Law Council of Australia / Federal Court of Australia

CASE MANAGEMENT HANDBOOK

Law Council OF AUSTRALIA
Federal Litigation and Dispute Resolution Section

FEDERAL COURT OF AUSTRALIA

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CHIEF JUSTICE'S CHAMBERS
FEDERAL COURT OF AUSTRALIA

FOREWORD

As noted in the original Foreword by the Honourable Justice P A Keane who was then Chief Justice of the Federal Court of Australia, when this Handbook was first launched in 2011 it was a very important development in the ongoing dialogue between the Court and the legal practitioners who practise before it about how best to manage cases before the Court.

Since then the Handbook has been expanded, and planning is well advanced to extend its coverage even further. It is a remarkable achievement of the Federal Litigation and Dispute Resolution Section of the Law Council of Australia and those members of that Section who have been involved in its development.

The Handbook is a practical guide about case management in litigation in the Federal Court. It provides information, guidance and ideas and discusses various tools and techniques that are available to the Court, both generally and in particular jurisdictional areas. It has been developed by experienced practitioners and has drawn on the experience of judges of the Court.

It is not surprising that the Handbook has been enthusiastically embraced by the profession. Not only is it now widely used, but it is often referred to in the course of proceedings in the Court as the source of procedural and other propositions being advanced.

The further development of the Handbook that has occurred and is planned has made it, and will continue to make it, an even more valuable resource for practitioners in their day-to-day work.

I commend this handbook to the profession. I hope all who practise in the Federal Court will use it to full advantage.

As a final note, I have recently communicated to the profession that the Federal Court is currently undergoing a fundamental redesign, to ensure that it operates as a truly National Court based on key National Practice Areas, including the establishment of a Commercial and Corporations National Practice Area. This redesign will be 'whole of Court' and will see major improvements in efficiency, use of resources and case management processes.

As part of the implementation of the National Court Framework, the Court will undertake extensive communication with the profession to ensure that its reformed National Court practice and procedure is communicated to the profession and that feedback and suggestions from the profession are taken into account as part of this process.

J L B Allsop AO
Chief Justice
Federal Court of Australia

December 2014

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ABBREVIATIONS

Arbitration Act	
ADR	Alternative dispute resolution
CCA	*Competition and Consumer Act 2010* (Cth)
CDRA	*Civil Dispute Resolution Act 2011* (Cth)
CPR UK	Civil Procedure Rules (UK)
Evidence Act	*Evidence Act 1995* (Cth)
Court	Federal Court of Australia
FCAA	*Federal Court of Australia Act 1976* (Cth)
FCRs	*Federal Court Rules 2011*
IAA	*International Arbitration Act 1974* (Cth)
NTA	*Native Title Act 1993* (Cth)
Old FCRs	*Federal Court Rules* (prior to 1 August 2011)
Order	O
Rule	r
section	s
UCPR	Uniform Civil Procedure Rules
US	United States of America
WA SCR	*Rules of the Supreme Court 1971* (WA)

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1. INTRODUCTION

by John Sheahan QC

A THE SCOPE AND OBJECTS OF THE HANDBOOK

1.1 This work had its inspiration in a workshop on case management conducted in 2008 by the Judges of the Federal Court of Australia (the Court) and practitioners from around the country. Several things emerged from the papers that were presented and the discussions and debates which followed.

1.2 One was that 35 years experience of case management notwithstanding; views as to the best way for litigation to be managed in the Court were far from settled. Even on what might be thought to be every day issues, there were significant differences of approach in evidence.

1.3 It also appeared that some Judges were employing techniques which were seen, in some situations at least, to offer particular advantages, but which other Judges and practitioners had not come across or considered employing. In a 2002 report on the Court's Individual Docket System[1] it had been observed that 'a large number of those interviewed had little knowledge of what different members of the Court were doing or how different chambers were managing their cases'. No doubt the position is much improved since then but the issue does not seem to have gone away.

1.4 Further, it became apparent that the full breadth of the powers conferred on the Court was not always appreciated by practitioners and Judges alike. On examination of the *Federal Court of Australia Act 1976* (Cth) (FCAA), the *Federal Court Rules 2011* (Cth) (FCRs), and the Evidence Act 1995 (Cth) (Evidence Act), the powers available to Judges to manage individual cases are very wide indeed. In an absolute sense, there is little that a Judge cannot do by way of case management. The major limitations on the Court's case management powers might be seen as residing more in constitutional than procedural law[2] – in particular the limitations imposed by the right to be heard, and to have controversies resolved by a tribunal which is and appears to be impartial.

1.5 This work is a response to those insights. In addition it seeks to address, albeit indirectly, one of the inevitable difficulties of case management under an Individual Docket System in a federal court – the natural tendency for practices and approaches to differ from venue to venue and Judge to Judge.

1.6 The principal aims of this work are twofold:

- First, to highlight the scope of the case management tools and techniques that are available to the Court and practitioners to assist in ensuring the quick, inexpensive and efficient resolution of proceedings before the Court; and
- Secondly, and more importantly, to gather and distil the experience of practitioners and Judges alike as to the merits and perils of specific techniques in different contexts.

1.7 It is hoped that a by-product will be fostering a more uniform set of approaches to case management issues.

1.8 It is also important to say what this work does not intend to do.

1.9 *First*, it is not intended to be a comprehensive treatment of practice and procedure in the Court, nor a substitute for existing works on federal civil procedure or evidence. *Secondly*, it is not intended to undermine the individual docket system or to restrict the discretions of Judges in performing case management. On the contrary, it is based on the belief that a particular advantage of proceeding in the Court is that, in general, each case is managed from start to finish by the Judge who will decide it, with the Court and the parties together able to attend to the circumstances of the particular case from the outset. This work seeks to encourage that process. *Finally*, the work is not intended to qualify or detract from the operation of the FCAA or the FCRs – indeed it could not do so. Again, the contrary is the case. The object is to encourage a better appreciation of the full scope of the opportunities they provide for quick, inexpensive and efficient resolution of disputes.

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1 Caroline Sage, Ted Wright with Carolyn Morris, *Case Management Reform: A study of the Federal Court's Individual Docket System* (Law and Justice Foundation of NSW, 2002) 42.

2 Nicholas v R *(1998) 193 CLR 173*, [74] per Gaudron J; Bass v Permanent Trustee Co Limited *(1999) 198 CLR 334*, [56].

2. BRIEF HISTORY OF THE COURT

by John Sheahan QC

2.1 From its establishment in 1977 the Federal Court of Australia was a procedural innovator. The Full Court emphasised the importance of this in a case in 1990 in which the relevance of English decisions on procedure was called into question:

> *[T]his Court has a system of case management which is different from the procedures adopted in any of the Divisions of the High Court of Judicature. The critical significance of a case management system was pointed out by Lord Griffiths, with whom the other four members of the House of Lords agreed, in Department of Transport v Chris Smaller (Transport) Ltd*[3] *(at 1207). Dealing with a submission that inordinate and inexcusable delay after the expiration of the limitation period should be a ground for striking out an action as a deterrent to other dilatory plaintiffs, even though a fair trial was still possible, Lord Griffiths expressed his scepticism that such a course 'would produce any greater impact on delay in litigation than the present principles'. He went on:*
>
> > *I believe that a far more radical approach is required to tackle the problems of delay in the litigation process than driving an individual plaintiff away from the courts when his culpable delay has caused no injustice to his opponent. I, for my part, recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure that once a litigant has entered the litigation process his case proceeds in accordance with a time table as prescribed by Rules of Court or as modified by a Judge ...*
>
> *In this Court, there is just such a system ...*[4]

2.2 The FCRs are distinctive from their beginning. Whereas rules in other jurisdictions[5] impose time limits within which proceedings must be served after commencement (typically, 6 months or a year) the first time limit in the FCRs is the time within which proceedings must be served before the *first directions hearing*, and the first directions hearing is on a date fixed by the court. This emphasises that from the very start the case is in the control of the Court rather than the parties.[6]

2.3 Despite its radical beginnings, procedures in the Court did not stand still. Civil procedure has been the subject of debate, agitation, experiment, and actual reforms virtually continuously for the last quarter of a century and more.

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3 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197.

4 *Lenijamar Pty Ltd v AGC (Advances) Limited* (1990) 27 FCR 388, 394–5.

5 E.g. UCPR (NSW) r 6.2.

6 See Old FCR O 4 r 11; FCR r 8.06 and *MBD Management Pty Ltd v Butcher* [2010] FCA 1071, [39]–[59].

2.4 A chronology of some the major Federal developments would include:

1987	*ALRC Report 38*: Evidence
1988	*ALRC Report 46*: Grouped Proceedings in the Federal Court
1994	Access to Justice: An Action Plan (AJAC Report)[7]
1995	Attorney General's Department '*Justice Statement*'
1995	Commencement of the *Evidence Act*
1997	Federal Court adopts the Individual Docket System
1999	O 15 r 2 Federal Court Rules replaced and Practice Note 14 (Discovery) published, confining the scope of discovery (now superseded)[8]
2000	*ALRC Report 89*: Managing Justice: A review of the federal justice system
2002	*Case Management Reform: A study of the Federal Court's Individual Docket System*
2005	s 31A (summary judgment) introduced
2009	Practice Note 30 – Fast Track issued (now CM 8)
2011	*ALRC Report 115* – Discovery of Documents in the Federal Courts

2.5 Finally, the decision of the High Court in *Aon Risk Services Australia Ltd v Australian National University*[9] has clarified the importance of case management principles in the exercise of courts' procedural powers.

2.6 This prompts the question of the extent to which continued discussion of case management is necessary or desirable.

2.7 In considering this issue it may be useful to keep in mind the broader history of modern civil procedure reform. In Anglo-Australian jurisdictions, the most dramatic single reform was not the product of the 20th century but of the 19th, in the Judicature Acts of 1873–75.

2.8 Prior to that reform, most English civil cases were divided between those at common law (dealt with by three separate courts – Kings Bench, Common Pleas and Exchequer) and those in Equity (dealt with by the Courts of Chancery). The division was the cause of immense difficulty. As described by Lord Bowen[10] in 1887:

> *The remedies they afforded to the suitor were different; their procedure was irreconcilable; they applied diverse rules of right and wrong to the same matters. The common law treated as untenable claims and defences which equity allowed, and one side of Westminster Hall gave judgments which the other restrained a successful party from enforcing. … The procedure of the Court of Chancery, on the other hand, was little adapted [518] for the determination of controverted issues of fact, and it was constantly compelled to have recourse for that purpose to the assistance of a court of law. The common law had no jurisdiction to prevent a threatened injury [and] … had no power of compelling litigants to disclose what documents in their possession threw a light upon the dispute …. In all such cases the suitor was driven into equity to assist him in the prosecution even of a legal claim. The Court of Chancery, in its turn, sent parties to the Law Courts whenever a legal right was to be established, when a decision on the construction of an Act of Parliament was to be obtained, a mercantile contract construed, a point of commercial law discussed. Suits in Chancery were lost if it turned out at the hearing that the plaintiff, instead of filing his bill in equity, might have had redress in a law court; just as plaintiffs were nonsuited at law because they should have rather sued in equity, or because some partnership or trust appeared unexpectedly on the evidence when all was ripe for judgment. Thus the bewildered litigant was driven backwards and forwards from law to equity, from equity to law.*[11]

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7 Access to Justice Advisory Committee (AJAC), *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994).

8 See *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415, [10].

9 [2009] 239 CLR 175,[93]–[98]

10 'Probably the only Judge in recent times whose work has commanded general interest': Van Vechsten Veeder, 'A Century of English Judicature', in Committee of the Association of American Law Schools, *Select Essays in Anglo-American Legal History*, by various authors, compiled and edited by a committee of the Association of American Law Schools (Boston: Little, Brown, and Company, 1907). Vol. 1. 730, 816.

11 Charles Synge Christopher, Baron Bowen, 'Progress in the Administration of Justice during the Victorian Period', in *Select Essays in Anglo-American Legal History, Boston*, 1908, vol I 516, 517–8.

2.9 As if these difficulties were not enough, procedures on both sides of the law/equity divide were, by today's standards, seriously deficient. On the common law side, the procedures were 'antiquated, technical and obscure'.[12] Just claims were liable to be defeated at trial by errors in pleading, by infinitesimal variances between pleading and proof, and by the absence or presence of purely nominal parties.[13] And the process of appeal by writ of error was arbitrary, slow and, if successful, resulted in a new trial.[14] As for Chancery, quoting Lord Bowen again, 'its practice was as dilatory and vexatious as its standard of right and wrong was noble and accurate.'[15] According to George Spence, as things stood in 1839, no man could enter into a Chancery suit 'with any reasonable hope of being alive at its termination, if he has a determined adversary'.[16]

2.10 Despite some 'teething problems',[17] the effect of the Judicature Acts was to sweep all this away. Bowen's description of the new regime is worthy of repetition:

> *In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes – upon oral evidence or upon affidavits, as is most convenient.*[18]

2.11 As for pleadings, a contemporary description was that it was no longer necessary to plead formal causes of action; rather 'each party should tell his plain tale unfettered by technicalities'.[19]

2.12 These great changes were, however, the culmination of a process of reform over several decades. Prompted by various commission reports, reform commenced forty years earlier with the Uniformity of Process Act 1832. It continued through the Hilary Term Rules of 1834, the Common Law Procedure Act 1842 (which permitted parties to give evidence in common law trials, something previously prohibited), the Documentary Evidence Act 1845–46, and the Common Law Procedure Act 1852; and on the Chancery side, the Chancery Amendment Act 1852, the Chancery Amendment Act 1858 (Lord Cairns' Act)[20] and the Court of Chancery Act 1860.

2.13 The pattern in the United States of America (US) was similar – reform once commenced was continued over decades.[21]

2.14 Two things emerge from this brief reference to history. The first is that recent procedural reforms of the last 25 years, though significant, are in truth modest in scope and ambition compared to those of the 19th century. The second is that the development of civil procedure should be seen as a process which takes time. It may be, of necessity, never complete. As Austin observed in 1832, no code can be perfect. There should, therefore, be perpetual provision for its amendment on suggestions from the Judges who are applying it, and who are in the best of all situations for observing its defects.[22]

2.15 In that light, the great innovation in the establishment of the Court, namely, that from its outset judicial case management was the procedural model, should be seen not as the conclusion of the history of reform but the commencement of a new phase of development and change; as a starting point, not a destination.

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12 Ibid 519.

13 Veeder, above n 10, 731.

14 Christopher, Baron Bowen, above n 11, 522–3.

15 Ibid 524.

16 Ibid 529.

17 P Polden, The Courts of Law' in William Cornish, J Stuart Anderson, Ray Cocks, Michael Lobban, Patrick Polden, and Keith Smith, *The Oxford History of the Laws of England,* vol XI (2010), 766–770.

18 Christopher, Baron Bowen, above n 11, 541.

19 C M Hepburn, 'The Historical Development of Code Pleading in America and England', in Committee of the Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History, vol. 2* (1907) 643–690.

20 See P M McDermott, 'Jurisdiction of the Court of Chancery to Award Damages' (1992) 108 LQR 652.

21 See generally, Hepburn, above n 19.

22 John Austin, Robert Campbell, 'Lecture XL: Law – Its Purposes and Subjects', *Lectures on Jurisprudence*, Vol 2 (J Murray, 1873), 673–5.

3. SOME GENERAL CONSIDERATIONS

by John Sheahan QC

A TIME IS MONEY

3.1 Lawyers' time is expensive. It cannot be too plainly stated that the only effective means for reducing the cost of litigation are means which result in less work being done by lawyers over the course of a proceeding.

3.2 Nevertheless, there has been a tendency for this basic fact to be overlooked. For example, case management conceived of as a series of timetabling events with the court focussing its role on 'keeping the case on the rails' may increase the speed of disposition of matters but it is likely to increase costs. And procedures which require witness statements or affidavits to be exchanged before trial may increase the prospects of settlement, but they add to the costs of every case that does not settle and may not reduce the length of trials.

3.3 In the US, the *Civil Justice Reform Act 1990*[23] promoted case management in federal courts and provided a statutory basis for empirical research on the effect of case management. In 1996 the Rand Corporation's Institute for Civil Justice published an evaluation of the reforms. Among its findings were two of particular relevance here:

> *Early judicial case management significantly decreased time to finalisation by about 25% but significantly increased litigant legal costs by about 30%. The report suggested that the latter was because, in those cases that would previously have settled before judicial involvement, the early involvement of the Judge increased lawyer work hours in responding to the Judge's requirements.*[24]
>
> *Of the range of early judicial case management strategies or techniques, simply fixing an early trial date for final hearing had by far the most significant effect, and did not affect litigant costs.*[25]

B EFFICIENCY CANNOT BE LEFT TO THE PARTIES

3.4 It is not the case that all the parties to litigation are concerned, or equally concerned, that their litigation be conducted efficiently. A consideration often mentioned in this context is that relatively well-resourced parties may seek to exploit that advantage. While this may occur, more prosaic factors are likely to be at least as important: a case that is vital for one party may be of less moment for the other on account of wider business ramifications, reputational issues or the size of the claim relative to the party's assets; a well-resourced party will feel free to spend more on any dispute; and respondents are typically less concerned by delay than applicants. Even where one party exerts pressure on its lawyers for the process to be efficient, they are to a significant extent at the mercy of the other party. Many litigants still prefer an approach to the litigation of their disputes that leaves 'no stone unturned'.

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23 'Ch 23: Civil Justice Expense and Delay Reduction Plans', USCA Title 28.

24 Sage, Wright with Morris, above n 1, 25.

25 Ibid 26.

C EFFICIENCY CANNOT BE LEFT TO THE LAWYERS

3.5 Lawyers are not always encouraged to give priority to efficiency. The law is increasingly complex. Clients' demands have not become less insistent. The risk of liability for professional negligence is a powerful incentive to thoroughness but a weak incentive for efficiency. Admittedly the risks in that regard have diminished to some extent due to statutory reform.[26] But other reforms have increased the risk of discipline by courts.[27] It scarcely needs saying that time charging, for lawyers not already working at or close to full capacity, does not provide an incentive to be efficient.

D THE JUDICIAL ADVANTAGE

3.6 Judicial case management involves a departure from the model of the Judge as merely an umpire. The departure is nevertheless consistent with the judicial role. As Learned Hand said many years ago now:

> *… a Judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.*[28]

Observations to the same effect have been made in the Court:

> *The days when parties were left at leisure to pursue private litigation in the way that they thought best suited their purposes have long gone. Courts have an overriding obligation to see to it that those using their facilities are proceeding in a way best calculated to bring litigation to an end at the earliest possible moment so long as the primary goal of achieving justice is not lost sight of.*[29]

3.7 The court has wide powers to achieve the objective of efficiency in the administration of justice. But perhaps the most important power of the Judge is the power to question, that is, the power to require practitioners and parties to account for the positions they have taken: whether a claim adds materially to the prospects of success and if not why it is pressed; why facts not seriously in dispute are not admitted; whether proof sought expensively (e.g., by discovery) might be more cheaply obtained (e.g., by an interrogatory or two). Deployed wisely, but vigorously, this power can be a major contribution to efficiency.

