The Rules Committee | Discussion Papers

Improving Access to Civil Justice

Initial Consultation with the Legal Profession

Date of Issue:	11 December 2019
Due Date for Submissions:	1 September 2020
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Introduction

1. The Rules Committee is seeking comment from members of the legal profession on four potential areas of reform to the High Court Rules 2016 and the District Court Rules 2014. The purpose of these potential reforms is to improve access to justice by reducing the costs associated with bringing a civil matter to court.

2. Specifically, the Committee is considering:

    a. introducing a short trial process in the High Court, and/or modifying the existing short trial process in the District Court;
    b. introducing an inquisitorial process for the resolution of certain claims in the High and District Courts;
    c. introducing a requirement that civil claims be commenced by a process akin to an application for summary judgment; and
    d. streamlining current trial processes by making rule changes intended to reduce the complexity and length of civil proceedings, such as by replacing briefs of evidence with "will say" statements, giving greater primacy to documentary evidence, and reducing presumptive discovery obligations.

3. Recognising the wide scope of these potential reforms, the Committee is seeking comment at an early stage of the reform process. The Committee will develop the potential reform options discussed, after considering the submissions received. More specific proposals will be consulted on later.

4. The Committee has not decided its preferred option(s) and it may consider options to reduce the costs of bringing a matter to court that are not discussed in this paper. Submitters are encouraged to make any other proposal for rules reform that they consider would improve access to civil justice.

Background

The justice gap

5. Increasingly, there is an unmet need for civil justice in New Zealand. This unmet need has been referred to as the "justice gap".[1] As the Chief Justice and others have noted,[2] an obvious symptom of this justice gap is the increasing number of unrepresented litigants before the Courts, including many litigants who cannot afford legal representation.

6. The objective of New Zealand's rules of practice and procedure is to facilitate the just, speedy, and inexpensive determination of proceedings and interlocutory applications.[3] If rules of procedure are contributing to justice being unaffordable, by imposing burdens disproportionate to the cost and complexity of the disputes being litigated, then arguably the rules are not fit for purpose.

Why are there so few defended District Court civil proceedings? What can be done about it?

7. Litigating a defended civil claim worth less than $100,000 in the District Court is routinely considered to be uneconomic. While several thousand civil claims are filed in the District Court each year, the vast majority of them are undefended debt recovery proceedings. In 2013-2018, only 4% of civil claims in the District Court were defended, and only a fraction of those went to trial.

8. On one view, there is enough flexibility in the District Court Rules to ensure that procedural requirements are proportionate to the value and complexity of claims.

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1 Helen Winkelmann "Access to Justice – Who Needs Lawyers" (Ethel Benjamin Address 2014, November 2014). Available at https://www.courtsofnz.govt.nz/publications/speeches-and-papers/#speechpaper-list-2014.

2 Nicholas Jones "Access Denied" *New Zealand Herald* (New Zealand, 4 November 2019).

3 Senior Courts Act 2016, s 145; High Court Rules 2016, r 1.2; District Court Rules 2014, r 1.3.

9. For example, the short trial procedure requires evidence to be given by affidavit and imposes time limits for the presentation of a party's case.[4] But there is a question whether practitioners and judges are making enough use of the flexibility that is already available under the Rules to tailor the procedure to the value and complexity of a claim. The short trial process does not currently provide default limits on discovery. Perhaps it should.

10. By contrast, more extensive procedural requirements, including discovery obligations, will be appropriate in some cases, such as those involving allegations of fraud. For such cases, the District Court Rules provide a full trial process.[5] A simplified trial process exists for intermediate cases.[6]

11. However, while there may already be sufficient flexibility in the Rules and a need for a flexible range of responses, changes to the culture of litigation may also be needed. Judges and lawyers have a responsibility to facilitate access to justice by minimising the costs of each proceeding to the extent that the interests of justice allow.

12. To encourage the culture change that may be required, the "presumptive" model of civil procedure that applies in New Zealand may also need to change. This will be true in both the District Court and the High Court.

13. A key consideration in any change, however, is to avoid inappropriately prioritising two concepts from the Rules' objective, "speedy" and "inexpensive", at the expense of the third concept: "just".

14. To that end, the rule of court should ensure that the default, "presumptive", procedures for civil trials are proportionate to the nature and value of the issues in dispute. That may mean a simpler procedure than the current default. Parties would then need to demonstrate why it is in the interests of justice for a more time-consuming and expensive procedure to apply.

15. The Committee is considering options for expediting civil trial processes in the High Court and the District Court. Several options are presented below. Submitters are also invited to suggest other options for the Committee's consideration.

Proposal One: Introduction of Short Form Trial Processes

Introducing the existing District Court short trial format into the High Court Rules

16. A short trial format is already available in the District Court for cases that can come to a hearing quickly, where the issues are relatively uncomplicated or a modest amount is at

4 District Court Rules 2014, r 10.4.
5 Rule 10.8.
6 Rule 10.7.

stake, or where the trial time is not likely to exceed a day.[7] A simplified trial format also exists for claims that neither qualify for a short trial nor justify a full trial.[8]

17. One possibility is to introduce a similar short trial format in the High Court but extend its application to cases of, say, four days or less.

18. In addition, triaging procedures could be introduced to direct suitable proceedings into the short trial format, to promote use of that format in the District Court and potentially the High Court. A presumption in favour of that process applying to cases satisfying certain subject matter and value criteria may also apply.

