to comply with subclause (3) fails to do so, a Judge may make any of the orders specified in rule 7.48(2).
- “(5) This rule applies to an amended pleading which either—
 - “(a) refers to documents not referred to in any earlier pleading filed by the party filing the amended pleading; or
 - “(b) raises a fresh issue or fresh issues of other than a purely legal nature.

“8.19 Composition of bundle

- “(1) Despite rule 8.18, a party must not include in a bundle served by that party under that rule any document contained in a bundle already served by any party.
- “(2) A copy or version of a document containing a modification or an obliteration or other marking must be treated as a separate document.

- “(3) The bundle of documents may be served either electronically or as a bundle of copies in hard copy form.
- “(4) This rule is subject to any claim by a party to privilege or confidentiality.
- “(5) A party may apply to a Judge for an order setting aside or modifying any claim made under subclause (4).

“8.20 Discovery orders to be made at case management conferences

- “(1) A Judge must make a discovery order for a proceeding on the standard track unless he or she considers that the proceeding can be justly disposed of without any discovery.
- “(2) An order under subclause (1) must be made at the first case management conference that is held for the proceeding, unless there is good reason for making the order later.
- “(3) A Judge may make a discovery order for a proceeding on the swift track if—
 - “(a) a case management conference is held for the proceeding; and
 - “(b) a party to the proceeding explains why the order is sought in a memorandum filed under rule 7.5.

“8.21 Standard discovery

- “(1) A discovery order must contain the terms prescribed in subclause (2) unless non-standard discovery is ordered under rule 8.22.
- “(2) Each party must make an affidavit of documents that lists the documents that are or have been in that party’s control and are—
 - “(a) documents on which the party relies; or
 - “(b) documents that adversely affect that party’s own case; or
 - “(c) documents that adversely affect another party’s case; or
 - “(d) documents that support another party’s case.

“8.22 Non-standard discovery

The Judge must make a non-standard discovery order in a proceeding—

- “(a) on the commercial list, or on the swift track (if rule 8.20(3) applies); or
- “(b) involving one or more allegations of fraud or dishonesty; or
- “(c) in which the total of the sums in issue exceeds \$2,500,000; or
- “(d) in which the total value of any assets in issue exceeds \$2,500,000; or
- “(e) where the number of documents to be discovered by the parties is reasonably anticipated to exceed 200; or
- “(f) in which the costs of standard discovery would be disproportionately high in comparison with the sums, or the value of the rights, in issue; or
- “(g) in which the parties agree that there should be non-standard discovery.

“8.23 Preparation for first case management conference

- “(1) The parties must, not less than 14 working days before the first case management conference, discuss and endeavour to agree on an appropriate discovery order, and the manner in which inspection will subsequently take place, having addressed the matters in the checklist in accordance with Part A of Schedule 9.
- “(2) If the parties reach an agreement under subclause (1) they must file a joint memorandum setting out the terms of the discovery order which they seek not less than 7 working days before the case management conference at which the making of a discovery order is to be considered.
- “(3) If the parties fail to reach an agreement under subclause (1), each of them must file a memorandum, not less than 7 working days before that conference, setting out the directions sought under rule 8.24 and that party’s reasons in support.

“8.24 Deciding the type of discovery

At the case management conference at which the parties’ or a party’s proposal for a non-standard discovery order is considered, the Judge may make—

- “(a) an order dispensing with discovery; or
- “(b) an order for standard discovery; or

- “(c) an order for non-standard discovery, setting out the subject headings and date periods of the documents to be discovered; or
- “(d) if any variation of the obligations as to inspection in rule 8.40 is required, an order to that effect; or
- “(e) any other order the court considers appropriate.

“8.25 Each party’s discovery obligations

- “(1) Subject to subclause (2), each party against whom a discovery order is made must give discovery of relevant documents electronically in accordance with Part B of Schedule 9 (the Listing and Exchange Protocol).
- “(2) A party who is not represented by a lawyer in a proceeding may apply to a Judge to be exempted from subclause (1), and the Judge may grant such an exemption if it is not practicable for that party to give discovery electronically, or if justice so requires.
- “(3) A party must give discovery of documents which have previously been disclosed under rule 8.19.
- “(4) A copy or version of a document containing a modification or an obliteration or other marking must be treated as a separate document.
- “(5) 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 or document available for inspection in hard copy form.
- “(6) Each party must comply with the order within such time as the court directs or, failing a direction, within 20 working days after the date on which the order is made.