3.8 This judicial advantage has been reinforced by the obligations imposed on parties and their representatives to conduct proceedings consistently with the overarching purpose of the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (ss 37 M(1), 37 N(1), (2) of the FCAA). These statutory duties assist practitioners to resist demands of clients that are not conducive to the efficient conduct of litigation. And they provide a standard that the court can require parties and their representatives to strive for.

3.9 Nor should it be forgotten that Judges require practitioners to account for their cases in an environment in which, to a significant degree, practitioners depend on the court retaining confidence in them. This is certainly true of those who practise regularly in a particular court or area of law.[30]

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26 *Civil Liability Act 2002* (NSW) and cognate legislation in other jurisdictions.

27 For example, by costs orders: FCAA ss 37N(4), (5) and 43(3)(f); Old FCR O 62 r 9; FCR r 40.07.

28 Quoted in Committee on Court Administration and Case Management of The Judicial Conference of the United States (Chair: Julie A. Robinson) *Civil Litigation Management Manual* (2nd ed), (2010), 6.

29 *E I Du Pont De Nemours & Co v Commissioner of Patents (1987) 16 FCR 423*, 424 per Sheppard J, with whom Burchett J agreed. See also *Aon Risk Services Australia Ltd v Australian National University* [2009] 239 CLR 175, [93]–[98].

30 Chief Judge Posner went so far as to describe English barristers as functioning more like adjunct Judges than private attorneys: RA Posner, *Law and Legal Theory in the UK and the USA* (Clarendon Press, 1996) 21–30.

3.10 A corollary of the foregoing is that cost and delay are most likely to be reduced by an early, and continuing process of 'narrowing' so that there are:

(a) fewer issues in contest;

(b) in relation to those issues, no greater factual investigation than justice requires; and

(c) as few interlocutory applications as are necessary for the just disposition of the matter.

3.11 A further corollary is that this process is unlikely to occur without active judicial engagement.

3.12 There are risks of course. Encouraging (or requiring) parties to meet and confer, or to mediate, in the hope that the need for judicial resolution of an interlocutory dispute may be avoided, will inevitably increase costs and delay if agreement is not reached. In addition, an outcome agreed by the parties may be inefficient. This is particularly a risk in the case of disputes about discovery. And some procedures which encourage early issue identification will 'front end load' the costs, and may increase costs overall if there is a settlement.

3.13 On the other hand, the time and expense of a hard fought interlocutory application (about pleadings, or even discovery) may provide an ideal opportunity for the Court to come to grips with the case, and so facilitate its subsequent management.

3.14 One risk deserves to be addressed specifically: risk of appearance of bias or pre-judgment of the issues in a particular proceeding. It has been suggested that trial Judges might require statutory protection if they were to engage in active case management. The concern is that such engagement might involve the frank expression of views which would create the risk of an appearance of bias or pre-judgment, and so a ground for disqualification of the Judge from the case.[31]

3.15 This concern may be overstated. The decision of the High Court in *Johnson v Johnson* has indicated that trial Judges have enough latitude to do what is necessary:

> At the trial level, modern Judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a Judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. ... Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.[32]

3.16 In this regard it is perhaps worth keeping in mind that a procedural model of robust judicial engagement was provided for by the *Commercial Causes Act 1903* (NSW) and its analogues. These gave the court power, in the interests of the 'speedy and inexpensive determination of the questions in the action really at issue between the parties'[33] to dispense with pleadings, to dispense with the rules of evidence and to require the parties to make admissions.[34]

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31 R Sackville, 'Mega-Litigation: Towards a New Approach', a paper delivered at the Supreme Court of NSW annual conference, August 2007, [50].

32 (2000) 201 CLR 488, [13]. Some observations in the decision of the NSW Court of Appeal in *Australian National Industries Limited v Spedley Securities Limited* (in liq) (1992) 26 NSWLR 411 may need to be treated with reserve in light of Johnson: cf Sackville, above n 31, [43].

33 *Commercial Causes Act of 1910* (1 Geo V, No 23) s 4(4).

34 Ibid s 5.

4. MECHANICS OF CASE MANAGEMENT

by John Sheahan QC

A THE FIRST DIRECTIONS HEARINGS

4.1 Directions hearings are the central events of case management. They are the primary occasions on which the parties and the Court engage with each other as to the best means of achieving the just and efficient resolution of the dispute. They are the primary mechanism for monitoring compliance with directions and for the making of orders concerning case management. The particular subjects that are discussed and resolved on these occasions are dealt with in later chapters (issue definition, discovery, conduct of the trial). Here it is necessary to address the subject more generally.

4.2 The previous structure of the FCRs was such that the date for the initial directions hearing was before any response to the applicant's case (whether by defence, affidavit or otherwise). For example, former O 11 r 20 provided that where an application was accompanied by a statement of claim a defence had to be filed within seven days *after the directions hearing*.

4.3 This structure had its disadvantages. They are addressed further in Chapter 5. In summary, it meant that the first directions hearing typically would occur in circumstances where there was no real definition of what was in issue between the parties. This promoted a tendency for orders on the first directions hearing to be formulaic or only to cover initial steps. In either case, the occasion was, if not wasted, at least a less than optimal use of the Court's and the parties' time and resources.

4.4 The FCR change this structure materially, but incompletely. As before, the Registrar sets the date for the first directions hearing when the originating process is filed (r 5.01 note 2, r 8.06 of the FCR). However the date for filing a defence is now 28 days after service of the statement of claim (r 16.32 of the FCR). This structure at least creates the possibility of the first directions hearing being set for a date after the defence is due to have been filed and served. The change is incomplete however, as it continues to be the case that the applicant is not obliged to serve the originating proceedings until 5 days before the return date fixed by the Registrar (r 8.06 of the FCR).

4.5 Absent a change in the rules, this leaves the possibility of a first directions hearing occurring before delivery of a defence in the hands of the applicant. In many cases commenced by application and statement of claim, the interests of efficiency will suggest that the applicant should seek a return date sufficiently distant as to permit, before that time:

(a) service of the originating application;

(b) 28 days to elapse for service of a defence; and

(c) an opportunity for the parties to consider and confer as to appropriate directions.

4.6 To some extent the process of issue identification will be assisted by the pre-action steps requirements of the *Civil Dispute Resolution Act 2011* (Cth) ('the CDRA'). However these steps cannot be counted on to result in issue definition of sufficient clarity to enable efficient case management.

B DIRECTIONS HEARINGS GENERALLY

4.7 When the Individual Docket System was introduced, an indication (admittedly non-prescriptive) of an appropriate model for case management 'events' was also published by the Court. It had these elements:

- **directions hearing** – designed to enable early assessment of cases, transfer from the Federal Court cases that should have been brought in other courts, and make directions to prepare the case for the Case Management Committee.
- **case management conference** – designed to consider settlement, administer dispute resolution options, review compliance with directions made at the directions hearing, set a trial date range and make such further directions as may be shown to be necessary.
- **evaluation conference** – designed to focus on disposition without trial, arrange a mediation conference if desirable, evaluate state of preparation of the case including compliance with directions given at the case management conference, and attempt to dispose of the case and, if not, allocate a trial date.
- **trial management conference** – designed to establish the ground rules for the conduct of the trial.

4.8 A significant feature of the subsequent history was that this model was scarcely ever applied in practice.[35] Most of the practitioners interviewed by Sage, Wright and Morris were unaware that the model even existed.[36]

4.9 Much of the work envisaged in 1997 for the first three events is captured by the provision for the Scheduling Conference in the Fast Track (CM 8 Part 6). Importantly, the Scheduling Conference only occurs after:

(a) issues have been defined by Fast Track Statements, responses and cross-claim and replies (see Part 6.1);

(b) each party has been able to prepare an initial witness list (Part 6.4);

(c) the parties are expected to be in a position to outline the issues, the facts in dispute, and to indicate if the matter is suitable for mediation and if so a timetable for that (Part 6.7).

4.10 Sage, Wright and Morris reported significant practitioner support for a model of case management, as long as it was a flexible one.[37] The Fast Track model is not especially flexible. That is as it should be – it is designed only for cases that suit that particular model. But there is much to be said for the view that the Fast Track style of scheduling conference, coming after issues have been defined, would promote the efficient management in many cases. This is discussed further in Chapter 5.

C COMMUNICATION BETWEEN PARTIES AND THE COURT

4.11 The introduction of the Individual Docket System made it natural for the docket Judge and her or his staff to have more frequent direct communication with practitioners about cases on the list. This phenomenon was adverted to by the ALRC in its report on the federal civil justice system.[38] The ALRC noted:

> The Law Council supports the development of this relationship to enable parties to approach the Judge on an informal basis at short notice to resolve issues and to avoid formal applications and unnecessary costs.[39]

4.12 It bears emphasis that attendances before the Court are costly.[40] An object of the Individual Docket System was to reduce the number of directions hearings. Facilitating informal communication between practitioners and the Court reduces the need for attendances.

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35 Sage, Wright with Morris, above n 1, 81–83.

36 Ibid 84.

37 Ibid.

38 Australian Law Reform Commission, *Managing Justice: A review of the Federal Justice System*, (2000) ('ALRC Report 89') 484, [7.8].

39 Ibid n 2074.

40 See Sage, Wright with Morris, above n 1, 88–9.

4.13 The Court's rules and practices provide other mechanisms for avoiding unnecessary court attendance:

(a) 4.13.1 – Orders may be made in accordance with a written consent – r 1.36, 39.2, 39.11

(b) 4.13.2 – The Court may dispense with the need for an oral hearing and deal with an application on the papers – s 20A FCAA. Former FCRs O 32A provided a procedure for this. There is no equivalent in the FCR, but directions to similar effect could be made on an ad hoc basis. For Registrars, see r 3.01(10(e)).

4.14 In addition, from its inception, the Court has been committed to innovative application of technology with a view towards increasing access to justice and efficiency. The Court assists its Judges to carry out their duties as efficiently and effectively as possible, and thereby reducing inconvenience and costs.[41]

4.15 The Court continues actively to explore opportunities for enhanced use of various technologies with particular regard to the needs of those in outlying regional, rural and remote localities.

4.16 The FCAA gives the Court broad powers, for the purposes of any civil proceeding, to direct appearances, submissions, and testimony to be given by way of video link, audio link or other appropriate means.[42] Telephone services and video-conferencing have been utilised as an adjunct to traditional interactions for sufficient time that they are now regarded as tried and tested technologies in the Court. The Court's 'Videoconferencing Guide' and *Practice Note 22: Video link hearing arrangements* (CM 22) provides guidance on practical arrangements for use of video links, charges and administrative procedures and forms.

4.17 Directions hearings are sometimes conducted by telephone, and directions made by telephone and fax[43] and email. The Court has actively encouraged legal practitioners to avoid unnecessary directions by the use of telephone, email and facsimile, if there is agreement (especially in the absence of default).

4.18 The Court's national video-conferencing system, the first of its kind in the world, operates to reduce the cost and time of witnesses giving evidence and has enabled more effective case management by Judges, regardless of location. This system is recognised by the Court as increasingly relevant to facilitating participation in court processes for those in rural and remote areas.[44]

4.19 Finally, the Court's eCourt strategy permits much to be done electronically that formally would require filing of documents and attendance at court or a registry. The Court's *Practice Note CM 23: Electronic Court File and preparation and lodgement of documents* (CM 23) provides guidance on the preparation and lodgement of documents and the Court's electronic court file (ECF). It deals with issues such as the commencement of the ECF; what is the 'official file' for both the electronic and paper court file; what is the 'filed document' for both eLodged documents and documents filed otherwise; eLodegment and 'other lodgement'; requirements for particular documents; particular lodgement requirements; and the Court's processing of lodged documents.

41 Australia. Federal Court, eCourt strategy: access, technology, justice (2001).

42 See ss 47, 47A, 47B, 47C and 47D FCAA; O 10 r 1(2)(a)(xvii) of the Old FCR; FCR r 5.04(3) Item 26.

43 See Sage, Wright with Morris, above n 1, 111; *ALRC Report 89*, above n 38, 398, 484.

44 Australia. Federal Court, 'Video conferencing Guide'.

5. IDENTIFYING AND NARROWING THE ISSUES

by Philip Crutchfield QC, Matthew Lees and Adam Rollnik

This Chapter has been revised. Please refer to the revised version available here.

A INTRODUCTION

5.1 Federal Court Practice Note CM 1 restates the purposes and principles of the 'Individual Docket System' which is utilised in the Court. Importantly, CM 1 provides that the Court and the parties must observe the overarching purpose of case management, which is '*the just resolution of disputes as quickly, inexpensively and efficiently as possible*'. To that end:

(a) the Court is expected to have regard to the desirability of 'identifying and narrowing the issues in dispute as early as possible'; and

(b) the parties and their representatives 'are obliged to cooperate with, and assist, the Court in achieving the overarching purpose and, in particular, in identifying the real issues in dispute as early as possible and in dealing with those issues efficiently.'[45]

5.2 Litigation is adversarial. It is also strategic and tactical. A party will understandably want another party to be tied to a very clear and narrow position whilst allowing itself maximum flexibility in its position. A specific response can be prepared to another party's narrow position.

5.3 The advantage of a broad position is that it affords 'wriggle room'. A party may not be certain, particularly at an early stage of a proceeding, precisely how it will ultimately put its case at trial. It may wish to wait and see the other party's position, discovered documents or evidence before the party nails its colours to the mast.

5.4 An approach of studied ambiguity does not, however, make for efficient litigation. A lack of clarity regarding the issues in dispute invariably requires practitioners to spend more time considering the various possible alternative positions of the other party, and considering a response to each of those positions. The costs, delays, uncertainty and frustration of litigation increase as a result.

5.5 A lack of clarity as to each party's position is also a serious impediment to reaching a negotiated resolution. Sometimes parties may not properly appreciate each other's position until well into the litigation process – such as during a Court-ordered mediation or even at trial. By then, the parties may have each spent a significant amount of time and money on the matter. If issues had been clearer from the outset, it is likely that some of that expenditure of time and money likely would have been avoided.

5.6 In a perfect world, all parties would have clearly and precisely defined positions from commencement and there would be no deviation from those positions during the course of the proceeding. In reality, however, there does need to be some allowance for parties to modify their position in appropriate circumstances, otherwise they will likely refuse to be tied down to specific allegations or to make reasonable concessions in the first place.

5.7 The Court's procedures therefore need to strike a balance between:

(a) tying parties to a position, so that all parties understand the issues in dispute and the proceeding can be conducted efficiently; and

(b) demanding no more certainty of parties than it is reasonable to expect, especially at the commencement of a proceeding.

5.8 This chapter considers the ways in which the Court's procedures can be used to assist and encourage the parties and the Court to identify and narrow the issues in dispute as early as possible in the course of the proceeding.

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45 Principles 3.2 and 3 in PA Keane, Chief Justice Case, *Practice Note CM 1: Case management and the Individual Docket System* (2011).

B SUMMARY

Pre-commencement costs

5.9 The Court should have a discretion to order a party to pay the other party's pre-commencement legal costs where the party:

(a) is unsuccessful in the proceeding; and

(b) has, prior to the commencement of proceedings, unreasonably failed to take genuine steps to resolve the matter, to respond to another party's genuine steps, or to otherwise identify and narrow the issues.[46]

Case management orders

5.10 Case management orders should be made by the Registry upon the filing of an application.[47]

5.11 Different orders may be made for various types of proceedings, reflecting their particular requirements or features.

5.12 More complex matters should generally involve longer time periods and greater judicial case management.

The first directions hearing and pleadings: statements of facts and contentions

5.13 The first directions hearing should ordinarily be held after the respondent has responded to the applicant's allegations.[48] The hearing then provides a greater opportunity for the parties and the Court to engage in a discussion aimed at defining and narrowing the issues in dispute.

5.14 Either party should, however, be able to bring the matter before the Court for an early directions hearing if it has a good reason for doing so.

5.15 The first directions hearing should generally address the issues in dispute as well as how the matter will be conducted leading up to trial. The parties' lead counsel should be required to attend.

5.16 The default position should be that in advance of the first directions hearing, the parties file and serve statements of facts and contentions in the form of the current Fast Track statements and responses.

5.17 To the extent that the parties are able to agree on relevant matters that are not in dispute, they should prepare a list of those matters. To the extent agreement cannot be reached, this is a matter that the Court could address, as appropriate, at the first directions hearing.

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46 The FCR and the Old FCR do not provide the Court with any power to award pre-commencement legal costs.

47 Rule 5.04 of the FCR empowers the Court to make directions for the management, conduct and hearing of a proceeding at any hearing, but not on the filing of an application.

48 Cf r 5.04 FCR.

C THE REQUIREMENT TO TAKE 'GENUINE STEPS' BEFORE COMMENCEMENT

The Civil Dispute Resolution Act 2011 (Cth)

5.18 The *Civil Dispute Resolution Act 2011* (Cth) (the 'CDRA') received royal assent on 12 April 2011 and commenced on 1 August 2011. The CDRA encourages the parties to take 'genuine steps to resolve a dispute' wherever possible before proceedings are commenced. A party who commences a proceeding is required to file a 'genuine steps statement', setting out the genuine steps which the party has taken to resolve the dispute, or the reasons why no such steps have been taken.[49]

5.19 The CDRA encourages parties to turn their minds to the issues in dispute, the outcomes they are seeking and how this can best be achieved prior to proceedings being commenced. This has the potential to help identify and narrow the issues in dispute at an early stage.

What are genuine steps?

5.20 The CDRA includes some examples of genuine steps, including:

- exchange of correspondence notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolution (see, e.g. s 4(1)(a) of the CDRA);
- exchange of relevant information and key documents (see, e.g. s 4(1)(c) of the CDRA); and
- holding a 'meet and confer', negotiation or mediation between the parties (see for example ss 4(1)(d)–(g) of the CDRA).

No requirement to file genuine steps statement in certain cases.

5.21 The CDRA provides that there are a number of types of proceedings that are excluded from the requirement to file a 'genuine steps statement'.[50] These include, among others:

- proceedings for an order imposing a pecuniary penalty for contravention of a civil penalty provision;
- proceedings in connection with a criminal offence;
- proceedings that relate to a decision of various tribunals;
- appeals;
- ex parte proceedings;
- proceedings under certain Acts; and
- proceedings excluded by the regulations.

Duty of lawyers to advise people of the requirements of the CDRA

5.22 A lawyer acting for a person who is required to file a genuine steps statement must:

- advise the person of the requirement; and
- assist the person to comply with the requirement.

49 Sections 6 and 7.

50 Subsection 6(3); ss 15, 16 and 17.

The cost of genuine steps and the discretion of the Court.

5.23 Part 3 of the CDRA provides that:

- the Court may have regard, when exercising functions or powers in proceedings before it, to whether a party who was required to file a genuine steps statement in the proceedings filed such a statement, and whether they took genuine steps; and
- the Court may take into account when exercising its discretion to award costs against a party (or that party's lawyer) whether a party who was required to file a genuine steps statement in the proceedings filed such a statement, and whether they took genuine steps.

5.24 In addition to its discretion under Part 3 of the CDRA, the Court possesses a broad discretion in relation to costs. A failure to take pre-action steps that should have been undertaken before the commencement of proceedings may result in adverse costs consequences for a party.[51]

5.25 Nevertheless, a party who attempts to take genuine steps still faces the risk that those steps will 'fall upon deaf ears' and/or that the cost of undertaking genuine steps will not be recoverable. This is because an order for costs is usually made on a party-party basis based upon the relevant scale of costs (Schedule 3 of the FCR). Schedule 3 does not contain any scale items for genuine steps undertaken before the commencement of proceedings.