Short causes procedure suggested by the New Zealand Bar Association

19. The New Zealand Bar Association recommends introducing a "short causes procedure" in the High Court, modelled on the procedure introduced in the Business and Property Courts of England and Wales.[9]

20. It would be for matters that do not require extensive disclosure, witness, or expert evidence. It would therefore be primarily suited, for example, to questions of contractual interpretation and other largely legal disputes turning on issues capable of tight definition. It would be less suited, for example, to cases involving allegations of fraud or dishonesty, or to matters in which the credibility of a witness is in question.

21. Pleadings would be limited to 20 pages. Discovery would be tailored or non-existent. The way evidence is given would be determined at the first case management conference. The default rule would be for evidence to be given in affidavits, with cross-examination. If briefs of evidence were allowed, they would be limited to 25 pages each. Or, alternatively, if will-say statements were directed they would be limited to ten pages.

22. Like the present commercial panel procedure,[10] it is proposed that cases would be managed by a single judge from the first case management conference through to trial to provide continuity, efficiency, and increased judicial understanding of the case from the outset. Judges and counsel would bear greater responsibility for ensuring the timely and appropriate identification of relevant issues, disclosure, evidence, and the most expeditious presentation of their case. Interlocutory applications would be determined

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7 District Court Rules 2014, pt 10 subpt 1.

8 District Court Rules 2014, r 10.1(4).

9 Civil Procedure Rules 1998 (Eng), at Practice Direction 57AA – Shorter and Flexible Trials Schemes. The schemes were introduced from 1 October 2018 following a successful two-year pilot.

10 Senior Courts Act 2016, s 19; Senior Courts (High Court Commercial Panel) Order 2017. Commercial cases are defined as high value disputes (over $2m), complex and difficult matters of commercial law, and proceedings brought by public authorities to enforce regulatory standards of good behaviour.

on the papers within one or two days of filing, unless extraordinary circumstances warranted a hearing.

23. Under the proposed short causes procedure, the time from statement of claim to trial would be no more than ten months. The trial would not exceed four days. There would be an expectation that judgments would be given no more than six weeks after trial.

Fast track procedure

24. Another option could involve reintroduction of the fast-track procedure that was in place in the High Court between 2009-2017 (or a variation of that procedure).[11] Parties' consent was required for fast-tracking, which was generally intended for cases with an estimated hearing duration of up to five days, with confined issues and not requiring extensive interlocutories.

25. Once transfer to the fast track was ordered, a conference was held at which a hearing date was directed to be allocated, which would normally be a further two to six months after the date of the conference. Directions leading up to the trial would also be made, including whether written briefs or "will say" statements would be utilised. A pre-trial conference was held approximately 15 working days before the trial, by which time all evidence would be served and an agreed bundle of documents filed, and at which any outstanding interlocutory matters would be dealt with.

Proposal Two: Introduction of Inquisitorial Processes

26. Two suggestions have been made of civil claims processes that would take a more inquisitorial approach than the current adversarial process.

Earthquake insurance claim process adopted by the Hon Sir Graham Panckhurst QC

27. The first suggestion is for a highly abbreviated adjudication/facilitation process for civil claims in the High Court, and potentially the District Court. This could be modelled on a process we understand was recently used to resolve approximately 25 earthquake insurance claims by insured parties.

28. We understand these cases were all complex litigation — involving factual disputes, and technical questions requiring expert evidence. We also understand that the value of the claims was high for the individuals involved, ranging from something like $500,000 through to $2 million for each claimant.

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11 High Court of New Zealand *Fast Track Practice Note* (2 June 2009).

29. We understand this process served as a precedent for the design of the jurisdiction of the Greater Christchurch Claims Resolution Service operated by MBIE and has some similarities to the Disputes Tribunal process.

30. This proposal involves a claims determination process with very little formality, leading to a final decision made by a Judge with limited (if any) rights of appeal, which is available to the parties who consent to use this process. It would involve a more fundamental departure from the traditional adjudication functions of the Court. It is suggested because profound changes may be needed to address the problem that civil litigation in the High Court is well beyond the reach of most New Zealanders, even when the value of their claims brings them within the High Court's exclusive jurisdiction.

31. The underlying philosophy of this proposal is that any ultimate decision will not be as full, precise, or perfect as the decision that would follow from a trial, but that the parties would have a much quicker and less expensive final answer to their dispute.

32. The key steps of such a process would be along the following lines:

    a. The claiming party and opposing parties would file initial claims and defences, in submission style (up to 30 pages), attaching key documents, expert reports etc.

    b. An initial hearing/meeting would take place with the Judge, who would seek to facilitate a resolution of the dispute. This would be different from current settlement conferences in that the Judge would be actively involved in the discussions throughout, and the same Judge would then go on to issue a decision if there is no resolution.

    c. If there is no resolution, the Judge would decide the next steps to allow the Judge to make a decision, including to interview witnesses, or experts, or receive additional documents. The process to be followed would be up to the Judge and should not be elaborate.

    d. The Judge would then issue a decision, which would be brief, capturing essential reasons only.

    e. Appeal rights would be limited or non-existent.

33. We understand few of the claims involved in the Sir Graham Panckhurst process went on to the adjudication phase as they were resolved at the settlement facilitation phase. That may reflect the Judge giving a clear steer on their thinking about the case at the facilitation phase, or it may reflect the particular nature and circumstances of the litigants.