“8.26 Solicitor’s discovery obligations

As soon as practicable after a party becomes bound to comply with a discovery order, the solicitor who acts for the party in the proceeding must take reasonable care to ensure that the party—

- “(a) understands the party’s obligations under the order; and
- “(b) faithfully fulfils those obligations.

“8.27 Affidavit of documents

- “(1) This rule applies to an affidavit of documents unless a discovery order modifies its requirements.
- “(2) In the affidavit of documents, the party must—
- “(a) refer to the discovery order under which the affidavit is made; and
 - “(b) state that the party understands the party’s obligations under the order; and
 - “(c) give particulars of the steps taken to fulfil those obligations; and
 - “(d) list or otherwise identify the documents required to be discovered under the order in a schedule complying with rule 8.28 and Schedule 9; and
 - “(e) state any restrictions proposed to protect the claimed confidentiality of any document.
- “(3) The affidavit may be in form G 37.

“8.28 Schedule appended to affidavit of documents

- “(1) The schedule referred to in rule 8.27(2)(d) must list or otherwise identify documents—
- “(a) in the control of the party giving discovery and for which the party does not claim privilege or confidentiality, identifying them by number:
 - “(b) in the control of the party giving discovery for which privilege is claimed, stating the nature of the privilege claimed:
 - “(c) in the control of the party giving discovery for which confidentiality is claimed, stating the nature and extent of the confidentiality:
 - “(d) that have been, but are no longer, in the control of the party giving discovery, stating when the documents ceased to be in that control, and the person who now has control of them:
 - “(e) that have not been in the control of the party giving discovery but are known by that party to relate to a matter in question in the proceeding, stating who has control of them.
- “(2) Documents of the same nature in category (b), (c), (d) or (e) may be described as a group or groups.

- “(3) The schedule need not include—
- “(a) documents filed in court; or
 - “(b) correspondence that may reasonably be assumed to be in the possession of all parties.

“8.29 Variation of discovery order

- “(1) Subject to rule 7.18, a party may apply for an order varying the terms of a discovery order.
- “(2) The variation may be granted by a Judge on the ground that—
- “(a) compliance or attempted compliance with the terms of the order has revealed a need for a variation; or
 - “(b) there has been a change of circumstances justifying re-consideration.

“8.30 Challenges to claims to privilege or confidentiality

If a party challenges a claim to privilege or confidentiality made in the affidavit prepared in accordance with rule 8.28, that party may apply to the court for an order setting aside or modifying the claim.

“8.31 Order for particular discovery against party after proceeding commenced

If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—

- “(a) to file an affidavit stating—
 - “(i) whether the documents are or have been in the party’s control; and
 - “(ii) if they have been but are no longer in the party’s control, the party’s best knowledge and belief as to when the documents ceased to be in the party’s control, and who now has control of them; and
- “(b) to serve the affidavit on the other party or parties.

“8.32 Order to discover particular documents before proceeding commenced

- “(1) This rule applies if it appears to a Judge that—
- “(a) a person (the **intending plaintiff**) is or may be entitled to claim in the court relief against another person (the **intended defendant**) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff’s claim without reference to 1 or more documents or a group of documents; and
 - “(b) there are grounds to believe that the documents may be or may have been in the control of a person (**the person**), who may or may not be the intended defendant.
- “(2) The Judge may, on the application of the intending plaintiff made before any proceeding is brought, order the person—
- “(a) to file an affidavit stating—
 - “(i) whether the documents are or have been in the person’s control; and
 - “(ii) if they have been but are no longer in the person’s control, the person’s best knowledge and belief as to when the documents ceased to be in the person’s control and who now has control of them; and
 - “(b) to serve the affidavit on the intending plaintiff; and
 - “(c) if the documents are in the person’s control, to make those documents available for inspection, in accordance with rule 8.40, to the intending plaintiff.
- “(3) An application under subclause (2) must be by interlocutory application made on notice—
- “(a) to the person; and
 - “(b) to the intended defendant.
- “(4) The Judge may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

“8.33 Order for particular discovery against non-party after proceeding commenced

- “(1) This rule applies if it appears to a Judge that a person who is not a party to a proceeding may be or may have been in the control of 1 or more documents or a group of documents that

the person would have had to discover if the person were a party to the proceeding.