5.26 The CDRA does not ameliorate this position. Some of the genuine steps identified by the CDRA have the potential to be very costly, depending on the nature of the dispute.

D THE FIRST DIRECTIONS HEARING

5.27 In the general division of the Court, a first directions hearing is usually held after the service of the Application but before the filing of any Defence by the respondent.[52] This means that the applicant may not be aware at the time of the first directions hearing of the respondent's position on the allegations. The Court will ordinarily be in a similar position.

5.28 By contrast, in the Fast Track List, a Scheduling Conference must be set down no later than 45 days after the filing of the Fast Track Application.[53] Because the respondent's Fast Track Response is due 30 days after service of the Fast Track Application,[54] the Scheduling Conference usually occurs after service of the Fast Track Response. It follows that by the time of the Scheduling Conference, the parties and the Court will be aware of the issues in the case.

Purpose of the first directions hearing.

5.29 The first directions hearing provides an opportunity for the parties to be heard as to timetabling of interlocutory steps and any other matters immediately arising.

5.30 As presently conducted, the first directions hearing is generally administrative in nature. It is often not attended by the parties' lead counsel. Further, as noted above, at the time of the first directions hearing, the respondent may not yet have indicated its position.

5.31 Because of these matters, the first directions hearing does not usually provide an appropriate opportunity to identify and narrow the issues in dispute.

5.32 It is recommended that the current process be changed, so that, in the absence of good reason to the contrary, the first substantive directions hearing be held after the filing by parties of statements of facts and contentions.

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51 See e.g. *Glaxosmithkline Australia Pty Ltd v Ritchie (No 2)* (2009) 22 VR 482.

52 The same position seems to be implicit in the FCRs: see r 5.04.

53 Practice Note CM 8, para 6.1.

54 Practice Note CM 8, para 4.7(b).

A comparative example: the Commercial Court in the Supreme Court of Victoria.

5.33 In the Commercial Court of the Supreme Court of Victoria there are two types of initial hearings:

- directions hearings, which may be first, further or final;[55] and
- Case Management Conferences, which may occur at any time.[56]

5.34 At the first directions hearing, Practice Note 10 of 2011 provides that the parties:

> *... should be ready to explain briefly, if requested, the nature of the dispute and the substantial questions in controversy, and to assist the Court to determine the course to be followed in order to achieve the Court Objective.*[57]

5.35 Some of the matters which should be considered at the first directions hearing include *'any of the procedures referred to in paragraph 8.9*', which procedures include:

8.9.1 *encouraging the parties to cooperate with each other in the conduct of the proceeding;*

8.9.2 *identifying the questions in issue at an early stage;*

8.9.3 *deciding promptly which questions need full investigations and trial and disposing summarily of others;*

8.9.4 *deciding the sequence in which questions are to be determined;*

8.9.5 *encouraging the parties to use alternative dispute resolution procedures;*

8.9.6 *encouraging and helping the parties to settle all or part of the dispute;*

8.9.7 *fixing timetables or otherwise controlling the progress of the proceeding;*

8.9.8 *considering whether the likely benefits of taking a particular step justify the cost of taking it;*

8.9.9 *dealing with as many aspects of the proceeding as possible on the same occasion;*

8.9.10 *managing the proceeding by making interlocutory orders on the papers, that is, upon written application and material without the necessity of appearance before the Court;*

8.9.11 *making use of technology.*

5.36 At a Case Management Conference, lead counsel are required to attend and the parties are required to prepare several documents in advance of the hearing, including a Case Memorandum, Draft List of Issues and Case Management Information Sheet, all of which are designed to assist the parties and the Court to, among other things, identify and narrow the issues in dispute.

Presumptive case management orders.

5.37 A purely procedural first directions hearing could be avoided in the vast majority of cases through the use of presumptive case management orders. Such orders could be made by the Court Registry upon the filing of the application. The orders would set out a basic timetable leading up to a substantive directions hearing to be held after the respondent has responded to the applicant's allegations. The first directions hearing would then provide a greater opportunity for the parties and the Court to engage in an effort to define and (if possible) narrow the issues in dispute.

5.38 The Fast Track List essentially implements this procedure in Practice Note CM 8. Paragraph 4.7 of that Practice Note provides for the filing and service of the Fast Track Application, Fast Track Response, Fast Track Cross-Claim (if any) and Fast Track Reply (if any) according to a predetermined timeframe. The first directions hearing is timed to occur shortly after the filing and service of the respondent's Fast Track Response.

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55 Practice Note 10 of 2011, part 8.

56 Practice Note 10 of 2011, part 7.

57 Practice Note 10 of 2011, para 8.5.

5.39 One limitation of presumptive case management orders is that not all proceedings require the same amount of time for the preliminary stages. In particular, some matters are more complex than others, whether due to legal, factual or practical problems. To some extent, this could be accounted for by introducing categories of presumptive case management orders, based on, for example, the amount in dispute, whether the matter is a singular or class action or, more generally, the expected complexity of the matter. Where an action is commenced under a particular statutory provision, for example, migration, judicial review and *Fair Work Act 2009* (Cth) matters, it may be more amenable to a presumptive case management order. More complex proceedings would allow the respondent greater time to respond to the applicant's allegations, but would receive greater case management oversight.

5.40 Proceedings could be assigned to different categories based on the applicant's selection, subject to a respondent's right to challenge that selection. That challenge could be made at the first directions hearing, although (based on the above proposal), that would usually be after the respondent has replied to the applicant's allegations. Accordingly, the respondent should have liberty to bring the matter before the Court for an early directions hearing (before filing its response to the applicant's allegations) if the respondent has some good reason for doing so.

5.41 The parties should also be able to agree to vary the presumptive case management orders by consent.

5.42 There is another point to be made. Although, as will be seen below, it is recommended that the general rule should be that statements of contention, responses and replies replace traditional pleadings, not all matters are suitable or appropriate for determination in the manner contemplated by the Fast Track procedures. The Court will obviously retain a general discretion in relation to such matters.

Defining and narrowing the issues.

5.43 If the above proposals are adopted, the first directions hearing would be held after both an application and statements of case in the form of a statement of fact and contention and response have been filed, and will therefore provide a greater opportunity for the parties and the Docket Judge to identify the issues in dispute, narrow those issues (so far as possible) and map out the path to trial.

5.44 The lead counsel retained on behalf of each of the parties should be required to attend the directions hearing. The parties are unlikely to make significant concessions in the absence of lead counsel. Lead counsel should be expected to identify the issues in dispute and explain to the Court what is likely to be involved in resolving those disputes at trial. The parties should expect the Court to test the parties' legal and factual contentions and inquire as to how the parties intend to prove factual contentions, and the basis for the legal contentions.

5.45 In this regard, the matters to be addressed at the first directions hearing might include:

- Should there be a separate trial of a preliminary issue, and/or should issues of quantum be referred to arbitration, a registrar or an expert?
- What are the factual issues in dispute?
- What legal issues are in dispute?
- Can frivolous or weak claims/defences be eliminated?
- As to disputed issues of fact, how do the parties intend to prove their position? In particular:
    - (i) Which witnesses are proposed to be called?
    - (ii) What documents are relevant to the disputed fact?
    - (iii) Is formal proof of the fact required and what disputed facts can be agreed?
    - (iv) Should the Court waive the rules of evidence in relation to any disputed fact pursuant to s 190 of the Evidence Act?

5.46 In addition to discussing the issues in dispute, the parties should be expected to address, and the Court will ordinarily make orders in relation to:

(a) Forum: is the chosen forum the most appropriate for the resolution of the dispute (would the matter better be dealt with in the Fast Track List or by the Federal Magistrates' Court, for example)?[58]

(b) Interlocutory steps: with the assistance of the lawyers for each party, the Court will set down some or all of the interlocutory steps to trial. In particular, the Court will, where appropriate, make orders as to the scope and timing of discovery to be provided.[59]

(c) ADR: the parties will be expected to address the Court as to whether mediation or some other form of ADR is appropriate and an appropriate timetable for completion.[60]

(d) Trial date: the parties will be expected to address the Court on an appropriate date for trial, and the Court will determine the date for trial and length of trial in an appropriate case.

(e) Viva voce or affidavit evidence: the parties will be expected to address the Court as to whether any or all evidence-in-chief at trial is to be given viva voce (perhaps with outlines of evidence, at least on non-critical issues), alternatively, affidavit evidence.[61]

(f) Conduct of trial: if appropriate, the Court may make orders for a 'chess clock' style allocation of time for the trial, may apply Part 10.6 of the Fast Track Directions, and may make any other appropriate orders on the time to be taken for trial.[62]

(g) Proportionality: the Court should consider ordering that the parties advise the Court as to each party's costs of discovery and costs of the proceedings overall, and that the plaintiff provide an early estimate of the quantum of the damages sought.

(h) Case management generally: any other means to minimise cost and delay.

E IDENTIFYING THE ISSUES

Pleadings

5.47 The function of pleadings is to inform a party of each other party's case so that the issues in dispute are identified and a party can prepare to deal with each other party's case.[63] Pleadings do so by setting out the applicant's position, and the respondent's response, such that, when read together, the whole of the pleadings should present a clear picture of the issues in dispute and the respective positions of both parties.

5.48 Pleadings must 'contain, and contain only, a statement in a summary form of the material facts on which the party relies, but not the evidence by which those facts are to be proved.'[64] Rule 16.02 of the FCRs (Order 11 of the Old FCR) provides, among other things, that pleadings:

(a) must contain consecutively numbered paragraphs where each separate matter is pleaded in a separate paragraph;

(b) must be brief; and

(c) must not fail to disclose a cause of action or be legally embarrassing, otherwise they are liable to be struck out.

5.49 Pleadings should focus on the real or substantial issues in dispute, and responsive pleadings must specifically traverse all allegations of fact; general denial of an allegation is not sufficient.

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58 FCR r 5.04(3) Item 2 allows the Court to make directions for the proceeding to continue as an expedited proceeding but does not allow transfer to another Court.

59 FCR r 5.04(3) Item 10 deals with this issue.

60 FCR r 5.04(3) deals with this issue.

61 Rule 5.04(3) Item 20 of the FCR deals with this issue.

62 See Old FCR O 32 r 4A. See FCR rr 30.23 and 5.04.

63 *Dare v Pulham* (1982) 148 CLR 658, 664.

64 Old FCR O 11 r 2. FCRs r 16.02.

5.50 The benefit of properly particularised pleadings is that they mark out the 'metes and bounds' of the issues between the parties such that, at trial, they provide a reasonably precise reference for the purposes of determining the relevance of evidence sought to be tendered.

5.51 Proceedings commenced in the Fast Track List pursuant to Practice Note CM 8 do not require pleadings. Instead, the parties are directed to use Fast Track statements, Fast Track responses and so on.

5.52 Fast Track statements and responses adopt a less formalistic approach to pleadings, in an effort to avoid prolonged disputes as to the form, rather than the substance, of pleadings at the interlocutory stage.

Particulars

5.53 In general, particulars should be used to prevent the other party from suffering embarrassment at trial. This is accomplished by:

(a) informing the other party of the nature of the case it has to meet (as distinct from the mode by which that case is to be proved); and

(b) limiting the generality of pleadings (see r 16.41 FCR).

5.54 Rule 16.41(1) FCR[65] does not prescribe a specific form that particulars ought to take. Rather, it simply states that:

> A party must state in a pleading, or in a document filed and served with the pleading, the necessary particulars of each claim, defence or other matter pleaded by the party.

5.55 The rules articulate several types of allegations of which particulars must be provided:

(a) fraud, misrepresentation, breach of trust, wilful default or undue influence (r 16.42 FCR);[66]

(b) conditions of the mind including knowledge (r 16.43 FCR); and

(c) damages (r 16.44 FCR).[67]

Adjuncts to pleadings

5.56 Each pleading only tells part of the story. To determine the issues in dispute, it is necessary to consider both the applicant's allegations and the respondent's response to those allegations. It is therefore often convenient to have a single document that consolidates the pleadings so that each allegation and the response to that allegation can be read at the same time.

5.57 Also, an agreed chronology often serves as a useful adjunct to pleadings. It is important that such chronologies be drafted in as neutral manner as possible.

5.58 Parties should consider whether it would assist to prepare a consolidated pleadings document and an agreed chronology. These documents could also be provided to the Court.

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65 Order 12 of the Old FCR.

66 O 12r 2 of the Old FCR.

67 O 12r 4 of the Old FCR.

Criticisms of pleadings

5.59 Despite the fundamental role played by pleadings, they have been the subject of longstanding discontent.[68] The principal criticisms of pleadings may be summarised as follows.

(a) Pleadings may be based on formulaic precedents and reveal little about the actual dispute.

i. Pleadings are technical and often overly formalistic and convoluted, making them difficult to understand – especially for parties who are unsophisticated or do not have access to legal resources. If parties cannot properly understand the case against them, they cannot effectively identify or narrow the issues in dispute.

(b) Contentions of law are not generally pleaded, so pleadings do not explain the basis for a party's contentions of law. This can result in a delayed understanding of the real issues in dispute, leading to increased costs and delays in informed settlement discussions.

(c) Pleadings rely on fine distinctions between 'matters of fact' and 'matters of law', and between substantive allegations and particulars.

(d) Although it is desirable for a party to put forward its case precisely as early as possible, a party may simply not be able to do so at the outset of the proceeding. This encourages broad, ambiguous pleadings, with the result that the issues in dispute are not narrowed even after a party becomes able to state its case more precisely (for example, after discovery).

(e) A respondent may seek to plead a bare denial or non-admission without explaining the factual or legal basis of the denial or non-admission.

(f) Pleadings are adversarial in nature. Rather than jointly identifying the real issues in dispute, parties use pleadings as an opportunity to advocate their case. There is little incentive to make genuine concessions.

(g) The technical and adversarial nature of pleadings encourages interlocutory pleadings disputes. Such disputes are often costly and achieve little in terms of progressing the determination of the matter.

5.60 These criticisms are real and substantial. To a considerable extent, they are ameliorated in the Fast Track List. The use of less formalistic Fast Track Statements, Fast Track Responses etc discourage interlocutory pleadings disputes. Parties in the Fast Track List know that the Court will not be receptive to interlocutory applications based solely upon an alleged defect in the form of the pleadings. The Fast Track procedures also allow the parties to state and explain their contentions of law, giving the parties and the Court an earlier understanding of the real issues in dispute. The general adoption of such procedures is recommended.

Lists of issues in dispute/not in dispute

5.61 The Court may at a directions hearing order that the parties take steps to clarify the real issues in dispute. This may be facilitated by the Court ordering the parties to agree on the real issues in dispute, and/or the issues not in dispute, in the proceeding by the preparation of a list of issues.[69]

5.62 In the Fast Track List, the Court may require the parties to provide a joint list of issues in dispute. Practice Note CM 8 requires that the parties' Fast Track Statement and Response set out each party's list of 'issues ... likely to arise in the proceeding'.

5.63 In the preparation of a joint list of issues, each party will understandably wish to present the issues in a way that is most favourable for that party. To try to reduce arguments about drafting, it should be required that the list of issues be drafted so as to present the issues in a manner that is as neutral as possible.

5.64 An agreed list of issues is an obvious mechanism by which the issues in dispute can be defined. Once the issues are properly defined, there is greater scope for the parties to narrow the issues by agreement and/or with the assistance of the Court.

5.65 To the extent that parties are able to do so, it is also desirable for them to agree a list of matters that are not

68 See Elizabeth Thornburg and Camille Cameron, 'Defining Civil Disputes: Lessons from Two Jurisdictions' *Melbourne University Law Review, Vol. 35, No. 1, 2011*; *U of Melbourn Legal Studies Research Paper No. 567*; *SMU Dedman School of Law Legal Studies Research Paper No. 94*.

69 See FCR r 5.04(3) Item 29 (b); O 10, r 1(2)(h) of the Old FCR.

in dispute. Such a document may assist the Court in understanding the nature or boundaries of the dispute. It will also assist the parties to direct their resources and attention to the issues that are genuinely in dispute.

Early production of key documents

5.66 In some cases, it may be clear that there are critical documents in the possession of one party. Ideally, such documents would be disclosed and provided as part of that party's genuine steps prior to the commencement of proceedings. However, if those documents have not been provided, it may be appropriate for that party to provide those documents to the other parties at an early stage of the proceeding, such as shortly after the first directions hearing or possibly even earlier. Once the other party or parties have access to those documents, they are likely to be in a far better position to assess its/their prospects in the case and the likely procedure required to bring the matter to trial (assuming the matter is to proceed).

5.67 If documents are produced early to enable a party to identify and narrow the issues in dispute, the party, after receiving the documents, should be expected to make a genuine effort to identify and narrow the issues in dispute. This would include the party making reasonable concessions or specifying its case with greater precision.

5.68 Under the FCR, a party must not give discovery unless the Court has made an order for discovery: r 20.12 FCR. The Court of course has the power to make such an order at any stage of the proceeding.

Concerns with the use of a list of issues in dispute.

5.69 There are a number of significant concerns with the compulsory use of lists of issues, and their adoption is not recommended.

5.70 Trying to force the parties to agree on a list of issues may simply result in additional disputation and costs. In theory, if parties have relatively clear and settled positions it should be possible for them to agree what issues are in dispute and then specify those matters in a document. In reality, the parties may not have relatively clear and settled positions, particularly at the outset of litigation.

5.71 Even if the parties agree on what issues are in dispute, there may be disagreement as to how those issues are set out in a list of issues. This may include the relative prominence given to various matters, the level of specificity or generality with which issues are framed, the language in which issues are described and even purely stylistic matters.

5.72 Each party may be expected to seek to have a list of issues framed in a way that is favourable to its case. Practitioners understandably seek to advocate their client's case at every opportunity. This would apply to an agreed list of issues. The parties will therefore often be at cross purposes in drafting the agreed list of issues.

5.73 Experience with agreed lists of issues in other Courts (such as the Commercial Court in the Supreme Court of Victoria and in the United Kingdom) is that they often involve protracted and frustrating negotiations. In those Courts the list of issues is generally used as an adjunct to pleadings, rather than replacing pleadings. If an agreed list of issues were to replace pleadings or statements of the parties' case, the negotiation of the document is likely to be even more protracted, since more will be at stake.

5.74 Alternatively, if an agreed list of issues it to somehow sit alongside the pleadings or statements of the parties' case, other questions arise. What is the relationship between those documents? Which prevails in the event of an inconsistency? Which defines the four corners of the dispute?

5.75 The question of whether lists of issues would be a useful tool to be adopted in some or all cases in the Court should be debated and considered by the profession and the Court.

Adoption of statements of facts and contentions in all matters?

5.76 It is recommended that the default position be that in all Federal Court matters, the issues be identified by way of statements of facts and contentions and responses thereto, similar to the procedure for issue identification adopted in the Fast Track list.