34. The proposal to curtail appeal rights from proceedings decided under this procedure may be controversial. It may be necessary to consider how:

    a. if ever, it may be appropriate to curtail appeal rights in cases where not all parties consented to the use of the procedure; or

    b. how the use of this process might be made compatible with the maintenance of appeal rights.

35. This proposal represents a concrete example of the possibility of introducing a "facilitated" or "mediated" justice procedure as an alternative form of dispute resolution within the High and District Courts. It would represent a departure from a strictly adjudicative and adversarial model of justice, incorporating aspects of procedure and a notion of the judicial role more familiar from civil law jurisdictions and tribunals such as the Disputes Tribunal.

Inquisitorial process suggested by the Hon Justice Kós

36. Another model has been suggested by the Hon Justice Kós for District Court proceedings up to, say, $100,000 in value and for cases where one party is not represented and cannot reasonably be expected to be represented. The process would be along the following lines:[12]

    a. the plaintiff would file a short statement of claim which would be reviewed by a court-appointed assessor;

    b. if the pleading is satisfactory, the claim would proceed – otherwise assistance would be available to remedy deficient pleadings. However, if the deficiency is irremediable, the case would not be allowed to proceed (a decision subject to judicial review);

    c. the assessor would meet the parties and identify the real claims and defences and devise a list of issues;

    d. parties would be required to produce any documents adverse to their case, with short affidavit evidence to be supplied where necessary;

    e. the Court, acting inquisitorially, would convene a case management conference to consider whether a judicial settlement conference was appropriate;

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[12] Hon Justice Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (Address to the AMINZ and International Academy of Mediators Conference, Queenstown, March 2016).

f. if a trial was needed, a decision would be made as to which witnesses would need to be questioned, whether the Court should appoint an expert, and whether witnesses would be required to confer to look for common ground;

g. a merits hearing would then take place, with relevant witnesses being examined by the Court on their evidence and the documents;

h. additional questions from the parties or their counsel could be asked only with leave; and

i. finally, a reasonably brief decision would be delivered.

Proposal Three: Requiring All Proceedings to Begin with a Summary Judgment Application

37. The third proposal for consideration is for civil proceedings to begin by way of something akin to an application for summary judgment.

38. The Committee acknowledges that not all types of claims would be suited to this procedure. Cases in the High Court are currently triaged into complex or ordinary. The triage process would be extended to identify those ordinary proceedings suitable for the summary judgment process.

39. The triage process would include consideration of the nature of the case and the number of parties amongst other matters. Indicatively, by way of example, matters involving allegations of fraud and default judgment applications in respect of liquidated debt claims would not be included in the procedure.

40. Even if judgment was not entered, the benefits of the summary judgment procedure in appropriate ordinary claims would include:

a. early clarification of the issues and identification of the points of difference between the parties (not currently achieved at case management conferences);

b. an early assessment of the adequacy of the evidence produced by the plaintiff, and of the necessary scope of discovery;

c. the parties getting an initial informed judicial reaction to their cases which would encourage and expedite settlement discussions;

d. identification of the best path to trial, and reducing the costs of going to trial on the current model by, for instance, making it easier to appropriately tailor the scope of discovery and limiting the number of issues to be addressed at trial.

41. The potential savings gained from the above could outweigh the additional costs associated with the application, especially if the streamlined processes noted below are also adopted or the proceeding is triaged into an expedited form of trial.

Proposal Four: Streamlining Standard Pre-Trial and Trial Processes

42. In addition to considering the specific suggested processes outlined above, the costs of going to court could potentially be reduced by reforming some of the existing rules of practice and procedure in relation to standard trials, for example in each of the four following areas.[13]

Replacing Briefs of Evidence With "Will Say" Statements

43. Much of the expense associated with preparing a case for trial relates to the preparation of witnesses' briefs of evidence.

44. Written briefs have become the usual way in which evidence-in-chief is presented in civil trials. The use of written briefs of evidence became common practice in the late 1980s/early 1990s and was enshrined in the High Court Rules in 1995.[14] Written briefs were introduced to speed up procedure and prevent ambush.[15] Whether or not these goals have been met is considered debatable.

45. In 2008, the Rules Committee considered reversing the presumption that written briefs will be used in trials while retaining the power of Associate Judges to order written briefs to be provided, by way of tailored directions at the pre-trial conference.[16] In a consultation paper inviting comment on the future of the written briefs regime, the Committee observed that:[17]

> First, the practice of lawyers reducing evidence to written briefs adds to costs. Lawyers treat witness statements as documents which must be as precise as pleadings and consequently go through many drafts. The perception is that far more time is spent on preparing written briefs than would be spent on preparing a witness for examination in chief. While it was once thought that written briefs would save trial time and hence costs, this assessment must now be revisited with the advent of FTR (real time recording and transcribing of Court proceedings), which will considerably reduce the time taken by oral evidence-in-chief.

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13 Papers addressing each of these proposed areas of reform, prepared by the Clerk in August and September 2019, are available on the Committee's section of the Courts of New Zealand website.

14 High Court Amendment Rules (No 8) 1995, r 3. See also Gillian Coumbe QC "Witness statements in civil cases – show me the evidence" (Litigation Skills Masterclass Seminar, Auckland, 25 November 2015).

15 Rules Committee *Minutes* (1 October 2012 at 4-5). Credit for initiating this change is attributed to Justices Tompkins and John Hansen.