- “(2) The Judge may, on application, order the person—
- “(a) to file an affidavit stating—
 - “(i) whether the documents are or have been in the person’s control; and
 - “(ii) if they have been but are no longer in the person’s control, the person’s best knowledge and belief as to when the documents ceased to be in the person’s control and who now has control of them; and
 - “(b) to serve the affidavit on a party or parties specified in the order; and
 - “(c) if the documents are in the control of the person, to make those documents available for inspection, in accordance with rule 8.40, to the party or parties specified in the order.
- “(3) An application for an order under subclause (2) must be made on notice to the person and to every other party who has filed an address for service.
- “(4) The Judge may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

“8.34 Expenses

If an order is made under rule 8.32(2) or 8.33(2), the Judge may, if the Judge thinks it just, order the applicant to pay to the person from whom discovery is sought the person’s expenses (including solicitor and client costs) of and incidental to the application and in complying with any order made on the application.

“8.35 Incorrect affidavit of documents to be amended

If, by reason of any change of circumstances or an error or omission, an affidavit of documents filed in response to a discovery order appears to the person making discovery to be defective or erroneous, the person must promptly file and serve an affidavit that corrects or supplements the affidavit of documents.

“8.36 Where process impeded by discovery of irrelevant documents

If a Judge considers that a party has impeded the process of discovery and inspection by including documents in an affidavit that are not required to be included, the Judge may order the party to pay costs to a party or parties specified in the order.

“8.37 Who may swear affidavit of documents

- “(1) When the Judge makes a discovery order, the Judge may—
- “(a) specify by name or otherwise the person who has to make the affidavit of documents; or
 - “(b) specify by description or otherwise a group of persons or a class of persons each of whom may make the affidavit.
- “(2) If the Judge does not specify the person or the group or class of persons, the affidavit of documents may be made as follows:
- “(a) if the person required to make discovery is an individual person, by that individual person:
 - “(b) if the person required to make discovery 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 9.82:
 - “(c) if the person required to make discovery 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.

“8.38 Challenge to privilege or confidentiality claim

- “(1) If a party challenges a claim to privilege or confidentiality made in an affidavit of documents, the party may apply to the court for an order setting aside or modifying the claim.
- “(2) In considering the application, a Judge may require the document under review to be produced to the Judge and inspect it for the purpose of deciding the validity of the claim.
- “(3) The Judge may—
- “(a) set aside the claim to privilege or confidentiality; or
 - “(b) modify the claim to privilege or confidentiality; or
 - “(c) dismiss the application; or

- “(d) make any other order with respect to the document under review that the Judge thinks just.

“8.39 Crown documents and public interest

An order made under section 27(1) of the Crown Proceedings Act 1950 must be construed as not requiring disclosure of the existence of any document if—

- “(a) the Prime Minister certifies that the disclosure of the existence of that document would be likely to prejudice—
- “(i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
- “(ii) any interest protected by section 7 of the Official Information Act 1982; or
- “(b) the Attorney-General certifies that the disclosure of the existence of that document would be likely to prejudice the prevention, investigation, or detection of offences.

“8.40 Inspection of documents

- “(1) As soon as a party who is required to make discovery has filed and served an affidavit of documents, that party must make the documents listed in the affidavit available for exchange.
- “(2) Documents must be exchanged in accordance with Part B of Schedule 9 (the Listing and Exchange Protocol).
- “(3) A party is not required to make privileged documents or documents no longer in that party’s control available for inspection.
- “(4) A party may limit inspection of confidential documents to the persons specified in the affidavit of documents, and subject to the restrictions proposed in the affidavit.
- “(5) Subclause (1) is subject to subclauses (3) and (4).
- “(6) Subclauses (3) and (4) are subject to any contrary order made under rule 8.38.
- “(7) A party who has received a document electronically under this rule may, on giving reasonable notice in writing, require the person giving discovery to produce the original document for inspection.
- “(8) This rule also applies to documents listed in an affidavit under rule 8.31 or rule 8.33.