5.77 Identifying the issues in this way has the advantage of forcing the parties and practitioners to focus on the real factual and legal issues, and engage with those issues, at a much earlier stage in the dispute. This can result in substantial costs savings, and earlier settlements and trials. The adoption of these procedures for issue identification may also effect an important cultural change in forcing practitioners, and the Court, to focus on the issues in the proceeding at a deeper level at the 'pleading' stage. At present, this kind of attention is often not brought to bear until much closer to the trial of the proceeding. By 'front-ending' more of the work, it is hoped that more matters will be concluded (whether by trial or settlement) at an earlier point. The attendant savings to the parties, the Court and the community ought not be underestimated.

5.78 There has been some criticism of the Fast Track procedure to the effect that respondents can be 'railroaded' and caught off guard by an organised applicant that has its case organised before proceedings are commenced. Not only might the Fast Track procedures raise an issue about 'fairness' to a respondent who is not positioned to respond within the timeframes specified, the absence of sufficient time for a respondent to consider a case made against it (including by the obtaining and considering of legal advice) might render that party reluctant to make appropriate early concessions. In theory, the CDRA should help overcome such problems (at least in proceedings to which the CDRA applies), but in practice it can be a real issue, and the Court needs to be alive to the point.

F ALL CARDS ON THE TABLE FROM DAY ONE?

5.79 The issues concerning cost and delay, especially at the pre-trial stage, are as much a concern (perhaps more so) in the US as they are in Australia. The Institute for the Advancement of the American Legal System is reported in The Economist as having the view that at the pleading stage (i.e. right at the start of the litigation process), litigants should put all the information they have forward at the outset.[70] Such a change would represent a radical departure from the traditional adversarial method of conducting litigation. However, methods such as this to reduce the cost and delays of litigation merit further consideration.

G RESOLVING ISSUES

Separate questions

5.80 In the ordinary course, all of the issues of fact and law in the proceedings should be determined together at one time.[71] Notwithstanding this, in some cases the conduct of the proceedings may be made more efficient by determining some issues before other issues.

5.81 The Court may order that any question or issue (whether or fact or law) in the proceedings be decided before, at or after any trial or further trial in the proceedings – that is, as a 'separate question'.[72]

5.82 For example, if in a proceeding:

- the respondent denies liability;
- even if the respondent is found liable, the respondent disputes the quantum of the liability; and
- the evidence as to the quantum of liability will be extensive and complex,

it may be appropriate to determine the issue of liability first, before the issue of quantum is determined.

5.83 Another example is shareholder class actions based on alleged misleading or deceptive conduct by the respondent company. It is common for the Court to order that common issues, such as whether the respondent engaged in misleading or deceptive conduct, be determined in advance of individual issues.[73]

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70 'Cutting legal costs: the paper chase', *The Economist*, 25 June 2011, 40–41.

71 Tallglen Pty Ltd v Pay TV Holdings Pty Ltd (1996) 22 ACSR 130, 141–2.

72 FCR r 30.01; Order 29.2(a) of the Old FCR.

73 Although, often, causation (reliance) issues for one or more group members will be determined at the first stage of the trial.

5.84 If orders are made for a separate question (or questions), the process generally entails:

- the formulation of the 'separate questions' for the Court to answer; and
- a trial confined to the issues raised by the separate questions.

5.85 If the answer to the separate questions does not resolve the proceeding, it may then be necessary for a further trial to be held.

5.86 Whether a separate question is appropriate is ultimately a matter for the Court. Generally, a separate question will not be appropriate unless:

- the outcome of the entire proceedings will be determined if the separate question is determined in a particular way; or
- there is some reason to think that, if the separate question is determined, the parties are more likely to negotiate a resolution of the proceedings.

5.87 A reason why separate questions are often inappropriate is that they can lead to complexities in the appeal process. A party may wish to appeal from the determination of the separate question before the other issues have been determined. This would require leave of the Court. If the separate questions do not resolve the proceedings, then, if leave is granted, there may be a considerable delay before there is an outcome in the proceedings. Alternatively, if leave is not granted, it will then be necessary to determine the other issues (which may be complex or time-consuming) when it is clear that one party will in due course wish to appeal based on the determination of the separate question.

Summary judgment of whole or part of the proceedings

5.88 Section 31A of the FCAA provides that the Court may give judgment for one party (in relation to the whole or any part of the proceeding) where the other party has no 'reasonable prospect' of successfully defending or prosecuting the claim.[74] Rule 26.01 FCR[75] allows the Court to give judgment (generally or in relation to any claim for relief) where it is satisfied that the proceeding or claim is frivolous, vexatious, an abuse of process or no reasonable cause of action is disclosed. This is generally known as 'summary judgment'.

5.89 An application for summary judgment should only be brought if there is a strong case that summary judgment is warranted. Otherwise, the application is likely to have the opposite effect to that intended – delaying the proceedings, rather than disposing of them swiftly. Nevertheless, in cases where summary judgment is warranted, an application for summary judgment will prevent a party from being involved in an ongoing unmeritorious claim.

Reference of issues to a referee

5.90 The parties and their legal representatives are responsible for investigating all of the factual and legal issues in the proceedings and presenting to the Court as admissible evidence the necessary material upon which the Court makes its decision. The Court does, however, have the power to appoint a person (a 'referee') and refer the proceedings or one or more issues in the proceedings, to the referee.

5.91 The Court's power to refer the proceedings or issues in the proceedings to a referee is contained in s 54A of the FCAA and regulated Div 28.6 of the FCR[76]. It is a very broad power. An example of a situation where a referee might be appropriate is if there was a large, detailed accounting exercise that needed to be undertaken.

74 See also r 26.01 of the FCR.

75 Order 20 r 5 of the Old FCR.

76 O 72A of the Old FCR

5.92 Upon receiving the referee's report, the Court may:

- adopt, vary or reject the report, in whole or in part;
- require an explanation by way of a further report by the referee;
- remit on any ground, for further consideration by the referee, the whole or any part of the matter that was referred to the referee for inquiry and report;
- decide any matter on the evidence taken before the referee, with or without additional evidence; or
- give any judgment or order in relation to the question it thinks fit.

5.93 Following an application made by a party, the Court may direct how the referee is to make his or her inquiries.[77] Otherwise, the referee is to conduct those inquiries as he or she thinks fit. A referee is not bound by the rules of evidence. Evidence may be given orally or in writing. The referee may require evidence to be on oath or affirmation.

H MULTIPLE PROCEEDINGS

Consolidation etc.

5.94 In some cases, multiple proceedings may be commenced which relate to a common question of law or fact, a similar or the same set of transactions or otherwise give rise to a common theme or set of circumstances which it is convenient to dispose of at once. Rule 30.11 provides that the Court may order those proceedings to be:

- consolidated;
- tried at the same time or one immediately after the other; or
- stayed, pending the determination of one of them.

77 See r 28.65(1) and (2) of the FCR.

6. ALTERNATIVE DISPUTE RESOLUTION

by the Hon Kevin Lindgren AM QC, Mary Walker, Ian Bloemendal, Joanne Staugas and Scott Ellis[78]

A INTRODUCTION

6.1 Alternative dispute resolution (ADR) is commonly understood to refer to the resolution of disputes, by or with the aid of, a procedure that is an alternative to litigation. ADR can also form part of a litigation process. ADR processes are diverse, and can include arbitration, mediation, non-arbitral expert determination, and early neutral evaluation, amongst others.[79]

6.2 The FCAA and the FCRs contain provisions relevant to ADR. In relation to ADR in the Federal Court, there is an initial issue of terminology. The FCAA and the FCRs refer to 'arbitration', 'mediation' and an 'alternative dispute resolution process' other than arbitration or mediation. 'Alternative dispute resolution process' is defined in s 4 of the FCAA as:

> a procedure or service for the resolution of disputes (other than arbitration or mediation) not involving the exercise of the judicial power of the Commonwealth.

6.3 In other words, arbitration and mediation are distinct from 'alternative dispute resolution process[es]', for the purposes of the FCAA and the FCRs, even though they would fall within it according to common parlance. This tripartite division of ADR in the FCAA and the FCRs must be borne in mind. The provisions of the FCAA governing arbitration, mediation and other ADR processes are s 53A–54B. Part 28 of the FCRs deals with ADR. Rule 28.02 provides:

> 28.02 Orders that may be sought
>
> (1) A party may apply to the Court for an order that:
>
> (a) the proceeding or part of the proceeding be referred to an arbitrator, mediator, or some suitable person for resolution by an ADR process; and
>
> (b) the proceeding be adjourned or stayed; and
>
> (c) the arbitrator, mediator, or person appointed to conduct an ADR process report to the Court on progress in the arbitration, mediation or ADR process.

6.4 Section 53A of the FCAA provides that the Court may refer proceedings or any part of them or any matter arising out of them to an arbitrator for arbitration, to a mediator for mediation, or to a suitable person for resolution by an ADR process, in each case in accordance with the FCRs.

6.5 Two things should be noted immediately. First, such orders may be made with or without the consent of the parties, except an order for referral to an arbitrator which does require the parties' consent: s 53A (1A). Second, the ADR process does not include the referral to a referee for inquiry and report (for which s 54A provides), because that is not a procedure or service for the resolution of disputes.

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78 Members of the Alternative Dispute Resolution Committee in the Law Council's Federal Litigation and Dispute Resolution Section. This chapter was written also as a chapter in Federal Civil Litigation Precedents, Lexis Nexis. The Law Council acknowledges with appreciation the agreement of all concerned for co-publication of the chapter in both works.

79 The Australian Government's former National Alternative Dispute Resolution Advisory Committee (NADRAC) defined ADR processes as an umbrella term at the heart of which an impartial person (i.e. a third party) assists those in a dispute to resolve the issues between them: Australian Government Attorney-General's Department NADRAC, *Your Guide to Dispute Resolution* (2012), 5. See also, National Alternative Dispute Resolution Advisory Council Dispute Resolution Terms (2003) 5. ADR options include mediation, arbitration, case management conferences, expert determinations, experts' conferences, joint experts' reports and concurrent evidence, Court appointed experts, fast track directions, costs conferences and referral to referees.

6.6 Section 54A of the FCAA and Division 28.6 of the FCRs provide for references out by the Court for inquiry and report. 'References out' are not commonly thought of as forms of ADR; however, they often require the referee to provide an expert determination or expert appraisal/opinion.

6.7 Federal legislation, such as the *Native Title Act 1993* (Cth) (NT Act) and the *International Arbitration Act 1974* (Cth) (IAA) also deal with ADR processes for matters before the Federal Court. In native title matters the ADR options most commonly used are mediation (albeit most commonly ordered under the provisions of the NT Act), case management conferences, experts' conferences and court appointed experts. To date arbitration, fast track directions, costs conferences and referrals to referees have not been utilised in native title matters. Sub-section 86B(6) of the NT Act provides that if the Court refers the whole or part of a proceeding for mediation under s 86N of the NT Act, the Court may not refer any aspect of the proceeding to mediation under the FCAA unless an order ending the NT Act mediation has been made.

6.8 The CDRA, which applies to all general federal law matters in the Federal Court not otherwise excluded, is also relevant. The Act encourages disputants to take 'genuine steps' to resolve their dispute before initiating proceedings in the Federal Court.[80] The Act, which was under review in 2013–14, also aims to improve access to justice by encouraging early dispute resolution. Both applicants and respondents must file a 'genuine steps' statement advising the Court about the steps they have taken to attempt to resolve their dispute, or the reasons why they have not taken such steps.[81] Respondents must state whether they agree with the applicant's genuine steps statement, or outline their disagreements and their reasons for those. Parties who do not comply with the Act may face costs consequences: Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys [2012] FCA 202.

B MEDIATION

6.9 Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or under an independent contractual arrangement.

6.10 The Law Council of Australia has published guidelines for mediators, legal practitioners and parties involved in the mediation process:

(a) Ethical Guidelines for Mediators: the Law Council's general ethical and practical framework for the practice of mediation;

(b) Guidelines for Lawyers in Mediation: the Law Council's guidelines to give assistance to lawyers representing clients in the mediation of civil and commercial disputes; and

(c) Guidelines for Parties in Mediations: the Law Council's general ethical and practical framework for the parties involved in mediation.

6.11 These guidelines have general application to the practice of mediation and apply to most models of mediation.

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80 Other than those arising under specified Acts or Acts with a specific dispute resolution mechanism such as proceedings relating to a civil penalty or criminal offence; appeals; ex parte proceedings and proceedings involving a vexatious litigant). Other excluded matters arise under s 40(1(g) of the Bankruptcy Act 1966; s 459A of the Corporations Act 2001; proceedings for review of a decision of a Registrar of the Federal Court of Australia or the Federal Circuit Court; and matters under the Family Law Act 1975, the Migration Act 1958, the Native Title Act 1993 and the Fair Work Act 2009.

81 Under the CDRA and the FCRs, an applicant's genuine dispute resolution statement must be filed at the same time as the originating application in accordance with Form 16. Respondents must file a statement in accordance with Form 11 before the return date fixed in the originating application.

6.12 In the Federal Court, Judges actively manage cases through an individual docket system. In the early stages of court proceedings parties are expected to consider mediation. All cases, regardless of their complexity or the number of parties, are eligible to be referred to mediation. Mediation raises no question of the exercise of judicial power. If it leads to a negotiated settlement, the basis of that settlement is contractual, although it may give rise to an order of the Court made by consent. Two practical questions arise for the Judge presiding, concerning consent and timing.

Absence of the consent of one or more parties

6.13 The first question is whether it is useful to order mediation without the consent of all of those who are to be parties to the mediation. Ordinarily this will be all of the parties to the proceeding. Experience suggests that a party may withhold consent for reasons that will not necessarily doom the mediation to failure. For example, a party may perceive that withholding consent may be seen by the other party as taking a firm and confident stance, or there may already have been a mediation or at least a negotiation, which has failed, and a party may think it a waste of time and money to participate in a further mediation.

6.14 Experience shows, however, that a mediated resolution can be achieved notwithstanding that these reasons or others have persuaded one party or even all parties from consenting to a court-ordered mediation. There may also be some additional prospect of success arising from the simple fact that the Court has ordered the mediation. In this connection it should be noted that s 37N(1) of the FCAA provides that the parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose, and s 37N (2) of the FCAA imposes a related duty on the parties' lawyers.

At what stage should an order for mediation be made?

6.15 The second practical question is that of the time at which mediation is best ordered. Should it be ordered 'early', that is to say, after closure of pleadings but before the filing of affidavit evidence, or 'late', that is to say, after the filing of affidavit evidence? The advantages and disadvantages of these alternatives are obvious enough. If mediation is ordered early, the litigation costs incurred by the parties are unlikely to be an obstacle to a settlement, whereas they may well be if mediation is ordered late, such as when the proceeding is ready for trial and all affidavits and expert reports have been filed. On the other hand, under an early referral to mediation the parties do not have the benefit of having seen the other side's evidence and have not themselves yet been subjected to the salutary discipline of preparation of their own evidence in accordance with the rules of admissibility, or been forced to recognise potential weaknesses in their case.

6.16 The Docket Judge contemplating making an order for mediation might consider exploring the timing alternatives with the parties' legal representatives. Rule 28.01 provides that the parties 'must' and the Court 'will' consider options for ADR, including mediation, 'as early as reasonably practicable'. This leaves open, however, the 'early/late' timing issue relating to the making of the Court's order that mediation be undertaken.

6.17 It is questionable whether there are identifiable criteria according to which mediation should or should not be ordered. The Judge knows little of the parties or of the background to the dispute. One thing that the Judge does know is whether a trial is likely to be lengthy, expensive and uncertain of outcome. It may be useful for a Judge, before ordering mediation, to require the parties themselves to attend court in person so that the Judge can refer to the disadvantages of a litigated outcome.

Legislative framework

6.18 Some aspects of the legislative framework relating to mediations ordered by the Court should be noted.

6.19 Section 53B of the FCAA provides that anything said or any admission made at a conference conducted by a mediator under a mediation ordered by the Court is not admissible in evidence. This is one of several provisions that are intended not to make a fundamental change to the position that would operate under general law principles, but to eliminate the need to rely on those principles, perhaps with the associated disadvantage of the potential uncertainty of their nature and scope.

6.20 Rule 28.02 of the FCRs allows a party to apply to the Court for an order that the proceeding or part of it be referred to an arbitrator, mediator or a suitable person for resolution by an ADR process, that the proceeding be adjourned or stayed, and that a report be made to the Court on progress in the process. Rule 28.04 provides that a party may apply for an order terminating a court-ordered mediation or terminating the appointment of an arbitrator, mediator or other ADR practitioner. This provision emphasises that where mediation is ordered by the Court, it remains subject to the overall control of the Court.

6.21 The FCRs do not, however, contain a provision similar to that found in r 20.7 of the New South Wales Uniform Civil Procedure Rules that within 7 days after the conclusion of the last mediation session, the mediator must report to the Court the time and date the first mediation session commenced and the time and date the last mediation session concluded.

6.22 The Court's powers relating to mediation do not prevent the parties from referring the proceeding to a mediator for mediation (r 28.05(1)). If they do so, however, the applicant must within 14 days of the referral apply to the Court for directions as to the future management and conduct of the proceeding (r 28.05(2)). As noted above, a mediation ordered by the Court must be carried out in accordance with Part 28 of the FCRs (r 28.03).

6.23 Rules 28.21–28.25 relate specifically to mediations ordered by the Court. Rule 28.21 contemplates that the order for mediation may nominate a mediator. If it does not do so, the Registrar will, as soon as practicable after the making of the order, nominate a Registrar or some other person as the mediator and give the parties written notice of the matters specified in Rule 28.21(b), i.e. the name and address of the mediator, the time date and place of mediation, and any further documents that the parties must give to the mediator. A note to Rule 28.21 states that in fixing the time and date for the mediation, the Registrar will consult with the parties. Oddly it omits to say that the Registrar will consult with them on the identity of the mediator to be nominated. It is not common for the Court to nominate the mediator. So far as is known, whenever it has done so (i.e. not appointed the Registrar), the nominee has been a person chosen by the parties.

The costs of the mediation

6.24 FCRs r 28.22 provides that the mediation must be conducted in accordance with any orders made by the Court. What are the orders that the Court might consider making? It might see fit to make an order as to the costs of the mediation. There are several possibilities here. First, there is the question of the liability of the parties to pay the mediator. The Court might order that the parties be jointly and severally liable to pay the mediator's fees, room hire and other expenses of the mediation. On the other hand the Court might prefer to make no order as to payment by the parties of those amounts, leaving the matter to be addressed in the Mediation Agreement which the parties to the mediation will enter into with the mediator.

6.25 Second, there is the question of the proportions as between the parties themselves for payment of the costs.

6.26 Third, there is the question whether the parties' own costs of the mediation (including their proportion of the mediator's fees, room hire and other expenses) are or are not to form part of their costs of the proceeding for the purpose of any order for costs that may ultimately be made. Again, the Court might choose to include some provision for this in its order or might leave the question to be addressed in the Mediation Agreement.

Order for attendance at mediation

6.27 The Court might decide to order that the parties must attend the mediation conference in person or be represented at it by persons who have authority to bind them to a settlement of the dispute. On the other hand the Court might leave this question to be dealt with in the Mediation Agreement that the parties will enter into with the mediator.