16 Rules Committee *Minutes* (1 October 2012).

17 Rules Committee *Consultation Paper* (10 December 2008), as reissued with revisions on 26 February 2009.

> Secondly, written briefs generally contain the words of the lawyer rather than the witness. Oral evidence-in-chief was always an important device for ascertaining the truth. A written brief may help a dishonest witness, who can hide behind another's words. A written brief may equally hurt an honest witness, who might be cross-examined on written evidence not recorded in the witness's own words.
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> Thirdly, written briefs can lead to opposing lawyers spending hours preparing and then cross-examining at length on the words used in the statements. The fact that every 't' is crossed and 'i' dotted in the brief without judicial culling potentially exposes more material to challenge. This can add to costs which probably would not arise if counsel were cross-examining on the spoken words as they unfolded in Court. Further, the witness is thrust immediately into a hostile cross-examination without having had time to adjust to giving evidence in evidence-in-chief.

46. Following opposition by some submitters to the abolition of the presumption of written briefs, the Committee made a more modest reform in 2012.[18] The new r 9.10 (oral evidence directions) modifies the practice of preparing written briefs of evidence by empowering the making of directions that evidence must be given orally when facts are disputed. New r 9.7 (requirements in relation to briefs) sets out the requirement that written briefs must be in the words of the witnesses not in the words of the lawyer involved in drafting the brief with the onus on the court to enforce this obligation.

47. However, concerns remain that rather than speeding up procedure, written briefs add to the length of cases.[19] It is timely to revisit the issue of written briefs to evaluate the effectiveness of the 2012 reforms, and to reconsider whether a more extensive change, as envisaged in 2008, should now be made.

48. Concerns about written briefs are not unique to New Zealand. Other jurisdictions have responded in various ways, for example as described in Appendix 1 in respect of three Australian states.

Changing the Presumptive Mode of Giving Evidence

49. Separately, members of the Committee have concerns about the use of witnesses to testify to matters largely addressed by (arguably more reliable) documentary evidence. This can needlessly prolong the hearing of trials. For example, in contract disputes in which pre-formation negotiations are relevant to the interpretation of the contract, this can result in the adducing of a large amount of evidence as to what witnesses understood about the formation of the contract that is of limited or no relevance.

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18 High Court Amendment Rules (No 2) 2012.

19 See, for example, Hon Justice Geoffrey Venning "Access to Justice – A Constant Quest " (New Zealand Bar Association Conference, Napier, 7 August 2015) at 11.

50. The Rules currently allow for affidavit evidence by agreement or by order of Court (unless a witness is required for cross examination).[20] And documents from the common bundle do not need to be referred to by a witness (in a brief or otherwise) to be received into evidence provided they are referred to in opening submissions.[21] However, in addition to these existing rules, the Committee is interested in receiving submissions on whether other rule changes may be necessary to reduce unnecessary reliance on, and time and expense consumed by, the current presumptive mode of oral evidence.

51. For example, the Committee is interested in receiving submissions on whether r 9.12 of the High Court Rules 2016 and District Court Rules 2014, requiring the reading aloud of witness briefs as evidence-in-chief at trial, should be replaced. One potential reform would be to provide that the Court may elect to read the statements out of court, prior to the witnesses being called, and that the witness's brief can be "taken as read" as their evidence-in-chief.

Changing Discovery Obligations

52. The disclosure of documents held by a party with a bearing on issues in a proceeding (discovery) is an important feature of almost all civil litigation. However, discovery can impose a logistical and costly burden on the parties. The discovery rules were significantly amended in 2011 including to replace the *Peruvian Guano* standard for disclosure with a more restricted "adverse documents" test.

53. These changes also introduced the concept of proportionality into discovery as well as a duty of cooperation between counsel (aiming to resolve issues of discovery and other interlocutory matters without the need for formal interlocutory applications). Another change was to require that the first pleading filed by a party to be accompanied, usually, by a bundle of the principal documents that that party has used when preparing the proceeding (initial disclosure). After these reforms were implemented, the profession was surveyed. Submitters responded that the reforms were an improvement and that the adverse document test was a success.

54. Despite the profession's apparently positive experience of these reforms, the Committee thinks it appropriate to revisit how well the discovery rules are working. Based on anecdotal evidence, the Committee is concerned that the Law Commission's 2002 observation that the cost of discovery can be disproportionately high when measured against its benefits"[22] remains an apt comment, the 2011 reforms notwithstanding. On the one hand, "great injustice" can result where the rules of civil procedure prevent party A from obtaining access to documents on which party B was sitting that party A needs,[23]

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20 High Court Rules, rr 9.55-9.56.

21 High Court Rules, r 9.5(4).

22 Law Commission *General Discovery* (NZLC R78, 2002) at [3].

23 At [1].

or where trial by ambush can result.[24] Importantly however, the continuing emergence of "new techniques for creating and reproducing documentations and of new methods for communication" threaten to render discovery a disproportionate burden on parties to civil litigation, even in the absence of the improper use of discovery as a tool of warfare by attrition.[25]

55. Statistics reproduced by the Law Commission in its 2002 report indicated that, at that time, a party to a major commercial dispute could spend nearly $1.5 million on discovery costs alone (adjusted to 2019 values), and "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."[26]

56. While current procedures, and litigation practices, are obviously very different to those in place in 2002, the Committee's initial research has not suggested the costs of discovery are as yet proportionate to the value of the discovery process as an aid to fact-finding. Comments in the Law Commission's 2002 report questioning the merit of discovery being available as of right,[27] the need for careful tailoring of discovery obligations to the requirements of each case,[28] and, relatedly, the need for precise and early definition of the issues in the proceeding as an aid to determining the appropriate scope of discovery,[29] remain relevant.