“8.41 Order facilitating inspection

- “(1) A Judge may, on application, make any order the Judge thinks appropriate to facilitate the efficient inspection of documents.
- “(2) An order under subclause (1) may, for example, require the person who is to produce the documents for inspection to do either or both of the following:
- “(a) arrange the documents in a stated manner or order:
 - “(b) assist the party inspecting the documents to locate and identify particular documents or groups of documents.

“8.42 Cost of production by non-party

If an order is made under rule 8.32(2) or 8.33(2), the Judge may, if the Judge thinks it just, order that the applicant pay the person from whom discovery is sought that person’s expenses (including solicitor and client costs) in making the documents discovered available for inspection by the parties to the proceeding.

“8.43 Right to make copies

- “(1) A party to whom a document has been made available electronically, or is produced for inspection under rule 8.40, or 8.41, may make copies of the document.
- “(2) On the application of a party to whom a document is produced for inspection under rule 8.40 or 8.41, a Judge may order the person who has control of the document to give the applicant a legible copy.
- “(3) An order under subclause (2) may be made on any terms the Judge thinks just, and, in particular, the Judge 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 given for purposes of inspection only.
- “(4) A party who obtains a copy under this rule—
- “(a) may use that copy only for the purposes of the proceeding; and
 - “(b) except for the purposes of the proceeding, must not make it available to any other person.

“8.44 Effect of failure to include document

A document that should have been included in a party’s affidavit of documents may be produced in evidence at the hearing only with the consent of the other party or parties or the leave of the court.

“8.45 Admission about documents discovered

- “(1) Whenever a party (**party A**) is permitted to inspect a document specified in an affidavit of documents served by another party (**party B**) on party A under this subpart, party A must (subject to any contrary order by a Judge) be treated as having made the following admissions in favour of party B:
- “(a) that the document, if described in the affidavit as an original document, is an original document and was printed, written, signed, or executed as it appears to have been; or
 - “(b) that the document, if described in the affidavit as a copy, is a true copy; or
 - “(c) party A has, with the leave of a Judge, withdrawn the admission treated as made under subclause (1).
- “(2) Subclause (1) does not apply if—
- “(a) a party has in a pleading denied the authenticity of the document; or
 - “(b) within 10 working days after inspecting the document, party A serves on party B a notice disputing the authenticity of the document.
- “(3) At the hearing of a proceeding, party A may give secondary evidence of a document and of its contents if—
- “(a) the document is shown in an affidavit served in accordance with this subpart to be in the control of party B; and
 - “(b) party B has not produced the document after being requested to do so by party A.
- “(4) Subclause (3) applies whether or not a notice to produce the document has been served on party B.
- “(5) Subclauses (1) to (3) apply, with all necessary modifications, in relation to an affidavit made in compliance with an order under any of rules 8.31 to 8.33 (which relate to discovery of

particular documents) as they apply in relation to an affidavit made under a discovery order.

“8.46 Restricted effect of admission

An admission under rule 8.45 for the purpose of a proceeding may not be used against the admitting party in another proceeding.

“8.47 Notice to produce documents or things

- “(1) A party to a proceeding may serve on another party a notice requiring the other party to produce a document or thing for the purpose of evidence at the hearing of the proceeding, or before a Judge, an officer, an examiner, or other person having authority to take evidence in the proceeding.
- “(2) If the document or thing is in the control of the party who is served with the notice, the party must, unless a Judge otherwise orders, produce the document or thing in accordance with the notice, without the need for a subpoena for production.
- “(3) The notice must be treated as an order of the court to produce the document or thing specified in the notice.

“8.48 Contempt of court

- “(1) Every person is guilty of contempt of court who, being a person against whom a discovery order or other order under this subpart has been made, wilfully and without lawful excuse disobeys the order or fails to ensure the order is complied with.
- “(2) This rule does not limit or affect any power or authority of the court to punish a person for contempt of court.”

5 Schedule 9 inserted

The principal rules are amended by inserting the following schedule after Schedule 8:

Schedule
New Schedule 9 inserted
Schedule 9
Discovery checklist and the listing and
exchange protocol

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The purpose of this schedule is to assist the parties in carrying out discovery in accordance with Part 8 subpart 3, and to specify detailed requirements for listing and exchanging documents when giving discovery.