Report by mediator to Court

6.28 FCRs r 28.23 provides that if only part of a proceeding has been the subject of the order for mediation, the mediator may, at the conclusion of the mediation, report to the Court in terms agreed between the parties.

6.29 FCRs r 28.24 provides that if the mediator considers that a mediation should not continue, the mediator must terminate the mediation and report to the Court on the outcome of the mediation. The rule does not identify any principles that are to guide the mediator in forming the opinion that the 'mediation should not continue'. No doubt the ultimate question for the mediator is whether he or she considers that a continuation of the mediation would not have utility.

6.30 Finally, FCRs r 28.25 provides that if the parties reach an agreement at a mediation they may file consent orders in accordance with r 39.11 of the FCRs.

Relationship between terms of the Court's order and the Mediation Agreement

6.31 A private mediator will have a standard form of Mediation Agreement expressed to be made between the parties to the mediation and the mediator, which the mediator will invite the parties to enter into with him or her. The Mediation Agreement will be likely to contain provisions:

(a) fixing the amount of the mediator's fees, and, if applicable, expenses;

(b) that the parties undertake, with joint and several liability, to pay those fees and expenses;

(c) providing, as between the parties themselves, for payment of the mediator's fees and expenses in certain stated proportions;

(d) that the parties undertake to engage in the mediation in good faith;

(e) that the parties will keep confidential the things they learn in the course of the mediation;

(f) where a party to the mediation is other than an individual, that it will be represented at the mediation conference by an individual who will have authority to enter into a settlement agreement binding on that party;

(g) either that the parties' costs of the mediation are to form part of their respective costs of the proceeding or that they are not to do so and are stand-alone costs to be paid by the parties in the agreed proportions, no matter what the final result in the proceeding may be; and

(h) that there is to be no settlement until a settlement agreement is signed by or on behalf of the parties.

6.32 The Court may or may not consider it best to order no more than the proceeding be referred to mediation on the basis that the mediation be concluded no later than a date specified by the Court in its order, leaving all the matters referred to above (and others) to be provided for in the Mediation Agreement.

C ARBITRATION

6.33 Section 53A of the FCAA empowers the Court to refer part or the whole of a proceeding to arbitration in accordance with the FCRs. Subject to the general principle requiring the Court and parties to consider options for ADR as early as reasonably practicable (see r 28.01). Rule 28.02 is the mechanism by which the Court may make such an order. FCRs r 28.11 to 28.13 provide guidance in relation to the conduct of arbitral proceedings.

6.34 Section 53A was introduced into the FCAA by the *Courts (Mediation and Arbitration) Act 1991* (Cth).

6.35 The power to refer proceedings to arbitration has rarely been exercised, and accordingly no standard practice has developed to guide parties and the Court through the process. Some procedural issues should be addressed by parties seeking a reference to arbitration under the FCAA and FCRs.

Rules regulating references to arbitration

6.36 While the Court may make an order of its own motion or in response to an interlocutory application, unlike mediation and other arbitration processes, a matter cannot be referred by the court to arbitration without the consent of all parties (s 53A(1A)). This limitation is also recognised in Note 2 to FCRs r 28.02. But the parties' consent does not detract from the fact that it is the Court, not the parties, that is referring the matter to arbitration under s 53A (see below).

6.37 When a referral order is made, the Court will adjourn or stay the primary proceeding and will make orders requiring the arbitrator to report to the Court on the progress of the arbitration (r 28.02(1)). A party may apply pursuant to r 28.11 for the Court to make various orders, including orders:

(a) nominating an arbitrator;

(b) specifying the manner in which the arbitration is to be conducted, including fixing a time by which it must be completed; and

(c) specifying how the arbitrator's fees and expenses must be paid and how the arbitrator's report is to be presented to the Court.

6.38 Unlike a reference to mediation or other ADR processes, a party cannot apply to the Court to terminate the arbitration process under r 28.04 once the initial referral order has been made.

Interaction between the FCAA, FCRs and arbitral legislation and arbitral rules

Arbitral legislation

6.39 Independently of the FCAA and FCRs, legislation in each state and territory governs the conduct of domestic commercial arbitrations initiated by an arbitration agreement and conducted within the relevant jurisdiction.[82] Similarly, the IAA regulates the conduct of international commercial arbitrations conducted in Australia.[83]

6.40 Three points can be made about the legislation:

(a) proceedings referred to arbitration under the FCAA and FCRs are unlikely to be subject to the domestic and international commercial arbitration legislation. Section 3 of the superseded domestic Commercial Arbitration Acts of the states and territories identified expressly the types of arbitration to which they did not apply, and they included court-referred arbitrations. Although the current domestic Commercial Arbitration Acts (of 2010–13) do not do so, s 1(5) of the legislation states:

> This Act does not affect any other Act by virtue of which certain disputes may not be submitted to arbiration or may be submitted to arbiration only according to provisions other than those of this Act.

(b) At least, this means that s 53A of the FCAA (and apparently rr 28.11 to 28.14 of the FCRs) prevail to the extent of any inconsistency with the domestic state and territory Commercial Arbitration Acts.

(c) But subject to s 1(5) just noted, the state and territory Acts apply to arbitrations provided for in any other Act: s 1(6). Notwithstanding this provision, it is suggested that the domestic Acts apply only where the arbitration takes place under and by virtue of an agreement made by the parties, which is not the case with a court referred arbitration: in that class of case, the arbitration takes place under and by force of an order of the Court, albeit an order made with the consent of the parties.

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82 *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); ***Commercial Arbitration Act 2013*** (Qld); *Commercial Arbitration Act 2012* (WA). The ACT has not yet passed a new Act based on the Model Law; its relevant Act remains the *Commercial Arbitration Act 1986* (ACT).

83 Note that it is beyond the scope of this handbook to discuss the substantive provisions of such legislation, except insofar as they are relevant to arbitrations conducted under the FCAA and FCRs.

(d) Likewise, it is suggested that the IAA applies only to arbitrations that take place under an arbitration agreement: see Article 7 of the UNCITRAL Model Law on International Commercial Arbitration which is Schedule 2 to the IAA.

(e) the FCAA and FCRs do not affect the parties' ability to refer a matter to arbitration by an arbitration agreement (which would have the effect of requiring the Court to stay the primary proceeding until the conclusion of the arbitration) (FCRs r 28.05); and

(f) under the domestic Commercial Arbitration Acts (s 34A), for all arbitrations commenced after the introduction of the new legislation, an appeal does not lie to the Court on a question of law arising out of an award, unless (a) the parties have so agreed, and (b) the Court grants leave. In effect, the former condition would require that the parties' agreement that there be a right of appeal be a term of the arbitration agreement, because once the award is given, at least one party, the successful one, will be unlikely to agree that it can be challenged. In contrast, s 53AB of the FCAA entitles a party to an award that has been registered with the Court under the FCRs to apply to the Court for a review of the award, on a question of law.

6.41 Accordingly, parties to proceedings can, in effect, 'elect' whether to conduct an arbitration arising out of a proceeding in the Court under, and in accordance with, the FCAA and FCRs, or under the commercial arbitration legislation, domestic or international as the case may be. Their choice may result in certain procedural differences.

Arbitral rules

6.42 Domestic and international arbitration organisations[84] publish procedural rules intended to be used to govern contractually agreed arbitrations conducted by arbitrators associated with those organisations. Those procedural rules can also, in effect, be adopted by reference in an arbitration agreement to govern an arbitration conducted under it.

6.43 While arbitrations initiated by a reference under the FCAA and FCRs will not be governed by these rules, the Court may, at a party's request, order that such an arbitration be conducted in accordance with them (amended appropriately to reflect the non-contractual nature of the referral to arbitration, the requirements of the FCAA and FCRs, and the non-application of the relevant commercial arbitration legislation pursuant to r 28.11).

6.44 Parties seeking a referral to arbitration should consider whether the adoption of such rules may be advantageous in conducting the arbitration.

Features of Court-annexed arbitration

6.45 Given that arbitrations annexed to the Court will not be subject to the relevant commercial arbitration legislation, parties must consider what benefits may be gained from pursuing a Court-annexed arbitration, as opposed to a contractually authorised arbitration under an arbitration agreement.

6.46 Some benefits may include:

(a) **Conduct of the arbitration**: FCRs r 28.11 allows parties to apply to the Court for an order as to how the arbitration is to be conducted and, subject to any mandatory provisions of the FCAA and FCRs, an arbitration may be conducted in largely the same manner as a contractually agreed arbitration, without the limitations or impositions of the domestic and international arbitration legislation.

(b) **Judicial involvement**: Judicial involvement in arbitration proceedings is strictly confined by both the domestic and international arbitration legislation, limiting 'court interference' to situations where procedural disputes cannot be resolved by the arbitrator and the parties, and also limiting the right of appeal. The role of the Court under the FCAA and FCRs is not so limited, and there may be scope for a higher level of judicial involvement in the process.

84 For example, the Australian Centre for International Commercial Arbitration (ACICA).

(c) **Enforcement of awards**: r 28.13 provides a process by which arbitral awards may be registered by filing an interlocutory application in the proceeding from which the matter was originally referred. Registration gives an award the same force and effect as an order of the Court. This process is distinct from a contractually agreed arbitration, in which an originating application would need to be brought for the making of an order in terms of the arbitral award – e.g. r 28.14.

D INTERNATIONAL ARBITRATION

6.47 International arbitration arises as a result of the agreement of the parties to submit their international commercial agreements and other international relationship disputes to an arbitral tribunal. International arbitrations in Australia are governed by the IAA which adopts the *UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 (Model Law)*. The Court's role in supporting international arbitrations is outlined in *Practice Note ARB 1*,[85] which identifies the various provisions of the IAA that confer jurisdiction on the Federal Court. International arbitration is regulated by Division 28.5 (r 28.41–28.50).

6.48 *Practice Note ARB 1* sets out the arrangements for proceedings before the Court in which orders are sought under the IAA. Each registry has an Arbitration Coordinating Judge who has a general responsibility for matters arising under the IAA. Proceedings will be listed before the relevant Arbitration Coordinating Judge, and the practice note provides that early mediation by a registrar or third party will be encouraged and sometimes ordered by the Court.

6.49 The parties are expected to discuss the utility of mediation or other assisted dispute resolution mechanisms. Mediation can be used to help identify and reduce issues in dispute, or to eliminate procedural arguments, as well as to resolve the whole matter.

Jurisdiction

6.50 Paragraph 2 of *Practice Note ARB1* states that the IAA confers jurisdiction on the Federal Court in relation to:

(a) applications for an order to stay a proceeding or part of a proceeding that is before the Court and which involves the determination of a matter that is capable of settlement by arbitration pursuant to an arbitration agreement between the parties;

(b) the enforcement of a foreign award under the Convention on the Recognition and Enforcement of Arbitral Awards 1958;

(c) applications under Article 6 of the Model Law for orders concerning:

(i) the appointment and termination of an arbitrator (Articles 11 and 14);

(ii) challenges against an arbitrator on the basis that the arbitrator lacks impartiality or independence or the necessary qualifications (Article 13);

(iii) whether an arbitral tribunal has jurisdiction to deal with the issues before the tribunal (Article 16);

(iv) the setting aside of an arbitral award (Article 34);

(v) the recognition and enforcement of an interim measure (Articles 17H and 17I);

(vi) issuing interim measures (Article 17J);[86]

(vii) assisting an arbitral tribunal to take evidence (Article 27).

(d) the enforcement of an award under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the Washington Convention).[87]

85 Federal Court of Australia, Chief Justice PA Keane, 'Proceedings under the International Arbitration Act 1974', *Practice Note ARB 1*, 24 May 2012.

86 *Practice Note ARB 1* uses the term 'Ensuing' however this must be a typographical error given that article 17J of the *UNCITRAL Model Law on International Commercial Arbitration* relates to the 'issuing' of interim measures.

87 17 UST 1270, TIAS 6090, 575 UNTS 159.

Staying curial proceedings in favour of arbitration

6.51 Section 7 of the IAA provides that the Court will stay proceedings that are the subject of a foreign arbitration agreement upon such conditions, if any, as it thinks fit. This provision implements Australia's obligations under Article 2 of the *Convention on the Recognition and Enforcement of Arbitral Awards* 1958 (also known as the *New York Convention*) and is based on Article 8 of the Model Law. The provision in the Victorian domestic Act, s 8 of the *Commercial Arbitration Act 2011* (Vic), has been held (2:1) to apply to a proceeding brought in the Victorian Civil and Administrative Tribunal: *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142.

6.52 Rule 28.43 of the FCRs provides that an application for a stay under this provision must be in the form of an originating application in accordance with Form 51, and must be accompanied by a copy of the arbitration agreement and an affidavit stating the material facts on which the claim for relief is based.

Enforcement of awards

6.53 Section 8 of the IAA implements Australia's obligations under Article 3 of the New York Convention by providing that the courts will recognise and enforce foreign awards. FCRs r 28.44 outlines the procedural requirements for making an application under this section. A 'foreign award' is defined in s 3 of the IAA as 'an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the [New York] Convention applies.'

6.54 While it is not explicitly provided for in the IA Act, it was confirmed in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 that the Federal Court has jurisdiction to enforce arbitral awards that have been rendered under the IAA by arbitral tribunals seated in Australia.

6.55 There are only limited grounds upon which the recognition or enforcement of an award may be refused. These grounds are set out in Article 36 of the Model Law and sub-s 8(5) of the IAA. The 'public policy' ground specified in Article 36(1)(b)(ii) (and Article 34(2)(b)(ii)) of the Model Law was discussed by the Full Court of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83.

6.56 Historically, there have been some reservations about the materials that a party might be able to place before a court in enforcement proceedings, on the basis that a court should be exclusively concerned with the award itself, and not with any extrinsic material: see *Universal Petroleum Co Ltd v Handels und Transport GmbH [1987] 1 WLR 1178*. There is no such restriction in the IAA, however, and parties are free to advance any relevant material that they see fit to support their case. That said, however, parties should be careful to avoid enlivening issues that have already been determined by the arbitral tribunal and have no relevance to the enforcement proceedings at hand.

Setting aside awards

6.57 There is no provision for appeal on a question of law in the Model Law: there is only a very limited right of appeal on a question of law arising out of an award (by prior agreement of the parties and with leave of the Court) in respect of domestic arbitrations: see, for example, s 34A of the *Commercial Arbitration Act 2010* (NSW)).

6.58 An application for setting aside an award is distinct from a proceeding where the enforcement or recognition of an award is challenged. FCRs r 28.45 provides that an application to set aside an award should be in the form of an originating application in accordance with Form 53, and that the application must be accompanied by an affidavit stating the material facts on which the claim for relief is based.

6.59 The 'public policy' ground specified in Article 34(2)(b)(ii) (and Article 36(1)(b)(ii)) of the Model Law was discussed by the Full Court of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83.

Powers of the Court in supporting arbitration

6.60 **Subpoenas**: The Court is empowered to issue subpoenas in support of arbitration in accordance with s 23 of the IAA. FCRs r 28.46 sets out the procedural requirements for applying for a subpoena under s 23 of the IAA.

6.61 **Other relief**: Additionally, r 28.45 provides that an originating application in accordance with Form 53 and an affidavit stating the material facts on which the claim for relief is based must be filed in order to apply to the Court for orders of any of the following kinds:

(a) appointing an arbitrator (Model Law Article 11(3)–(4));

(b) challenging an arbitrator's appointment (Model Law Article 13(3));

(c) terminating of an arbitrator's mandate due to failure to act or impossibility to act (Model Law Article 14);

(d) challenging the tribunal's preliminary determination on jurisdiction (Model Law Article 16(3));

(e) recognising and enforcing, or refusing to recognise and enforce, interim measures (Model Law Article 17H–17I);

(f) making court-ordered interim measures (Model Law Article 17J); and

(g) assisting in the taking of evidence (Model Law Article 27).

E OTHER FORMS OF ADR IN THE FEDERAL COURT

6.62 In the preparation and application of its ADR program, the Court recognises that the cases it manages demand flexibility, individual attention and tailored considerations, i.e. differential treatment of cases according to their individual requirements. It is not unusual in complex cases for the parties to be involved at various stages in case conferences, conferences of experts and mediation. In this way the Court aims to give parties the best opportunity to settle the matter by agreement while at the same time ensuring that if agreement is not reached, the case is prepared and ready for hearing and determination.

Case management conferences

6.63 At any hearing the Court may direct the parties to attend before a Registrar to satisfy the Registrar that all reasonable steps for achieving a negotiated outcome of the proceeding have been taken or to clarify the real issues in dispute so that appropriate directions may be made for the disposition of the matter or to shorten the time taken to prepare for, and at, trial. The FCRs also provide that the Court may make a direction that the parties attend before a Judge or Registrar to consider the most economic and efficient means of bringing the proceeding to trial and of conducting the trial (r 5.04).

6.64 It is now common for Judges to refer native title matters to case management for the purpose of identifying the issues in dispute and the most efficient means of resolving them. The parties and their representatives have an obligation to cooperate with, and assist the Court in fulfilling the Court's case management objectives and, in particular, in identifying the real issues in dispute as early as possible and resolving those issues in the most efficient way possible.[88]

6.65 Case management conferences do not attract the non-admissibility provisions of s 53B that attach to discussion in mediation. It is, however, possible for the participants and the Registrar convening the case management conference to agree that part or whole of the conference will be conducted on a confidential basis. It is important to note that in referring a matter to a case management conference, the Court will often also make an order that the Registrar provide a report on the outcomes of that conference within a set timeframe.

88 Chief Justice PA Keane, *Case Management and the Individual Docket System* Practice Note CM1 (2011).

References out

6.66 Section 54A empowers the Court to refer a proceeding of one or more questions arising in a proceeding in the Court to a referee for inquiry and report in accordance with the FCRs. The Court may deal with the report as it thinks fit, including by doing the following:

(a) adopting the report in whole or in part;

(b) varying the report;

(c) rejecting the report;

(d) making such orders as the Court thinks fit in respect of any proceeding or question referred to the referee.[89]

F PROTECTION OF MEDIATORS, ARBITRATORS AND REFEREES

6.67 Mediators, arbitrators and referees have the same protection and immunity as a Judge has in performing the functions of a Judge where the mediator, arbitrator or referee has been functioning pursuant to an order made under s 53A, s 54A, 53C or 54B as the case may be. Mediators and arbitrators acting under purely consensual mediation and arbitration agreements (that is to say, without the involvement of the Court) do not enjoy a statutory protection and indemnity in these terms but state or territory legislation may confer immunity in some circumstances and under the general law, the quasi-judicial status of an arbitrator has been held to attract the common law immunity of a superior court.[90]

89 Section 54A(3) provides for the Court's power in dealing with the referee's report.

90 *Sutcliffe v Thackrah* [1974] AC 727; and see Doug Jones, *Commercial Arbitration in Australia* (2013, 2nd Ed., Thomson Reuters, Lawbook Co) at [12.140].

7. DISCOVERY OF DOCUMENTS

by Roger Forbes and Chris Rogers

This Chapter has been revised. Please refer to the revised version available here.

A PURPOSE OF DISCOVERY

7.1 As Practice Note CM 1 states, the overarching purpose of case management within the individual docket system is the just resolution of disputes as quickly, inexpensively and efficiently as possible. This reflects the overarching purpose of the civil practice and procedure provisions of the FCAA: see s 37M. For this reason the Court will in each case fashion any order for discovery to suit the issues in the particular case: see CM 5.