57. Given these recurrent concerns, the Committee is prepared to contemplate potentially wide-ranging changes to the presumptive discovery obligations attaching to parties to civil litigation.

58. These could extend, say, to the abrogation of a right to discovery in favour of a presumptive "disclosure only" model that would apply except where the Court was satisfied the interests of justice required a more onerous model. That is the position under a pilot scheme presently underway in England and Wales, and in the Federal Court of Australia. Another example is provided by Ontario, where parties are required to undertake "discovery planning" aimed at identifying the scope of discovery and any disputes at the earliest possible stage of the proceeding.

59. A selection of discovery measures from other jurisdictions is included in Appendix 2 to stimulate ideas. Any other suggestions for changes to the Rules are welcomed.

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24 At [5].
25 At [3]-[5].
26 At [3].
27 At [7].
28 At [16]-[17].
29 At [15].

Providing for Greater Judicial Control of Hearings

60. Currently, case management is well-established at the pre-hearing stage through to trial. One way of reducing the costs associated with trial might be to extend case management to the trial itself. Doing so could help to ensure more effective use of hearing time and to reduce the length of the hearing.

61. Possible rule changes in this area might include greater use of time limits in trials. These currently exist for short and simplified trials in the District Court,[30] but could be introduced in the High Court as well.

62. As well as time limits, judges could be encouraged – through the inclusion of a clear basis to do so in the rules – to intervene more in the examination of witnesses. This would be most effective if supported by other amendments designed to increase judges' involvement in identifying the main issues and points of dispute in files at an early stage, and to allow judges to ensure counsel remain focused on the most important issues in dispute. Powers of this type would also be supported by, for example, costs rules allowing an award of costs to be increased or reduced where a party has engaged in unnecessary questioning of witnesses.

63. The Committee is also interested in exploring whether more rigour is needed in setting the length of fixtures. For example, it could be made clear that parties will need to justify why they seek a particular hearing length, including with supporting affidavits.

Return of Submissions

64. The Committee invites submissions and comments on the above suggested options for reform. Members of the profession are also invited to submit any other proposal for reforming the rules of practice and procedure that might improve access to civil justice by reducing the costs of litigation, regardless of whether it is described above.

65. Submitters should note that the Committee's role is limited to matters that are within the rule-making power in legislation. Policy areas such as access to legal aid for civil proceedings and court fees, while relevant to the broader topic of access to justice, are outside the Committee's role.

66. Submissions or comments should be directed to Sebastian Hartley, Clerk to the Committee, by 5 pm on 1 September 2020, using the details on page one of this document. Inquiries regarding this document may, in the first instance, be directed to the Clerk by post, phone, or email.

[30] District Court Rules 2014, rr 10.4, 10.7.

67. Submitters are requested to please include their name, any firm or professional organisation affiliation relevant to their submission, contact telephone or mobile number, and either their email address or postal address. The Committee may contact submitters regarding their submissions.

68. Please be aware that all submissions received:

    a. may, at the Committee's discretion, be posted on the Rules Committee's website;

    b. may form part of the Committee's response to any future request made to the Committee under the Official Information Act 1982;

    c. will be retained indefinitely as part of the Committee's records created and maintained pursuant to the Public Records Act 2005 and may be subject to public inspection under the provisions of that Act.

69. If you would prefer that your submission, or any part of your submission, not be made publicly available or released in this manner, please indicate this in a letter or email covering your submission.

The Rules Committee would like to take this opportunity to remind members of the profession that feedback from the profession is a valuable way of ensuring that the rules are working well.

If you have any concerns about any rule or its application, please raise this with the Committee by writing to the Clerk at PO Box 60, Auckland, or RulesCommittee@justice.govt.nz.

Appendix 1 – Briefs of Evidence in Three Australian States

1. In Western Australia,[31] the default position as of 1 February 2019 is to use witness outlines (will-say statements) rather than briefs of evidence. Witness outlines are required to address only matters in issue, and outlines must "clearly identify all the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation." Cross-examination based on the content of witness outlines is prohibited without leave of the Court.

2. Briefs of evidence are not ordinarily required in the Commercial Court of the Supreme Court of Victoria and the Commercial Division of the County Court of Victoria and will only be ordered where their provision fulfils the overarching purpose of the Civil Procedure Act,[32] Generally, briefs of evidence will not be appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the determination of factual matters in dispute will depend on an assessment of the credibility of a witness.

3. The default position in New South Wales is that the evidence in chief of any witness at any hearing, including a trial, must be given by way of affidavit unless the Court provides otherwise.[33] Alternatively, the Court may direct that a portion of the witness's evidence be given by way of witness statement, and may make such directions with regard to each different question of fact or witness.[34]

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31 Rules of the Supreme Court 1971 (WA), O 36; Practice Direction 4.5 (WA).

32 See Practice Note SC CC 1 (Vic) at [15.12] and following; Practice Note PNCO 1-2019 Operation and Management of the Commercial Division at 18. The Civil Procedure Act 2010 (Vic) provides that the overarching purpose is the "just, efficient, timely, and cost-effective resolution of the real issues in dispute".