Part A
Discovery checklist

- 1 Assessing proportionality**
- 1.1 Review the pleadings to identify the categories of documents required if standard discovery orders were made in the terms set out in rule 8.21.
- 1.2 Identify (with your client, if you are a lawyer) where those documents are likely to be located, including the following:
 - (a) the individuals likely to have those documents or know where they might be located;
 - (b) the location and likely volume of any documents held as hard copies or electronically; and
 - (c) whether other people have discoverable documents within the client's control (eg, lawyers, accountants).
- 1.3 Consider what methods should be used to locate electronic material efficiently. For example—
 - (a) identify what is located centrally (eg, on a server) and what is located only on individual computers (including laptops);
 - (b) consider what document management system (if any) the client uses, and whether this will assist; and
 - (c) assess whether keyword searches will be effective.
- 1.4 Take steps, or ensure that your client (if you are a lawyer) is taking steps, to preserve the documents involved (eg, by preventing routine destruction of archived materials, deletion of emails etc), and ensuring they will not be inadvertently altered.

Schedule 9—*continued*Part A—*continued*

- 1.5 Estimate the likely volume and cost of discovering the above material—
- (a) approximate number of hard copy and electronic documents;
 - (b) estimated cost of assembling and discovering those documents (including reviewing for relevance, privilege and confidentiality, and listing the documents).
- 1.6 Assess whether that estimated cost is proportionate to the sums in issue or the value of the rights in issue in the proceeding. If the cost is disproportionate, or if any other paragraph of rule 8.22 applies, paragraph 2 should be consulted.
- 2 Non-standard discovery**
- “2.1 If non-standard discovery applies under rule 8.22, then in accordance with rule 8.23 seek to agree a proposal in relation to the discovery order that should be made, with respect to the following:
- (a) *categories*: identify the categories of documents required to be discovered by the parties, and for each category seek to limit discovery to what is reasonable and proportionate. This may be done by, for example, specifying—
 - (i) date range;
 - (ii) types of documents;
 - (iii) key individuals (eg, those who are company directors or at a specified management level); and
 - (iv) accessibility (eg, whether the parties should attempt to restore deleted or back-up tape material).
 - (b) *method for locating the documents*: when appropriate, seek to agree what steps must be taken to search for such documents, based on what is reasonable and proportionate, including consideration of the following:
 - (i) appropriate keyword searches;
 - (ii) other methods for searching for or culling the documents (eg, optical character recognition and,

Schedule 9—*continued*Part A—*continued*

for electronic materials, email threading or clustering documents); and

- (iii) whether specialist assistance is required to locate documents efficiently and accurately.
- (c) *staged discovery*: In conjunction with identifying the categories and methods to be adopted by the parties, discuss whether any different deadlines are appropriate (ie, staged discovery).

3 Listing and exchange

- 3.1 Parties are required by rule 8.25(1) to use the Listing and Exchange Protocol in Part B of this schedule unless they agree otherwise or a discovery order otherwise requires. Parties must—
 - (a) consider whether the Listing and Exchange Protocol is appropriate and seek to agree any modifications; and
 - (b) if any electronic material contains relevant information that cannot be seen if provided to other parties in paper or image form, consider what special arrangements will be necessary for inspection (eg, unusual software licences are required).

Part B

Listing and exchange protocol

1 Protocol requirements

- 1.1 Parties are required to—
 - (a) list documents providing the following detail for each document:
 - (i) document ID;
 - (ii) date;
 - (iii) document type;
 - (iv) author;
 - (v) recipient;
 - (vi) parent document ID; and
 - (vii) privilege category.

Schedule 9—*continued*Part B—*continued*

- (b) exchange documents electronically by way of—
- (i) a single, continuous table or spreadsheet with each column exclusively containing the detail from 1.1(a) above; and
 - (ii) multipage images.
- 1.2 Parties must endeavour to apply the specific details in paragraphs 2 to 6 to ensure consistency for listing and exchange.
- 1.3 Any technical terms have the meanings set out in paragraph 7.