7.2 Documentary discovery is an invasive process which requires the compulsory identification and, subject to claims of privilege, disclosure of documents (including, in appropriate cases, information concerning certain documents no longer in the possession of a party and a description of documents in respect of which privilege is claimed) relevant to matters in dispute. The process has the following objectives:

- to facilitate the proof of facts in issue;
- to avoid ambush or surprise with associated delay and wasted costs.

7.3 Like other interlocutory procedures, discovery may also serve the important secondary purpose of permitting the parties to properly assess the strengths and weaknesses of their respective cases prior to trial with a view to early settlement of claims.

7.4 The process of disclosure in the form of documentary discovery is clearly conducive to the fair determination of disputes in accordance with the merits. It may arm the parties, and ultimately the Court, with a more complete body of relevant material as a foundation for the resolution of the dispute. However it is frequently identified as a principal cause of excessive litigation costs and has the capacity to impose significant burdens upon the parties and the Court and to delay the progress of matters towards trial. The dogged pursuit for the illusive 'smoking gun' may come at too high a price. Parties may seek to use the threat of wide-ranging discovery to impose an intolerable cost burden on an opponent, as a lever for settlement. The Court has a broad discretion in relation to discovery and will balance the costs, time and possible oppression to the producing party against the importance and likely benefits to the opposing party of such discovery.[91]

B SHOULD DISCOVERY BE SOUGHT?

Identifying the issues in dispute

7.5 It has been noted that one of the principal objects of discovery is to facilitate the resolution of issues in dispute in the litigation. The essential starting point is, of course, to identify the issues in dispute – usually by reference to the pleadings – and to determine what, if any documents in the hands of an opposing party, may advance the client's case with respect to those matters. However a consideration of the need for, and utility of, discovery in a particular matter extends beyond a mere identification of matters in dispute by reference to the pleadings. Proper case preparation and Practice Note CM 5 prompt early consideration of the following matters prior to the formulation of any request or order for discovery:

- To sustain a claim, or to establish a defence, does a party require discovery of an opponents documents at all and, if so, for what purpose?
- Can that purpose be achieved by a less expensive means?

91 see *United Salvage Pty Limited v Louis Dreyfus Armateurs* SNC [2006] FCA 116, [3] and *Kyocera Mita Australia Pty Ltd v Mitronics Corp Pty Ltd* [2005] FCA 242.

- Can a party's interests be served by discovery only with respect to particular issues in dispute?

- Should discovery occur by reference to defined categories and, if so, how should those categories be defined so as, on the one hand, to maximise the prospect of uncovering material with genuine forensic value and, on the other hand, containing costs within sensible bounds?
- Should discovery occur in stages so that, in the first instance, discovery is confined to particular issues or to 'high level' or 'summary documents' with a view to the possibility of focused supplementary discovery at a subsequent stage?
- Has the Court already ordered, or should the Court be asked to order, some bifurcation of the issues: for example, a separate hearing on liability prior to quantification of loss?

7.6 In approaching these questions the parties should consider the overriding purpose of discovery and its utility in a particular matter.

Discovery not as of right

7.7 Under the FCRs and practice notes discovery is not as of right. In every case a party must apply to the Court to obtain an order for discovery. FCRs r 20.11 embodies the fundamental principle of case management expressed in CM 1: A party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. While practitioners are certainly expected to co-operate with a view to negotiating and agreeing orders for discovery, the process of discovery remains at all times with the discretion of the Court and subject to its directions: rr 20.11 to 20.13; CM 5; CM 6. Rules 20.11 and 20.12 make clear that the Court is to retain control of the scope of discovery in proceedings and that a party to proceedings which gives discovery beyond what the Court considers necessary will not be entitled to its costs of that discovery. Accordingly, the Court will not merely endorse consent orders for discovery presented to it by the parties (particularly orders for general discovery) but will require practitioners to justify those orders by reference to considerations set out in the Practice Note.

Discovery must be for the just resolution of the proceeding

7.8 Rule 20.11 provides that 'a party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible'. The FCRs then provide what is effectively a two-track approach. Rule 20.14 obliges a party to discover documents 'that are directly relevant to the issues raised by the pleadings or in the affidavits' where an order for 'standard discovery' is made. Where standard discovery is not appropriate a party may seek an order for 'non-standard discovery' under r 20.15 which may provide for discovery of only certain categories or types of documents or documents from certain sources etc.

Pre-discovery conference and discovery plan

7.9 The formulation of an appropriate discovery regime in a particular case having regard to the principles articulated in the FCRs and Practice Notes may, in a complex case or a matter requiring extensive discovery, call for significant cooperation between the parties prior to the making of discovery orders. The parties will be unable to formulate a proposal without significant information exchange regarding a range of matters including the following:

- Is there an opportunity to further refine the pleadings or to provide further particulars in order to define or narrow the scope of issues in dispute and, in particular, those issues likely to give rise to a significant discovery burden?
- What is the appropriate stage for the formulation of discovery, orders or requests for production of documents? Should discovery (as a whole or with respect to particular issues) be deferred pending, for

example, the service of evidence with respect to all or particular issues in dispute?

- Is there an opportunity in particular areas to obviate the need for formal discovery by, for example, the informal exchange of high level or summary documents (with or without verification by affidavit), informal data exchange (with or without verification), statements of agreed fact, notices to admit, or targeted interrogatories?
- Is it possible to identify with sufficient precision the particular personnel who may have generated or who hold documents relevant to particular matters in dispute?
- Should the parties exchange information regarding their management structure and/or information flows within their respective organisations in order to focus discovery?
- Should the parties first be required to exchange information (with or without verification) concerning such matters as their financial or accounting systems, document retention policies, hard copy and electronic file storage systems and the like?
- Is it possible to agree in advance categories of documents which should be excluded from discovery such as, for example, documents common to the parties such as sent and received emails passing between those parties, publicly available information and the like?

7.10 Except in relation to electronic documents (as to which see Practice Note CM 6), the FCRs and Practice Notes do not require the parties to conduct a pre-discovery conference to develop a discovery plan addressing the issues identified above prior to seeking discovery orders. However, in many instances practitioners and the Court will not be able to address the matters identified in Practice Note CM 5 unless such a process has been undertaken. In many cases it will be in the interests of the parties that such information exchange and joint planning occur prior to the discovery process being embarked upon. Significant cost can be incurred if disputes subsequently arise regarding the adequacy to the discovery (which disputes could have been avoided by prior information exchange and planning), if supplementary discovery orders are made requiring a party to substantially repeat the discovery process, or if the interlocutory timetable is otherwise disrupted as a consequence of delays or difficulties relating to discovery.

7.11 While a cooperative approach is to be preferred, and will be expected by the Court, in the absence of cooperation the Court may choose to make a range of orders prior to the discovery process being embarked upon. Those orders may require:

- The filing of some or all of the evidence of a party so as to more clearly define the matters in dispute and the scope of required discovery.
- The parties to file affidavits, participate in oral depositions, attend for examination or to otherwise exchange information concerning internal management structures, accounting or other financial or management systems, document management systems and the like. In some cases an order requiring an appropriate witness with direct knowledge of a parties' business and document retention systems to attend before the Court for examination about the nature and sources of potentially relevant documents will be preferred by the Court. Such an approach can avoid the costly preparation of affidavit material on those issues.
- A party to produce specified documents or data categories or summary documents containing data drawn from financial or other systems.
- The provision of further particulars and/or strike out inadequately particularised allegations in the pleadings.

7.12 The role of the Court in relation to the management of the discovery process obviously extends beyond the framing and making of discovery orders. The formulation, prior to the making of discovery orders, of a joint discovery plan will enable the Court to monitor the discovery process. In particular cases it may be appropriate for the Court to direct the parties to file and serve reports on a regular basis to inform the Court of the progress of discovery by reference to the discovery plan.

An order fashioned to the particular case, and taking into account

alternatives

7.13 When addressing the questions posed by the FCRs and Practice Note CM 5, practitioners and the Court should have regard to the following matters:

- **Pleadings and narrowing issues**: the identification of issues in dispute is undertaken primarily by reference to the pleadings (as amplified by any particulars). When approaching discovery the parties should actively consider not only whether a matter in dispute warrants discovery (and, if so, the scope of that discovery), but whether it is in the party's interests that the dispute be eliminated or at least narrowed.

- For example, the applicant may wish to consider whether an allegation in its statement of claim which has not been admitted should still be maintained. Other allegations, sufficient to sustain an aspect of that party's case, may have been admitted or may give rise to less extensive discovery burden. By maintaining the non-admitted allegation the applicant may 'unnecessarily' expose itself to a significant discovery. On the other hand, a respondent may wish to review a non-admission having regard to the cost and burden of potential discovery on that issue. The provision of particulars may convert allegations of a general nature into something more specific and conducive to a more focused discovery request.

- Practitioners should expect the Court to test such matters prior to making any discovery orders. The Court will wish to be satisfied the parties have made every effort to narrow the scope of matters in dispute before addressing itself to the appropriate scope of discovery with respect to those disputed matters.

- **Production of documents referred to in pleadings or affidavits and notices to produce**: before discovery orders are made it will generally be appropriate for parties to have taken advantage of their right pursuant to r 20.31 to seek production of documents referred to in pleadings or affidavits. In this way it may be possible to obtain early production of centrally relevant material, and thus confine the subsequent discovery burden. This may also be achieved by service of a Notice to Produce in accordance with r 20.35.

- **Notice to admit facts**: a party may serve a notice upon an opponent calling upon it to admit facts or documents (r 20.01). Adverse cost consequences may follow if the recipient of the notice fails to admit a fact or document which is subsequently proved. The purpose of the Notice to Admit process is not to permit a party to reproduce all of the non-admitted allegations in its pleading and to call for admissions. However, a properly targeted notice may eliminate an area of factual dispute and, accordingly, obviate the need for discovery with respect of that matter.

- **Statement of agreed facts**: in certain matters it may be possible for the parties to jointly formulate a statement of agreed facts as a foundation for the Court determining some or all matters in issue. The statement of agreed facts may serve as a common factual foundation for expert reports. To the extent that facts are agreed, the discovery burden may be eliminated.

- Some caution is required however. It will not be possible, or indeed sensible, to seek to agree facts in many cases. Indeed, the ability of the parties to agree facts may depend upon the prior provision of discovery. Further, the time and expense associated with endeavours to agree facts may exceed the cost and delay associated with discovery. Further, except in the clearest cases, statements of agreed fact may prove to be an inadequate or incomplete basis for the Court to determine the dispute.

- **Interrogatories**: the subject of the interrogatories is addressed in Chapter 8. It is sufficient to note at this stage that, as with a notice to admit facts, a targeted interrogatory may, in an appropriate case, obviate the need for documentary discovery or at least assist to confine the scope of discovery.

C TIMING

The traditional approach

7.14 As the primary purpose of discovery is to elicit material relevant to the determination of matters in issue, and as the matters in issue are usually identified primarily by reference to the pleadings, the traditional approach is for discovery to occur following the close of pleadings and prior to the exchange of any affidavits. Moreover the traditional approach is for discovery to be undertaken as a single exercise and in accordance with a single set of discovery orders or categories.

7.15 The traditional approach may be modified where the Court makes orders pursuant to r 30.01 for the bifurcation of issues. For example, the Court may order issues of liability to be determined separately and prior to any determination of the quantum of damages. In such cases discovery may be confined in the first instance to documents relevant to liability, with discovery in relation to quantum being deferred. In this way the parties and the Court may seek to defer significant costs associated with discovery of documents relevant only to quantum as such discovery may become unnecessary in the event that the applicant's liability case fails or is successful only in part.

7.16 Even adopting the so-called traditional approach, the bifurcation of discovery in this manner will not be appropriate in every case. The objectives of discovery include the avoidance of ambush and surprise and facilitation of early resolution and settlement. Unless the parties can informally test the applicant's claim for relief they will not know what is at stake. This will likely be an impediment to early resolution. Further it will prevent the parties and the Court moulding the interlocutory process in a way that reflects the nature of the case.

7.17 It is common, for example, for representative actions under Part IVA of the FCAA to proceed in bifurcated fashion with common issues associated with liability tried first and issues of individual causation and loss deferred to subsequent hearings. In such matters the burden of discovery usually falls first upon the Court has commonly not made orders for discovery by members of the represented class (causation and loss issues) after the close of pleadings. This has frequently meant that representative actions progress through the complex interlocutory steps towards a trial on liability without the Court or the parties having a clear understanding of the amount at stake. This may be a significant impediment to early resolution.

The current approach – when appropriate in the particular case: CM 5

7.18 The Court has ample power to control all stages of the discovery process including the scope of discovery, the

time at which it is to be given and whether it should occur in a single tranche or in stages[92]. Particular issues relating to the discovery of electronic material and the application of the Practice Note CM 6 are addressed below.

7.19 Practice Note CM 5 requires practitioners and the Court to actively consider the stage in the proceedings at which discovery should be ordered and whether that discovery should be given in stages.

7.20 Practitioners and the Court should consider the following matters:

- Do the pleadings define the issues in dispute with sufficient particularity? Should the plaintiff first be required to file some or all of its evidence? For example, in a complex competition matter, should the applicant be required to file expert reports in relation to market definition prior to discovery by one or all parties so that the expert report will be available to guide the formulation of discovery categories?[93]
- Should the parties be required to prepare a joint statement of issues in dispute?
- Should the parties be required to serve outlines of evidence (including expert evidence) prior to discovery?
- Should a party be ordered to provide evidence relating to its internal systems and procedures including document retention policies, electronic data/storage processes etc prior to discovery being ordered?
- Should discovery with respect to certain issues first be confined to high level or summary documents, with discovery of lower level or source documents being deferred?
- Is it possible to identify certain key individuals whose relevant files should be discovered in the first instance? Further discovery should be ordered only if justified upon review of initial discovery.
- Is there a prospect that the discovery burden will be eased if one or more parties first has leave to issue subpoenas to third parties?
- Is there an appropriate way in which the issues in dispute can be bifurcated (acknowledging the risks of doing so) so as to enable aspects of discovery to be deferred? On the other hand, could this increase costs in the longer term and/or create an obstacle to settlement?

7.21 As stated in s 7.10 above, the Court will expect the parties to have explored these issues prior to the formulation of the proposed discovery orders or any application for discovery.

7.22 While the parties and the Court have considerable leeway when fashioning discovery orders several notes of caution are required:

- As already noted, the deferral of discovery on certain issues (for example, with respect to quantification of loss) may be antithetical to the early resolution of the dispute.
- Staged discovery may sometimes increase rather than reduce the costs associated with the discovery process. For example, if it becomes necessary for parties to repeat the review of hard copy documents or to run search processes across electronic documents repeatedly, the costs burden may be greatly increased. Anything that results in a party being required to repeat the review of large numbers of documents is likely to add very substantially to the eventual costs of discovery. The Court should explore whether ordering staged discovery is likely to result in double handling of documents or the repetition of tasks which might otherwise be avoided, with a view to framing staged discovery orders in a way which avoids or minimises this problem.

7.23 Once discovery is ordered, a party's discovery obligation is ongoing, as is made clear by r 20.20(1). Helpfully, r 20.20(2) provides that a party is not obliged to discover any document created after commencement of proceedings if the party is entitled to claim privilege in respect of the document.

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92 see generally *Sogelease Australia Ltd v Griffin* [2003] NSWSC 178.

93 It may be necessary to provide in advance that the applicant may have to supplement initial evidence if cause is shown following the provision of discovery.

D CATEGORIES OF DOCUMENTS

7.24 In light of Practice Note CM 5 it is likely that an order for standard discovery (pursuant to r r 20.14) will only be made in proceedings where the issues in dispute are very limited and clearly defined, such that an attempt to further limit discovery by use of categories would be otiose. In most cases the specification of categories or classes of documents which must be discovered will be an effective and appropriate approach. The Court will ordinarily include the relevant categories in the discovery order.

7.25 The use of discovery categories constitutes a recognition that the Court will attempt to strike an appropriate balance between the completeness of disclosure being made by the parties, on the one hand, and the need to ensure that the costs and burdens of discovery are proportionate and reasonable, on the other hand.

7.26 It should be noted that categories will generally only reduce the overall burden of discovery if they effectively target the discovery effort to particular subsets of the total documentary records held by the party giving discovery. If the categories are framed in a way that requires a party to review of all of its documents in order to locate documents that fall within the categories, the use of categories will not reduce the overall burden of discovery when compared to general discovery.

7.27 Categories are also useful because they effectively translate the issues arising on the pleadings into a more practical description of the kinds of documents that are likely to be relevant to those issues. Where the discovery is of such a size that a number of different people will review documents to assess whether they are discoverable (as will usually be the case) the use of categories helps reduce the subjectivity and inconsistency that may otherwise be involved. The process of developing proposed categories of documents also does much to focus the parties' attention on just what documents will be required to run their case.

7.28 Examples of types of categories that may be appropriate in some cases are:

- all tax invoices/contract notes/consignment notes issued by Widget Co. Limited to Purchaser Corporation Limited in the period [date] to [date];
- all senior management reports/incident reports/financial reports prepared in the period [date] to [date];
- all email correspondence between Mr Smith and Mr Jones in the period [date] to [date] which refers to [topic];
- all foundation core samples taken by Engineering Co Limited at the Site in the period [date] to [date].

7.29 As far as possible, the categories should be framed by reference to particular custodians or repositories of documents, or particular types of documents. This helps reduce the number of primary documents that need to be located and reviewed to identify potentially relevant material (see further below). If categories are not framed in this way, it may be necessary for a party to review a range of primary sources that is similar to that which would need to be reviewed to give general discovery.

7.30 As far as possible, the categories should be framed by reference to attributes of the documents which are likely to be readily apparent on their face. Categories which call for evaluative Judgements should be avoided.

7.31 Categories can often usefully be defined by reference to documents authored by certain key personnel (usually the relevant decision makers/protagonists). For example, a category might be framed as:

- all emails between Ms Smith, Mr Jones, Ms Bloggs and Mr Page relating to the profitability of the Parramatta and Richmond stores in the period [date] to [date]; or
- all documents prepared by Ms Smith, Mr Jones, Ms Bloggs or Mr Page relating to the profitability of the Parramatta and Richmond stores in the period [date] to [date].

7.32 The Pre-discovery Conference Checklist issued with Practice Note CM 6 makes clear that the parties should give consideration to appropriate categories and seek to agree such categories if possible, prior to the Pre-discovery conference.

E THE PERIL OF CATEGORIES

7.33 Despite the best intentions, there is often a tendency to frame the categories broadly to catch as many documents as possible for fear that something critical may be missed. Where this happens the categories can amount to little more than an enumeration of the documents which would otherwise be caught by an order for general discovery. Examples of categories which are framed too widely may (in certain cases) include:

- All documents relating to or evidencing the profitability of Investment Co. Limited in the period [date] to [date];
- All documents relating to the investment by Principal Co. Limited in Investment Co. Limited;
- All emails relating to Project X;
- All documents in relation to the investment strategy of Principal Co Limited.

7.34 A category which calls for 'all documents relating to' a certain matter will often be considered too wide because a document may relate to something in many different ways and the relation of a document to the relevant matter may be subjective and tenuous.