33 Uniform Civil Procedure Rules 2005 (NSW), r 31.1(3).

34 Rule 31.4(2).

Appendix 2 – Approaches to Discovery in Other Jurisdictions

1. The Committee is aware of a pilot scheme to streamline discovery obligations underway in England and has noted reforms that have been undertaken in the Federal Court of Australia, New South Wales, and Ontario. These provide examples of how discovery obligations in New Zealand could potentially be streamlined.

England

2. The current English pilot scheme applies to existing and new proceedings in the Business and Property Courts of England and Wales and the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, and Newcastle for two years from 1 January 2019 (and to any proceedings to which it applied at the end of the two years until those are concluded.[35] It does not apply within the Shorter and Flexible Trials Scheme (see below).[36]

3. The principles applicable to the pilot scheme rules are as follows:[37]

    a. Disclosure is accepted to be important to achieving the fair resolution of civil proceedings, being concerned with identifying and making available documents that are relevant to the issues in the proceedings.

    b. Parties, and their representatives, are expected to co-operate with each other, and to assist the court, to determine the appropriate and proportionate scope of disclosure in the most efficient way possible.

    c. The Court will be concerned to ensure that disclosure is no wider than is reasonable and proportionate in resolving the issues in the proceeding.

4. The new rules can be summarised as a two-stage process:[38]

    a. Initial Disclosure: Like the process found in arbitration, the parties are required to disclose the documents on which they rely. The parties may opt-out of this requirement if it is unnecessary or if the court has ordered it is not required.[39]

        i. The reasons for any agreement to that end must be recorded by each party in writing and made available to the court on request at a case management conference.[40] The court may set aside an agreement if it considers that

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35 Civil Procedure Rules 1998 (Eng), Practice Direction 51U r 1.2.

36 Rule 1.4.

37 Rules 2.1-2.9.

38 Justice Teare, Chair of the Commercial Users Group *Minutes* (Rolls Building, London, 4 December 2018) at 3.

39 Civil Procedure Rules 1998 (Eng), Practice Direction 51U rr 5.3(1)-(2).

40 Rule 5.8.

Initial Disclosure is likely to provide significant benefits and the costs associated with initial disclosure are not likely to be disproportionate to those benefits.[41]

ii. Initial disclosure is also not required where any party concludes and states in writing, on a good faith basis, that giving Initial Disclosure would involve giving any other party (after removing duplicates, documents already provided to the other party, or known to be possessed by the other party, which documents parties are obliged not to provide as part of Initial Disclosure unless required), more than 1000 pages or 200 documents (or such higher but reasonable figure as agreed on by the parties).[42]

iii. Where this obligation does apply, at the same time as their statement of case is served on the other parties, each party must provide (in, absent agreement to the contrary, electronic format) to each other party an Initial Disclosure List of Documents that lists and is accompanied by copies of:

1. the key documents on which it has expressly or otherwise relied in support of the claims or defences advanced in its statement of case, including the documents referred to in that statement of case; and

2. the key documents that are necessary to enable the other parties to understand the claim or defence they must meet.

iv. Parties are not obliged to undertake any search for documents beyond any search already undertaken or caused to be undertaken for the purposes of the proceedings, including those undertaken in advance of the proceedings, in providing initial disclosure.[43]

v. Complaints about Initial Disclosure will be dealt with (ordinarily) at first case management conferences, and a "significant failure" to comply with Initial Disclosure obligations can result in an adverse costs order.[44] Failures to comply with Initial Disclosure duties are also relevant to the granting of extended disclosure.

b. Extended Disclosure: The parties must identify issues for disclosure – those issues, out of those disclosed by the pleadings, in relation to which extended disclosure is sought – to provide the basis for further discussions as to the scope of disclosure, the appropriate technology to be adopted, and so forth.

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41 Rule 5.8.
42 Rule 5.4.
43 Rule 5.4.
44 Rule 5.13.

i. Within 28 days of the final statement of case being filed and served, each party must state, in writing, whether they are likely to request Extended Disclosure of one or more of Models B, C, D, or E (see below).[45] Where any of the parties has indicated this will be the case, the claimant must, within 42 days of the final statement of case, prepare and serve on the other parties a draft List of Issues for Disclosure or equivalent.[46]

ii. The List of Issues for Disclosure is completed on s 1A of the "Disclosure Review Document" (**DRD**). The Disclosure Review document is the document by which the parties identify, discuss, and seek to agree the scope of any Extended Disclosure and provides the form in which relevant information is to be given to the Court. The obligation to complete, seek to agree, and update the DRD is an ongoing one. Any party who fails to co-operate and constructively engage in the process is at risk of having any application for Extended Disclosure denied or case management conferences adjourned with an adverse order for costs.[47]

iii. Issues for Disclosure are those key issues in dispute, and those issues only, that the parties consider will need to be determined by the court with some reference to contemporaneous documents for the proceedings to be resolved fairly.[48] It does not extend to every issue in dispute. The claimant must ensure that the list provides a fair and balanced summary of the key areas of dispute identified by the parties in their respective statements of claim and defence.[49]

iv. Having agreed the List of Issues for Disclosure and exchanged their proposals on the Model(s) for Extended Disclosure applicable to each, the parties should prepare and exchange drafts of s 2 of the DRD, including costs estimates of the proposals and (where possible) estimates of the likely volume of documents involved, no later than 14 days before the case management conference.[50] Any disputes that cannot be resolved will be decided at the first case management conference.[51]

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45 Rule 7.1.
46 Rule 7.2.
47 Rule 10.3.
48 Rule 7.3.
49 Rule 7.4.
50 Rule 10.6.
51 Rule 10.7.

v. A menu of five options is available to the Court in deciding whether to grant disclosure, ranging from a disclosure like that required in initial disclosure through to "full" disclosure. Specifically, the models are:[52]

1. *Model A – Confined to Known Adverse Documents:* The court may order that the only disclosure required in relation to some or all Issues for Disclosure is of known adverse documents in accordance with the (continuing) duty of the parties to disclose any document that a party or their representative is actually aware (without undertaking any further search than it has already undertaken or caused to have undertaken) that are or were in its control that contradicts or materially damages, or contains information that contradicts or materially damages, the disclosing party's contention or events of events or supports the contention or version of events of an opposing party.