2 List of documents format

- 2.1 The document descriptions must comply with the following precise requirements:

Field no.	Field name	Description
1	Document ID	The document ID must be a unique reference The document ID must follow through sequentially in a logical order, eg, chronologically. The format must be alphanumeric ie, AAA.000001 Parties must agree Party Codes, for example: <i>AAA – Party A</i> <i>BBB – Party B</i> <i>CCC – Party C</i>
2	Date	The date appearing on the face of the document. Dates must appear as DD/MMM/YYYY – eg, 01 Jan 2010 If a document is “Undated” leave this field blank. If a document is partially dated or only partially legible, this field must contain such date information as can be determined from the document. If the date is estimated, state in an additional field titled “Estimated”.
3	Document type	The type of document being listed – eg, email, letter etc, Parties may agree to construct a predefined list for all document types.

Schedule 9—*continued*Part B—*continued*

Field no.	Field name	Description
4	Author	The name of the Author of the document. If only part of either the individual or organisation can be determined, provide the information available. If the Author is unknown, leave this field blank.
5	Recipient	The name of the recipient(s) of a document. If only part of either the individual or organisation can be determined, provide the information available. If the recipient is unknown, leave this field blank.
6	Parent document ID	This field will be populated with the Document ID of the Parent document. This field will be populated only if a document is attached to, or embedded within, another document.
7	Privilege category	This field is to be populated if the document is subject to a privilege claim.

2.2 If information cannot be determined for a description it must be left blank.

2.3 The parties may agree not to list “face value” descriptions for electronic documents, and instead use agreed “metadata” material that is extracted from the electronic files. In all cases, however, the method must be agreed. This is to ensure parties’ descriptions are consistent with each other.

2.4 Any “document ID” used in any supplementary discovery must be unique and run sequentially from the last number used in the previous list.

3 Specific document decisions

3.1 *Duplicate documents:*

- (a) Parties must take reasonable steps to ensure exact duplicate documents are removed from the discovered documents. Only 1 unique copy of each document must remain. A document with any addition, erasure or annotation must be treated as a separate document from its unaltered version: *see* rule 8.25(4).

Schedule 9—*continued*Part B—*continued*

- (b) An email and attachment are to be considered a duplicate only if the entire “email and attachment” document group is contained elsewhere.
- (c) An attached document to a document group will not be classed as a duplicate if it is contained as a stand-alone document elsewhere.

3.2 *Emails:*

- (a) When there is a chain of emails, list only the top level email.
- (b) If other documents in a chain are relevant to the proceeding they must be listed separately based on the actual top level of the email. A party must have the top level email in its possession to exchange.
- (c) Email chain technology may be investigated, to direct parties to the end point of an email chain.

3.3 *Attachments:*

- (a) Attachments must be listed as separate documents.
- (b) In general, attachments must appear immediately after the “Parent” document in the list, and will take the next “Document ID”.
- (c) Only one level of attachment is permitted. Any document regarded as an attachment to an attachment must be regarded simply as an attachment, and the “Parent document ID” must be that of the lead “Parent” document.

3.4 *Consistency of names:*

- (a) It may be beneficial to establish a set list of common names to ensure consistency across the document descriptions.
- (b) Consistent naming conventions may be established for fields like Document type, Author and Recipient.

4 Privilege

- 4.1 Parties must agree any specific Privilege requirements for listing and exchange.

Schedule 9—*continued*Part B—*continued*

- 4.2 Privileged documents must be individually listed and given a “Document ID”, except for—
- (a) documents which are communications between the clients and their external legal advisers created after litigation was in contemplation (which may be group listed); and
 - (b) documents privileged in their entirety created after commencement of the proceeding (which may be group listed).
- 4.3 Documents must be given a description in accordance with 2.1 above, unless the description discloses information contained in a communication for which privilege or confidentiality is claimed.
- 4.4 The “Parent document ID” information must be noted in the list, if the privilege claim relates to part of a document group.

5 Redactions

- 5.1 The redacted sections of a document must be blanked out on the electronic image. Parties may agree that a label or note must be provided explaining the grounds for the redaction.

6 Exchange format

- 6.1 The format of the spreadsheet must be as follows:
- (a) each document must be contained within a separate row and all field entries must be contained within single cells; and
 - (b) a delimiter, eg, (;), must be used for any multi-entry fields – eg, “Recipient”.
- 6.2 Documents must be contained within a folder on the media disk.
- 6.3 Documents must be provided as multi-page pdfs (or another format if agreed). The filename for each individual document must be the “Document ID.PDF”.
- 6.4 All electronic image documents must have the “Document ID” clearly marked on at least the first page of the document.