7.35 Detailed thought directed to proper and close framing of the categories is generally time well spent and can significantly reduce the time and expense involved in discovery while ensuring that material with genuine forensic value is disclosed.[94] The pre-planning and disclosure process described in sections 7.9 and 7.10 above is vital in this regard.

7.36 It is all too easy for the parties to pass 'like ships in the night' when it comes to identifying appropriate categories of documents. They can find themselves trying to specify categories without any knowledge of the record keeping systems, reporting lines or document management practices of the other party. As a result, a party can find themselves subject to a discovery order demanding significant time and cost for compliance, which could have been avoided or made significantly more efficient by the party providing information about these matters in advance of the orders.

7.37 The provisions of Practice Note CM 6 relating to parties' discovery plans and the discovery conference provide an appropriate opportunity for parties to volunteer information about:

- their internal management structure, including delineation of functions and responsibilities between departments or business units;
- the organisational reporting lines and management structures;
- their accounting and accounting record keeping practices;
- series of regular reports prepared and kept by the organisation;
- methods by which their files and records are maintained (e.g. hard copy or electronic);
- all relevant documents are available without the need to resort to backup tapes (see further discussion of backup tapes below).

7.38 Where appropriate, such information may be required to be disclosed in affidavit form or on oral examination, but in the first instance an informal disclosure will often be of significant assistance so that the parties and the Court may seek to achieve the objectives of CM 5 and CM 6 armed with relevant information about the nature of potentially relevant documents, how they are stored and how information relevant to the proceedings might most efficiently be obtained.

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94 in relation to categories see generally *KGL Health Pty Limited v Mechtler* [2008] FCA 273, [9] and *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415, [10]

7.39 In framing the categories in commercial disputes it can be a useful exercise for practitioners to consider how, if they were in the position of an officer of the other party, they would most readily obtain access to the information which the party requires for the purpose of its case. By employing that mindset, attention is focused on how the required information can be obtained most efficiently rather than seeking to trawl through every document in the hope of locating a 'smoking gun'.

The utility of 'source' based categories

7.40 Particularly in the case of email correspondence, it is usually desirable for the parties to identify key personnel whose correspondence or emails will be discovered in order to cut through the sheer volume of documents. In identifying those personnel consideration should be given to the decision making processes of the relevant organisation and its internal management structures. For example, in relation to issues of intent or purpose in the context of trade practices matters, discovery may properly be limited to the senior executives of the relevant organisation, being the people who are capable of forming the necessary intent, or having the relevant purpose, forming an element of the cause of action.

The utility of document type based categories

7.41 The advantage of categories framed with reference to types of documents is that generally documents of a similar type, for example regular reports forming part of a reporting series, will be co-located in the records of the parties and therefore more easily accessible. Also, significantly less time and cost will be involved in legal review of documents and making assessments as to relevance, where discrete series of business records are discovered.

Do categories reduce the burden of the discovering party?

7.42 In practice, categories which are framed by reference to the subject matter of documents are often the least useful in limiting the scope of discovery, while categories that identify the creator or recipient of documents or the types of documents (e.g. nominated categories of reports or types of correspondence) tend to be significantly more useful in focussing the discovery.

7.43 Categories which require production of all documents 'evidencing' some issue raised by the pleadings are often of little use in focussing the discovery because a document can evidence a fact in an almost unlimited variety of ways. Also, such category may be objectionable because a document may, as a matter of fact or law, evidence something even though this is not apparent from the face of the document. The document may be 'one piece of the jigsaw' but this may not be apparent without knowledge of a significant number of other documents of which the person reviewing documents for discovery may not have personal knowledge.

7.44 Finally, if there is a large number of categories, it may impose a significant additional burden on the party giving discovery, because potentially relevant documents may need to be carefully assessed against each of the categories, which increases the level of legal decision making required.

The risk of 'gaming'

7.45 There can be a tendency to take the view that if the opposing party asks for a certain category or type of documents then the other party has a prima facie right or entitlement to seek discovery of similar categories of documents. Such an approach should be avoided. Each party should focus on the documents required to make out its case and where they might most readily be found.

Other limiting devices

7.46 Categories may be confined by use of exclusions including:

- documents reasonably believed to be in the possession of the opposing party. For example, emails passing between the parties may be excluded;
- drafts;
- publicly available documents;
- specified source accounting documents (if the information they contain is incorporated in high level summary records).

7.47 There may be certain types of data (for example weekly/monthly/annual financial figures) which will appear across a large number of documents within a party's possession. Where this is the case, rather than include a category such as 'all documents containing monthly profit figures for the period [date] to [date]' it will often be more efficient and easier for the party holding the documents to prepare a summary document which collects of the relevant data over time in one place. The same effect can be achieved in a more formal way by use of an appropriate interrogatory. Alternatively, a party may itself proffer such a data capture and thereby avoid what would otherwise be a significant burden of discovery if all document containing those figures were required to be discovered.

F THE VIRTUAL MIRE – ELECTRONIC DOCUMENTS

General

7.48 Discovery of electronic documents will usually comprise the bulk of the discovery exercise in modern commercial litigation. Practice Note CM 6 provides a framework for the management of electronic discovery. Importantly paragraph 6.1 provides that before the Court makes an order that discovery be given using documents in electronic format, it expects the parties to have discussed and agreed upon a practical and cost effective discovery plan. The Default Document Management Protocols and Advanced Document Management Protocols released with the practice note should guide the electronic discovery process. The protocols specify (among other things) a uniform approach to the identification and numbering of documents by the parties and the manner in which documents and lists of documents should be exchanged.

7.49 The discovery plan should give particular attention to identifying the sources of relevant documents and can explain any particular complexity that may need to be addressed or difficulty that might be expected to be encountered so that the Court has foreknowledge of this.

7.50 Two sources of documents in particular can often prove challenging in the context of electronic discovery: emails and documents contained on disaster recovery backup tapes.

7.51 The steps involved in discovery of electronic documents (including documents from backup tapes) will usually include the following:

- identifying the relevant authors or sources of documents to be discovered;
- identifying the relevant storage devices including servers (and possibly backup tapes) on which the relevant authors' documents were stored during the relevant period (this in itself can be an exercise of significant complexity as management structures and/or technology may have changed through the relevant period);
- capturing the relevant documents from the storage device, server and/or restoring relevant backup tapes;
- restoring data from backup tapes into a readable format (often this will need to be outsourced to IT specialists);
- identifying documents linked to the relevant authors;

- delimiting and de-duplicating the documents so that where multiple copies or versions of the same document are stored electronically they are only discovered once (e.g. an email will appear in the senders 'outbox' and identically in each of the recipients' 'inboxes');
- the formulation of search terms and protocols so that potentially relevant data/documents may be identified amongst a large data set;
- running searches across a potentially relevant data set to identify documents which may come within relevant electronic search terms;
- uploading of the relevant documents into a database for legal review;
- legal review to identify claims for confidential privilege and/or confidential material;
- creation of meta data files and imaging of the documents for provision to other parties.

7.52 To give some idea of the volume of material that can sometimes be faced in giving discovery of electronic documents, as a general indicative rule:

- a typical CD-ROM of 650 megabytes (Mb) can hold up to 320,000 typewritten pages; and
- one gigabyte (Gb) of data can hold up to 500,000 typewritten pages.

7.53 While it has typically been the practice for parties to give electronic discovery by way of exchange of electronic lists of documents accompanied by copies of the documents in electronic form (usually on CD-ROM) it may be appropriate in some cases for the parties to agree to provide discovery by uploading documents to a central electronic document repository/database.

Search terms

7.54 Search terms are commonly employed to identify potentially relevant documents or records amongst a large number of electronic data retrieved from a storage device or computer memory. Employing the terms, search software can search across the whole of, or specified parts of, each electronic file to isolate material for further manual review. By this means parties may discharge their obligation to undertake reasonable searches and enquiries to identify discoverable material.

7.55 The use of search terms is a powerful and necessary tool in limiting the scope of electronic documents. They are usually used to identify a subset of electronic documents which can them be subject to a process of manual review to ascertain whether they fall within the discovery categories. Although in some cases, the search terms may take the place of categories.

7.56 It will usually be desirable for the parties to have reasonable certainty as to what is required of them at the outset of the electronic discovery process, including some certainty that their proposed search terms are adequate and not contentious. Otherwise parties may be faced with the prospect of having to revisit the document set to identify further documents if it is shown that the search terms employed were inadequate, involving additional cost and delay.

7.57 To obtain such certainty, parties should usually seek to exchange draft lists of proposed search terms at an early stage. This can be done in the context of the discovery plans contemplated by CM 6. There is the prospect that the other party may seek to expand the scope of the search list, but this is perhaps the price that to be paid for obtaining certainty. Subject to the Court's supervision, it is for the discovering party to formulate an approach to electronic discovery which enables it to discharge its 'reasonable search' obligations. It is important for parties to recognise that the FCRs do not impose an obligation of absolute disclosure. Neither party is expected to warrant that every relevant document has been identified and disclosed. Search terms involve a trade-off between completeness of disclosure, on the one hand, and cost and delay, on the other hand.

7.58 The appropriateness and adequacy of the proposed search terms should be analysed in light of the pleadings and the facts known to the parties with a view to agreeing such categories in advance of the pre-discovery conference and any ultimate order for discovery. It may be appropriate for the search terms to be included in the discovery orders and such an approach is within the Courts general discretion in relation to discovery orders.

7.59 The challenge is to formulate search terms that are sufficiently specific to the issues which are the subject of the proceedings to identify the relevant documents, while capturing as far as possible all relevant documents. Key business terms such as 'contract', 'negotiation', 'profit', 'report', 'management' etc will typically be of little assistance in this area and should generally be avoided. Useful search terms can include the names of persons involved in relevant transactions and the names often given internally to commercial projects and transactions within large organisations.

7.60 It will often be necessary or desirable for the search terms to be married with appropriate Boolean operators (i.e. 'AND', 'OR' and 'NOT') to create structured searches. For example in a case relating to preference shares of X Co. Limited where the document set is likely to contain many references to other types of shares, it may be necessary to use a search constructed as 'preference AND (share or shares)'. Where a case relates to representations made by Jones or Smith as agents for Y Co. Limited about X Co. preference shares, an appropriate search structure may be '(Jones OR Smith) AND preference AND (share OR shares).

7.61 Exclusionary search terms (i.e. in Boolean logic NOT 'X') can be powerful in limiting the scope of discovery although they must be used with care. Such terms can be used to remove from the set of potentially relevant material, documents which contain one of the keywords in association with another key word. For example, where a keyword 'report' is used it may be appropriate to exclude documents which include 'report' but also include 'engineering' because the proceedings relate to financial reporting and the electronic records contain many irrelevant engineering reports. In that case the search chain would be 'report NOT engineering'.

7.62 Care must be taken however, as such exclusionary terms can remove from the pool of potentially relevant documents at the outset documents that may be of significance, simply because they contain one of the exclusionary terms. To be effective the exclusionary terms must be precise and they must be so unusual that they would not reasonably be expected to appear in a relevant document.

7.63 The process of developing and refining appropriate search terms and structures will often be an iterative one. Where the underlying document set is very large, it may be necessary to test various iterations of the searches across the documents using an electronic search tool in order to identify a search structure that limits the number of irrelevant documents captured for manual review while still capturing the relevant documents.

7.64 The formulation of appropriate search structures by reference to the peculiarities of the particular underlying document set and the issues in the dispute can be a science in itself and the knowledge of those with experience in the area of forensic IT and applied legal technology can be of great assistance in this process. Where it is sought to have the search terms included as part of the discovery orders, it may be necessary to put on evidence from a suitably qualified expert in the area in order to satisfy the Court of the adequacy of the proposed search terms.

Back-up tapes/disks

7.65 Restoration of documents contained on backup tapes created by organisations for disaster recovery purposes can often be a very expensive and time consuming process and yield little in terms of useful documents. For that reason back-up tapes should be seen as an option of last resort where they contain documents that cannot be accessed/or more readily accessed) by other means.

7.66 Often such backup tapes are periodically reused and when this occurs the information from previous backups (also called sessions) is not necessarily erased from the tape.

7.67 The process of identification, restoration and review of documents from backup tapes will typically involve the following steps:

- performing a search of back-up tape and server records to identify relevant backup-tapes;
- retrieve relevant back-up tapes from the organisation's archival library or depository;
- sorting the tapes into a logical order for restoration;
- analysing the file types contained on the tapes to ascertain whether they are readable;
- restoring the file directory structures on the tape to identify the areas and sessions of relevance;

- constructing a computer hardware and software environment capable of reading the data on the tapes (this is sometimes necessary where the tapes were created some time ago);
- converting potentially relevant unreadable file types into a readable file format (where possible);
- de-duplicating the data by removing exact duplicate copies.

7.68 Where a party demands production of material from backup tape in circumstances where the restoration and extraction of data will involve significant cost but a risk of little return in the form of information relevant to the proceedings, it may be appropriate for the Court to order production of such material on the basis that the costs of restoring, extracting and producing the documents is borne (or borne in the first instance) by the party seeking production regardless of the outcome of the proceedings.

7.69 Parties should also give consideration to whether the process of identifying, restoring and extracting documents from backup tapes should be undertaken internally or outsourced. This may largely be determined by what electronic and human resources the party may have available internally. The parties and their advisors should also have regard to the ultimate recoverability of the costs of the necessary work. It may be that where this work is outsourced and invoiced to the party, the costs may be more readily quantifiable for the purposes of assessment and taxation. As a matter of practice, internal costs of document retrieval and processing of documents for discovery are seldom recoverable upon taxation, even if the process may be more efficiently undertaken internally.

7.70 Practitioners should be cautious before advising their clients who may be required to give discovery to embark upon wholesale restoration of backup tapes or take preparatory steps prior to having a reasonable expectation that discovery of the documents contained on the backup tapes will ultimately be required. While a pro-active approach may in some cases be laudable, recent authority suggests that a party who voluntarily undertakes the burdensome task of retrieving electronic documents in anticipation of discovery orders may subject themselves to a discovery burden which the Court would not otherwise have been inclined to order[95]. The Court should be alert to this difficulty as there is some expectation that the parties will not 'sit on their hands' and defer all work on discovery and evidence during the pleading stages. An expectation that the parties will, in an unguided fashion, get on with those tasks may be misplaced and the Court should gain an understanding, at least in broad terms, of the potential scope and nature of discovery at an early stage. If appropriate it should direct the parties to meet, to exchange information and report to the Court.

Meta-data

7.71 Electronic documents commonly include a record of information relating to their creation and alteration referred to as 'meta-data'. Meta-data may include the file name of the document, the user name of the creator of the document, the date of its creation and modification and when it was printed. In the case of emails, meta-data will include the name of any document attached to the email. Meta-data can be thought of as information about information. Depending on the issues in dispute, it may have significant forensic value.

7.72 Where an electronic document is discovered the associated meta data comprises part of the document and is therefore prima facie discoverable. Modern document review databases will generally capture and preserve this material in an appropriate form. The default document exchange protocol issued with CM 6 provides for how meta-data is to be handled between the parties.

95 See *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65.

G REDACTION

Relevance

7.73 The authorities suggest that there is no absolute entitlement for a party to redact irrelevant material in an otherwise relevant document.[96] If the document contains material relevant to the proceedings or otherwise falls within the categories for discovery then it is discoverable in its entirety although the parties and the Court may be amenable to some arrangement for redaction of irrelevant material. The parties would commonly may make appropriate provision for this in the discovery plan or protocol.

7.74 Simply because material is not relevant to the proceedings does not necessarily mean that there is a sound or proper basis for it to be redacted. Large scale redaction of documents may render the documents difficult to interpret, because the relevant material has been shorn of its context, and so lower the overall forensic utility of the discovery process. Redaction may be costly and spawn collateral disputes.

7.75 Where the material said to be irrelevant is also commercial in confidence this may be a proper ground for seeking to redact it (see below). Consideration should be given to whether a confidentiality regime should be established to protect such material. Such regimes typically provide for certain types of confidential documents (unredacted) to be made available only to certain persons or classes of person (e.g. the parties' legal advisers, experts retained in the proceedings and the principal instructing in-house counsel). Redacted versions of the documents are available to others.

Confidentiality

7.76 Confidentiality regimes can be a source of particular complexity, cost and collateral disputation in proceedings. This is because it becomes necessary to prepare confidentiality undertakings, put in place systems to ensure confidentiality is maintained (including redaction), and the parties' inability to freely provide instructions will often be impeded. Costs associated with such regimes – including the cost of return or destruction of documents at the conclusion of the proceedings – are frequently overlooked.

7.77 Consideration should be given to whether a confidentiality regime is in fact required as parties will in any event be bound by the usual undertaking as to use of discovered material. A breach of the usual undertaking is regarded as a serious matter.[97] Any regime adopted should go no further than is reasonably required to protect the commercial and confidential interests of the party. The Court will not endorse a confidentiality regime as a matter of course. The Court will be alert to the risk that disclosure of commercially sensitive material may be used inappropriately as a lever for early settlement, however, the Court has an overriding obligation to ensure that justice is, and is seen to be, administered in an open and transparent matter. Even if the parties agree a particular confidentiality regime, the Court may ultimately not adopt that approach at trial if it considers that such a regime would go too far in restricting public review and scrutiny of the Court's process. The parties will need to justify why the proposed regime is appropriate.

7.78 One approach, which has not generally been favoured, is to have a general confidentiality regime which limits the extent of disclosure that may be made of all documents produced by the parties. The implied undertaking should be the starting point for any confidentiality regime.

7.79 The more common approach has been for the parties to nominate only particular discovered documents to which the confidentiality regime will apply. Keeping track of which documents are subject to the regime, who holds those documents and what use is being made of them can become a significant (and expensive) task in itself.

7.80 The parties may adopt the approach of having multiple levels of confidentiality: that is, there may be some 'super confidential' documents which are only made available to the parties' external advisors and experts, while other documents of a less sensitive nature may be made available to certain specified internal officers of the opponent. Multiple tiers of confidentiality add significantly to the complexity of administering the document review and management process, increase the attendant costs and also increase the risks of inadvertent non-compliance with applicable restrictions. For this reason, the Court will examine the need for such measures

96 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* (No 4) [2010] FCA 863.

97 ***Hearne v Street*** (2008) 235 CLR 125.

carefully.

7.81 The Default Document Management Protocols issued with CM 6 contain provisions relating to redaction of confidential and privileged information.

7.82 The parties may be content to agree to redact commercial in confidence material completely in discovered documents, however, to the extent that material is confidential but also relevant to the facts in issue in the proceedings, the other parties should be given access to that information at least via their external legal advisers and ideally also through relevant in-house counsel (providing such counsel do not also have a commercial role).

7.83 Redaction of electronic documents can usually be undertaken by document reviewers using one of the specialist proprietary software programs. A box is drawn over the materially electronically on screen and the relevant data is then extracted from the form of the document prepared for exchange with the other party. In paper based discoveries it is a matter of physically blacking out the relevant material in the copy produced to the other party.

7.84 Examples of precedent confidentiality undertakings and orders that may be of assistance are reproduced in Appendix A.

Privilege

7.85 Documents may contain a record of a privileged communication while the balance may not be privileged. It is the practice in such cases to redact the privileged portion and to produce the balance.