2. *Model B – Limited Disclosure:* The court may order the parties to disclose, to the extent they have not already done so in Initial Disclosure, but without limit as to quantity, the key documents on which they have expressly or otherwise relied in support of the claims or defences advanced in their statement of case, including the documents referred to in that statement of case; they key documents that are necessary to enable the other parties to understand the claim or defence they must meet; and known adverse documents. Under Model B, a party is under no obligation to undertake a search for documents beyond any search already conducted for the purposes of obtaining advise on its claim or defence or preparing its statement of case. Where any such search is conducted, however, the continuing duty to disclose adverse documents applies.

3. *Model C – Request-Led Search Based Disclosure:* The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure. Where the parties cannot agree that disclosure should be given, or the disclosure to be given, the requesting party must raise that request at the case management conference. The court will determine if the request is reasonable and proportionate and may either, based on that conclusion, grant the request, grant the

[52] Rule 8.

request in part, or refuse the request. The ongoing duty to disclose known adverse documents still applies.

4. *Model D – Narrow Search-Based Disclosure, With or Without Narrative Documents:* Under Model D, a party discloses documents that are likely to support or adversely affect its claim or defence or that of another party in relation to one or more Issue for Disclosure. Each party must undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D is ordered, with the court to determine appropriate limits based on the information contained in the DRD. The order should specify whether Narrative Documents, being those documents that are relevant only to the background or context of material facts or events, and not directly to the Issues for Disclosure, that are not themselves adverse documents, are to be disclosed. Where the disclosure of Narrative Documents is not specified, they must not be disclosed. The ongoing duty to disclose known adverse documents still applies.

5. *Model E – Wide Search-Based Disclosure:* Model E will be ordered only in an exceptional case. Under Model E, a party must disclose documents that are likely to support or adversely affect its claim or defence or that of another party in relation to one or more Issue for Disclosure or that may lead to a train of inquiry which may then result in the identification of other documents for disclosure, being documents that likely support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure. Each party must undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D is ordered, with the court to determine appropriate limits based on the information contained in the DRD. This will likely be broader than that ordered for Model D disclosure. Narrative documents must, in the absence of an order to the contrary, be disclosed. The ongoing duty to disclose known adverse documents still applies.

vi. The extent of discovery ordered will be determined, at the first case management conference,[53] "having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly"[54] and, in particular:

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53 Rule 6.3.

54 Rule 6.4.

1. the nature and complexity of the issues in the proceedings;
2. the importance of the case, including any non-monetary relief sought;
3. the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
4. the number of documents involved;
5. the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
6. the financial position of each party;
7. the need to ensure the case is dealt with expeditiously, fairly, and at a proportionate cost; and
8. the purpose of the pilot rules being to limit the searches required; and
9. the volume of document to be disclosed, such that the parties' use of disclosure models and applications should not increase costs through undue complexity.

vii. In all cases, it is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable, and proportionate. Where Disclosure Model D or E is proposed, the proposing party should be prepared to explain why Disclosure Model C is inappropriate.[55] The question of whether something is reasonable and proportionate is to be determined by the court in all the circumstances of the case, including the factors noted above. Generally, the Court will avoid ordering different models of disclosure in relation to different Issues for Disclosure to avoid increasing the costs and burdens of disclosure, but this is subject to the general principles.

Australia - Federal

5. In the Federal Court of Australia, there is no discovery as of right, and parties are prohibited (under sanction of denial of costs or disbursements) from giving discovery without an order being made.[56] A party may not apply to the Court for a discovery order unless doing so will facilitate the "just resolution of the proceeding as quickly,

55 Rule 6.5.

56 Federal Court Rules 2011 (Cth), rr 20.11-20.12.

inexpensively, and efficiently as possible".[57] It has been the clear policy of the Court, since 1999, that orders for discovery going beyond the standard discovery requirements will rarely be granted. Even where parties submit a consent order to that effect, discovery will not be ordered as a matter of course.[58]

6. The standard obligation is based on the post-*Peruvian Guano* relevancy standard now also used in New Zealand.[59] Whether this has been complied with will be assessed in terms of whether the party undertaking the search has acted reasonably, having regard to:[60]

    a. the nature and complexity of the proceeding;

    b. the number of documents involved;

    c. the ease and cost of retrieving a document;

    d. the significance of any document likely to be found; and

    e. any other relevant matter.