Schedule 9—*continued*Part B—*continued*

- 6.5 If a document has relevant metadata, parties may request its provision in native file format. Either—
- (a) the “Document ID” must be contained within the name of the native file format eg, “Document ID.xls”; or
 - (b) the “filename” of the native file must be specified in an additional field in the spreadsheet.
- 6.6 The parties may agree that the images be provided in an agreed searchable format.

7 Glossary

In this Schedule, unless the context otherwise requires,—

custodian means the individual who has custody of a document

document has the meaning set out in rule 1.3 of the High Court Rules and includes all ESI

document descriptions mean the set of data fields used to describe a document under paragraph 2.1

document id (or document number) has the meaning set out in paragraph 2.1

electronic image means an electronic representation of a paper document or electronically stored information. An electronic image may be a searchable image or an unsearchable image. Examples are image PDF files and TIF (or TIFF) files

electronically stored information (ESI) means any information stored electronically. It includes (for example) email and other electronic communications such as SMS and voicemail, word processed documents and databases, and documents stored on portable devices such as memory sticks and mobile phones. In addition to documents that are readily accessible from computer systems and other electronic devices and media disks, it includes documents that are stored on servers and back-up systems and electronic documents that have been “deleted”. It also includes metadata and embedded data

field means a section of data in a database, for example a field containing the date of a document

Schedule 9—*continued*Part B—*continued*

media disk means a CD or a DVD

metadata means data about data. In the case of an electronic image document, metadata is typically embedded information about the document which is not readily accessible once the native electronic document has been converted into an electronic image or paper document (eg, the date the document was last printed or amended). Metadata may be created automatically by a computer system (system metadata) or may be created manually by a user (application metadata). Depending on the circumstances of the case, metadata may be discoverable

native file format means an electronic document, stored in the original form in which it was created by a computer software program

optical character recognition (OCR) means the computer-facilitated recognition of printed or written text characters in an unsearchable image

portable document format (PDF) means a file format which enables documents to be displayed or printed in a manner which preserves the formatting originally used by the author. A PDF file may be either a searchable image file or an unsearchable image file

redaction means the process of rendering part of a document unreadable. It is sometimes referred to as masking. Redaction is typically used to render confidential or privileged portions of an otherwise discoverable document unreadable

tagged image file format (TIF or TIFF) is an electronic image format.

Clerk of the Executive Council.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

These rules, which amend the High Court Rules, come into force on 1 April 2011.

The disclosure of documents held by a party and relevant to the issues in a proceeding (“discovery”) is an important feature of almost all civil litigation.

In significant commercial litigation especially, the discovery of documents imposes a huge and costly burden, often increased by the existence of numerous electronic communications. At present some 90% of all documents are generated electronically.

The following are the most important changes introduced by these amending rules:

- Parties must co-operate with each other at an early stage to discuss the methods they are going to use to conduct a reasonable search that is proportionate to the proceeding.
- The first pleading filed by a party will now have to be accompanied, usually, by a bundle of the principal documents that party relies on (“initial disclosure”).
- Discovery orders will be mandatory in all cases, and will usually be made at the first case management conference.
- “Standard discovery” will be narrower in scope than the current *Peruvian Guano* test (documents which are or may be relevant to issues in the proceeding, or may lead to a chain of inquiry).
- A new category of “non-standard discovery” is being created for several defined categories of case, eg, those of very high value. Non-standard discovery will also apply to reduce the scope of standard discovery if its cost would be disproportionate to what is at stake in the proceeding.
- All discovery must now be given electronically – unless a lay litigant obtains an exemption by persuading a Judge that electronic discovery would be impracticable or would be unjust.
- The process of discovery, and subsequent inspection of the documents discovered in a party’s affidavit of documents, is to be facilitated by introducing Schedule 9. Part A of this schedule is a practical discovery checklist which parties must con-

sider. Part B is a Listing and Exchange Protocol, the purpose of which is to reduce handling of hard copies, to eliminate duplication, and to promote consistency of document descriptions in computer-generated spreadsheets.

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Date of notification in *Gazette*:
These rules are administered by the Ministry of Justice.