7. If a party regards standard discovery as being insufficient, especially in complicated commercial litigation, an application can be made for non-standard or more extensive discovery. A party making such an application must identify how the search and scope of discovery will differ compared to standard discovery, any other criteria that should apply, the use the party intends to make of each category of document, and if a discovery plan should be constructed and adhered to.[61] The application must be accompanied by the categories of documents sought, the proposed electronic format for discovery (if any), a draft of any discovery plan that is sought to be used, and, if more extensive discovery than is required under standard discovery is sought, an affidavit stating why that is appropriate.[62]

8. In the Commercial and Corporations National Practice Area of the Federal Court of Australia, provision is also made for the use of Redfern Discovery Procedures, as are now widely used in international commercial arbitration.[63] The Redfern Discovery Procedure

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57 Federal Court of Australia Practice Note 14: Discovery (1999) (Cth) (repealed). See now the Federal Court of Australia Central Practice Note (2010) at [10.3] and following.

58 *Dennis v Chambers Financial Planners Pty Ltd* (2012) 201 FCR 321 at [14]-[15].

59 Federal Court Rules 2011 (Cth), r 20.14.

60 Rule 20.14(3).

61 Rule 20.15(1).

62 Rule 20.15(2).

63 The Redfern Discovery Procedure is explained in the Commercial and Corporations Practice Note (C&C-1) at [8.4]: see <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/c-and-c-1>.

will be made available where doing so is an expeditious process proportionate and appropriate, having regard to the financial and operational burdens on the parties and their representatives.

New South Wales

9. In the Equity Division of the New South Wales Supreme Court,[64] to help achieve the "just, quick, and cheap resolution of the real issues in dispute",[65] disclosure is not permitted unless it is necessary, and disclosure will not be ordered (except in exceptional circumstances) until evidence has been served.[66] The assumption is that parties can serve their evidence without the need for discovery, and that discovery will be ordered only where that would not be possible without discovery (such as where facts are not within the knowledge of the party applying for disclosure).[67] The granting of disclosure is ultimately a discretionary matter for the Court, which will be exercised in order to give effect to the overriding objectives of civil procedure.

10. In the Supreme Court Equity Division, Commercial, Technology, and Construction Lists:[68]
    a. practitioners must confer at an early stage on format, protocols, type and extent of discovery;
    b. practitioners must meet to agree on whether discovery can be made without the need to categorise documents into privileged and non-privileged materials and, relatedly, whether discovery will be made on a without prejudice basis, allowing a "quick peek" at discovered documents, with the disclosure of documents under this procedure not amounting to waiver of privilege;
    c. practitioners must notify each other of potential discovery problems and confer on a range of discovery issues;
    d. parties must produce a joint memorandum setting out areas of agreement and disagreement and their best estimates of the contemplated costs of discovery, with the court then making orders having regard to the "overriding purpose of the just, quick, and cheap resolution of the dispute between the parties" and the contents of that memorandum.
    e. the court may limit the amount of costs of discovery able to be recovered.

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64 See further Hon Justice Venning, Chief High Court Judge "Greater Efficiency in Civil Procedure" (NZBA-ABA Joint Conference, Queenstown, 24 August 2019) and Practice Note SC Eq 11 – Disclosure in the Equity Division (NSW).

65 At [3]-[5].

66 *Bauen Constructions Pty Ltd v New South Wales Land and Housing Corporation* [2014] NSWSC 684 per Ball J.

67 Practice Note SC Eq 11 – Disclosure in the Equity Division (NSW) at [19].

68 Practice Note No SC Eq 3: Supreme Court Equity Division – Commercial List and Technology and Construction List (NSW) at [27]-[32]. See http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/5a7a17ffe5925011ca25751c001f353c?OpenDocument.

Ontario

11. In Ontario, parties must agree to a "Discovery Plan" within 60 days after the close of pleadings.[69] The plan, which must be agreed in writing, must detail:[70]

    a. the intended scope of documentary discovery, taking into account relevance, costs and the importance and complexity of the issues in the particular action;

    b. dates for the service of each party's affidavit of documents;

    c. information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

    d. any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

12. The parties are subject to continuing duties to update and revise the plan as the situation develops.[71] Should the parties fail to agree to a plan, the Court is empowered to impose such limits on discovery as are just in imposing a discovery plan on the parties,[72] and the court may refuse to grant any relief or to award any costs if the parties have failed to agree or update a discovery plan.[73]

13. The policy behind requiring discovery planning was that:[74]

> parties should be encouraged to discuss early in the litigation how discovery will unfold, when and how production will occur and when oral discoveries will take place. It would be prudent to document areas of agreement and disagreement, if any. Early discovery/production planning will reduce costs in the long run.

14. Where a dispute arises, in determining whether a party or other person must answer an interrogatory or produce a document, the Court is required to consider whether an order for discovery would result in an excessive volume of documents being ordered to be produced to the requesting party,[75] and must also consider whether:[76]

    a. the time required for the party or other person to answer the question or produce the document would be unreasonable;

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69 Rules of Civil Procedure 1990 (Ontario), r 29.1.03(1).
70 Rule 29.1.03(3).
71 Rule 29.1.04.
72 Rule 29.1.05(2).
73 Rule 29.1.05(1).
74 Justice Coulter A Osborne *Civil Justice Reform Project: Summary of Findings and Recommendations* (Department of the Attorney-General of Ontario, Toronto, November 2007) at 64.
75 Rules of Civil Procedure 1990 (Ontario), r 30.08(1).
76 Rule 30.08(1).

b. the expense associated with answering the question or producing the document would be unjustified;
c. requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
d. requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
e. the information or the document is readily available to the party requesting it from another source.