7.86 Redaction of privileged information can be of assistance in so far as it allows the other parties to have access to the balance of the document, while maintaining the client's privilege in the redacted portion.

7.87 However, care should be taken to ensure that the material over which privilege is claimed is in fact privileged. Where the balance of the document is not privileged, it may be that this is because it has been used for a purpose which is incompatible with the maintenance of the privilege.

Dealing with privilege claims

7.88 A party's list of documents should provide a least a basic indication of the basis on which privilege is sought. For example where the author or recipient of a communication is an external legal adviser this should be made clear on the face of the list in order to avoid unnecessary correspondence about the basis of privilege.[98]

7.89 The authorities make clear that work product from and correspondence with in-house lawyers may also attract legal professional privilege if certain requirements are met. If there are a significant number of documents from a variety of in-house counsel over which privilege is claimed, the party giving discovery may consider putting on a brief affidavit identifying the relevant in-house counsel, their roles and whether they hold current practising certificates, with a view to avoiding any protracted dispute about privilege.

7.90 To the extent that it may be necessary to make application to the Court to determine challenges to claims of privilege, the parties should endeavour to bring all such disputes before the Court in the course of one application rather than having to return to Court on multiple occasions.

7.91 In many cases, material which is redacted for privilege may not be of direct relevance to the proceedings and the producing party need not be concerned if the docket Judge wishes to inspect the material in order to determine whether the claim for privilege is properly made out. However, where the material is such that it would be prejudicial for the docket Judge to inspect it for the purpose of resolving the claim it may be appropriate that the docket Judge nominate another Judge to inspect the material and determine the validity of the claim/s for privilege. Alternatively, an ADR regime may be established in relation to discovery and privilege issues and privilege issues dealt with by an independent third party in that context. Questions of admissibility will, of course, remain to be determined by the trial Judge.

98 see generally *Gardner v Irvin* (1878) 4 Ex D 49; *Webb v East* (1880) 5 Ex D 108; *City of Baroda* (1926) LT 576; [1926] All ER 653.

7.92 Where the process of identifying privileged material prior to the exchange of documents would be a time consuming task and the privileged material is unlikely to be directly relevant to the case, the Court may make an order that the production of documents by way of discovery will not amount to a waiver of such privilege. While such an approach has the advantage of avoiding the costs of legal review of documents, in a large number of cases it will not be appropriate because the privileged material will be such that it delivers a real forensic advantage to the other party or least puts that party in a position where it will have to conduct its casing trying to ignore its knowledge of relevant information which is privileged.

H PRODUCTION OF DOCUMENTS FROM NON-PARTIES

7.93 While the most efficient and appropriate method for a party to access a document in the possession of a stranger to the proceedings will be by way of subpoena, in appropriate circumstances the Court may order a non-party to give discovery pursuant to r 20.23. The Court is generally more cautious in ordering discovery against a non-party to the proceedings and the party seeking such discovery is under an added obligation to endeavour to formulate the discovery order as precisely as possible so as not to impose an unnecessary burden on the person subject to the order.

I SUMMARIES OF VOLUMINOUS DOCUMENTS – EVIDENCE ACT S 50

7.94 Parties should have regard to the availability of Evidence Act s 50 which provides for the use of summary documents as a means of proving voluminous or complex documents. That provision may be useful, where, for example, a document has been through many revisions over time and it may be most efficient to prove the various revisions by reference to the original document and then a cumulative table of amendments. Similarly, where a series of complex reports over a long period contains particular data of relevance to the proceedings, that data might be proved by use of a document (for example, a graph) which extracts only the relevant data from the larger reports.

7.95 If such a summary is to be used, the other parties should be given access to examine the underlying documents and an adequate opportunity (in advance of trial) to raise any objections or suggestions in relation to the content of the summary.

J ADR IN RELATION TO DISCOVERY

7.96 Particularly in large discoveries that may be conducted on a staged basis over a number of months, a multiplicity of disputes may arise between the parties. Rather than rely on the Court to determine such disputes it may often be easier and more efficient for the parties to adopt a suitable ADR process, such as a private mediation facilitated by an experienced barrister or retired Judge.

7.97 Such an ADR approach may also assist the parties to formulate discovery plans and to shape proposed discovery orders. However, as noted above the Court will ultimately determine the scope of discovery and will not necessarily make orders simply because they have been agreed by the parties.

8. DISCOVERY OF FACTS

by Roger Forbes and Chris Rogers

This Chapter has been revised. Please refer to the revised version available here.

8.1 Interrogatories may be defined as a form of discovery that involves one party asking the other party specific questions relating to the matters in issue in the proceeding in a written form in accordance with the FCRs.[99]

8.2 Rule 21.01 provides that a party may apply to the Court for an order that another party provide written answers to an interrogatory. Such application must be accompanied by an affidavit annexing the proposed interrogatories.

8.3 In *Ryan v Federal Capital Press of Australia Pty Ltd* (1990) 101 FLR 396 at 397, Miles CJ observed:

> *Interrogatories tend to increase delay and add to the cost of litigation … In practice, the unrestrained application of this principle means that questions asked by way of interrogatories can be and often are more prolix than those asked in cross-examination. The cross-examiner tends to ask only those questions to which a favourable answer is expected. No such inhibition restricts the range of interrogatories, particularly those generated or assisted by the word processor.*
>
> *The tendency towards the greater use of extensive interrogatories has led to a more widespread recognition in the courts if not among practitioners that interrogatories should be not be used as a general substitute for a request for further and better particulars of the opponent's case as a means of pinning down a witness to a particular answer in the hope of having the witness contradict it at the trial. In some cases a Notice to Admit will be an appropriate alternative or preliminary to interrogatories and will be far cheaper.*

8.4 In the Fast Track, interrogatories are only allowed in exceptional circumstances.[100]

8.5 The use of interrogatories can lead to parties behaving in inefficient ways (expending time and cost for little result, or for tactical purposes) and controlling the use of interrogatories is a mechanism by which that inefficiency can be reduced.[101]

8.6 A tightly drafted interrogatory may in certain cases be a useful tool in refining the issues in dispute at a relatively early stage of proceedings. A wide ranging interrogatory or one that puts to the opposing party complex and multi-faceted questions in a summary way will often simply become a source of dispute in itself and add little that is not otherwise available to the parties via the Court's other procedural mechanisms. In many cases a Notice to Admit facts or documents pursuant to r 22.01 may be a simpler alternative to an interrogatory. The Notice to Admit procedure does not require an application to the Court.

8.7 An appropriate interrogatory can be of assistance in reducing the scope of discovery where, for example, a party wishes to rely on certain data (perhaps financial data) which is generated on a regular basis and may be found across a number of different documents generated by the party giving discovery. In such a case, rather than calling for production of 'all documents evidencing monthly profit figures' consideration should be given to the use of an interrogatory requiring the other party to disclose such information. This will often alleviate the need for the discovering party to review a large number of documents in order to capture all documents that contain the information.

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99 Peter E Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (Butterworths, 1997).

100 See Federal Practice Note CM 8.

101 Victorian Law Reform Commission, *Civil Justice Review: Report* (VLRC, 2008) 299.

9. INTERLOCUTORY APPLICATIONS

by Kylie Downes QC and James Hutton

This Chapter has been revised. Please refer to the revised version available here.

A GENERAL APPROACH TO INTERLOCUTORY APPLICATIONS

9.1 Interlocutory applications are principally governed by Part 17 of the FCRs[102] although, as explained below, other parts of the FCRs are also relevant.

9.2 As noted at paragraph 3.10(c) above, cost and delay are most likely to be reduced by there being as few interlocutory hearings as are necessary for the just disposition of the matter. There is an exception, in that some interlocutory applications may potentially result in a narrowing of the issues in dispute or otherwise hasten the resolution of the proceeding (potentially, strike out applications, applications for summary judgment or dismissal, or applications for determination of a separate question). Putting those types of application to one side, case-management considerations plainly favour encouraging the parties to have fewer or no contested interlocutory hearings.

9.3 The distinctive feature of the Individual Docket System is that the trial Judge will determine interlocutory disputes, subject to availability, except where the dispute is one appropriate to be determined by a registrar or by a Judge other than the trial Judge in a rare case where determination of the application might or might reasonably be perceived to prejudice the trial Judge's final determination of the proceedings.

9.4 The hallmark of Part 17 of the FCRs is its flexibility. It is not prescriptive as to the form of interlocutory applications, the evidence required to support them, or the manner in which they are to be heard and determined. That flexibility and lack of prescription is necessary given the wide variety of applications that have to be accommodated. It is also particularly appropriate for a Court that makes use of a docket system, where the trial Judge is in a position to oversee the manner in which interlocutory applications are brought and conducted and to ensure that they do not result in procedural unfairness, delay, undue expense or inefficiency, and where the trial Judge may impose an order or regime that is not sought by either party (for instance, targeted document production where wide-ranging discovery is sought on both sides).

B WHAT IS AN INTERLOCUTORY APPLICATION AND WHEN IS ONE NEEDED?

9.5 The FCRs define an 'interlocutory application' as 'an application, other than a cross-claim, in a proceeding already started'.[103] A party who wants to apply for an order in a proceeding that has already started must file an interlocutory application in accordance with Form 35 unless an oral application is made.[104]

9.6 The FCRs definition of 'interlocutory application' embraces a very wide range of applications which are contemplated specifically in the FCAA or FCRs, including applications such as:

(a) applications for summary judgment or summary dismissal;[105]

(b) applications for joinder or removal of a party;[106]

(c) applications to set aside originating applications;[107]

102 Formerly O 19 of the Old FCR (headed 'Notices of Motion').

103 FCRs, Schedule 1 (Dictionary).

104 FCRs, r 17.01. Note also FCRs, r 5.07, which provides that 'a party who wants to obtain an 'interlocutory order' must make an application in accordance with r 17.01.' Rule 5.07 is narrower than r 17.01.

105 FCAA, s 31A.

106 FCRs, Division 9.1.

107 FCRs, r 13.01(3).

(d) applications for the amendment of pleadings;[108]

(e) applications to strike out pleadings;[109]

(f) applications for security for costs;[110]

(g) applications for discovery;[111]

(h) applications for interrogatories;[112] and

(i) applications to set aside, or otherwise with respect to, subpoenas and notices to produce.[113]

9.7 The definition also extends to applications that are not addressed expressly in the FCAA and FCRs but are common in practice, such as applications for interlocutory injunctions and applications for adjournments.

9.8 It will be noted that not all of these applications are confined to matters of practice and procedure. Applications for summary judgment or dismissal, strike out applications, applications for permanent stays and (in some contexts) applications for interlocutory injunctions require resolution of substantive as well as procedural issues and may formally or in practice finally determine the rights, duties and obligations of the parties. By adopting a wide definition, the FCRs avoids taxonomic disputes about the difference between applications for interlocutory and final relief.[114] Note, however, that the distinction remains for other purposes (most importantly, rights of appeal).[115]

Circumstances in which an interlocutory application is not needed

9.9 The FCRs definition of interlocutory application has three notable limitations.

9.10 First, it does not extend to applications made before proceedings are commenced, including applications for preliminary discovery, freezing orders and search orders. These are governed by Part 7 rather than Part 17. The forms to be completed are also different.[116]

9.11 Secondly, it is permissible for a party to include in its originating application prayers for interlocutory as well as final relief. That is an efficient practice and also sanctioned by the FCR.[117] It obviates the need for filing a separate form. Determination of an application for interlocutory relief sought in an originating application will generally be governed by the principles relating to interlocutory applications, notwithstanding that such applications do not strictly come within the FCRs definition because they are not applications in a proceeding 'already started'.

9.12 Where an originating application includes a claim for interlocutory relief, that claim may be heard on the return date of the originating application; or a date for its later hearing may be set on the return date and directions made in relation to the interlocutory application.[118]

9.13 Thirdly, in practice it is common for parties to seek contested directions at a scheduled directions hearing without bringing a formal interlocutory application. That practice probably depends on there being a distinction between 'directions' and 'orders'.[119] If a formal interlocutory application is not filed, a party should (at the least) put the other parties on notice of the proposed direction.

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108 FCRs, Division 16.5.

109 FCRs, Division 16.2.

110 FCRs, Part 19.

111 FCRs, Part 20.

112 FCRs, Part 21.

113 FCRs, Part 24.

114 See *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at [43] (French J, as his Honour then was), citing *Ex parte Bucknell* (1936) 56 CLR 221 at 225. See also *Hall v Nominal Defendant* (1966) 117 CLR 423; *Carr v Finance Corporation of Australia* (1981) 147 CLR 246.

115 FCAA, s 24(1A), (1B), (1C) and (1D).

116 Forms 12 and 14. The form which is used depends on the relief being sought.

117 See r 8.03(2) (application to state relief claimed), which refers to both interlocutory and final relief.

118 See the Guide to Individual Docket System.

119 Otherwise see r 17.01(1) (a party who wants to apply for 'an order' to file an interlocutory application) and r 5.07 (a party who wants to obtain an 'interlocutory order' to file an interlocutory application).

C. MAKING AN INTERLOCUTORY APPLICATION – WRITTEN APPLICATIONS

9.14 In general, a party seeking an order in a proceeding that has already started must file an interlocutory application in the prescribed written form.[120] 'File' is defined to mean 'file and serve'.[121] The old terminology of 'notice of motion' has been dispensed with, although the interlocutory application form serves the same purpose of providing notice to persons who may be affected by the orders sought.

Settling a hearing date for the application

9.15 The Individual Docket System means that the hearing date for any interlocutory application must be convenient to the Judge to whom the proceedings have been allocated (subject to the exceptions covered below).

9.16 If a claim for interlocutory relief is to be contested, parties or their lawyers should advise the docket Judge's Associate as soon as possible and give an estimate of the likely hearing time. Advice should also be given about urgency and preferred dates if known,[122] which date may include a date which coincides with the next directions hearing.[123] Emails to the generic email address of the Judge's Associate are preferred and these are listed on the Court's website at www.fedcourt.gov.au in the 'Contact Us' information.

9.17 Except in the context of an *ex parte* application:

(a) contact by email or other form of correspondence with the docket Judge's chambers (but not the Judge directly) should only be made after all other parties have been notified about the proposed communication and all emails and correspondence with chambers are then copied to all other parties or their lawyers;

(b) telephone contact with the docket Judge's chambers should as a general rule not be made without the prior knowledge and consent of the other parties.[124]

9.18 Contact should not, without express prior consent of the other parties, include information or allegations material to the substantive issues.[125]

9.19 In practice and depending on the urgency of the application, an alternative approach to that above is to raise the proposed filing and hearing of the interlocutory application at a directions hearing which can result in a date being set by the Judge for the hearing of the application accompanied by directions relating to that application.

Serving the application

9.20 The party filing the interlocutory application must serve it and any accompanying affidavit on 'any other party' at least 3 days before the date fixed for the hearing.[126] However, if the circumstances are such that the applicant will suffer serious prejudice if required to provide the requisite 3 days of notice, then an abridgment of time should be sought with evidence adduced to justify the order.

9.21 The prescribed form (Form 35) requires that notice be given to each party who 'may be affected by' the application and provides for the time and date for the hearing of the application to be set out. However, the prescribed form also contemplates that it might not be served on a particular party or on any other party. The FCRs also provide that an interlocutory application may be determined in the absence of a party if service of the interlocutory application on the party is not required, service has been effected but the party does not appear, or the Court has dispensed with service.[127]

120 FCRs, r 17.01(1). The prescribed form is Form 35.

121 FCRs, note 2 to r 17.01(1).

122 See the Guide to Individual Docket System.

123 The usual and efficient practice is to select a hearing date for the application that coincides with the next directions hearing. Notice should generally be given to the other party or parties if that course is proposed to be taken. That limits the total number of hearings that are required to be held and thus the costs incurred. However, such an approach requires a degree of organisation and foresight by the parties.

124 See the Guide to Individual Docket System.

125 See the general statement on communications with a Judge's chambers in *John Holland Rail Pty Limited v Comcare* [2011] FCAFC 34.

126 FCRs, r 17.01(2).

127 FCRs, r 17.04

9.22 Despite the options in the prescribed form and the FCR, the appropriate course is still to serve the prescribed form on all parties to the proceedings and any party who may be affected, unless there is a particular reason for not doing so. An example would be where a search order or freezing order is sought initially on an ex parte basis where it is suspected on reasonable grounds that giving notice of the application may defeat its purpose.

Making an interlocutory application – oral applications

9.23 Apart from making a written application (in accordance with the service and timing requirements set out above), the FCRs provide that a party may also make an oral application for an interlocutory order at a hearing.[128] The FCRs formalise what has always been the case in practice.

9.24 The rules do not restrict the circumstances in which an oral application can be made, but in practice they are usually only appropriate where: (i) the hearing of the application without written notice will not unfairly prejudice the other party or parties or any other person who may be affected by the application (for instance, because it is a minor procedural application or no evidence is required or the evidence is not contested); and (ii) there is some reasonable explanation for why the application was not made by written interlocutory application on notice.

9.25 An oral application can also be made where interim relief is sought on an urgent basis and severe prejudice will be suffered or the relief sought would no longer be available if the applicant was required to prepare a formal interlocutory application. This would be a rare situation.

D WHO IS THE APPROPRIATE PERSON TO HEAR AN INTERLOCUTORY APPLICATION?

9.26 Consistent with the Individual Docket System, the default position is that the docket Judge will hear all interlocutory applications. Broadly speaking, there are three exceptions to that principle.

9.27 First, in some cases it will be appropriate for an application to be determined by a registrar. In such a case, a direction to that effect may be given by the docket Judge.[129] The powers of registrars are set out in the FCR.[130] Some relevant factors which are relevant to the issue of when it will be appropriate include the other commitments of the docket Judge, the complexity of the application and the extent to which it requires familiarity with the substantive issues, the extent to which it is likely to affect the final determination of the rights and obligations of the parties, and the extent to which it raises ongoing case-management issues.

9.28 Secondly, in some cases it will not be appropriate for the docket Judge to hear an interlocutory application because of the potential for the application to result in a reasonable apprehension of bias.[131]

9.29 Apprehended bias may arise because of the nature of the Judge's findings on the interlocutory application (for instance, if findings of misconduct or adverse credit findings are made against a party on an interlocutory application)[132] or the fact that a Judge has considered documents or other evidence that will not be admissible at final hearing and which gives rise to a reasonable perception of prejudice. However, it is important that legal representatives take a robust, realistic and sensible approach to this issue. In any Individual Docket System and as a matter of routine, Judges will make provisional findings on substantive issues at interlocutory hearings and be required to disregard inadmissible material that has been put before them.

9.30 Thirdly, in some cases administrative necessity or expediency dictates that a Judge other than the docket Judge should hear the application. In some very large cases, a practice has been adopted of appointing a second Judge (not being the Judge to whom the case has been allocated for hearing) to hear and determine some or all interlocutory disputes.[133]

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128 FCRs, r 17.01(3).

129 See the power in FCRs, r 1.37.

130 FCRs, Division 3.1 and Schedule 2.

131 See paragraphs [3.14]–[3.15] above.

132 As to which, see *British American Tobacco Australia Services v Laurie* (2011) 242 CLR 283.

133 Such a practice was adopted in relation to the C7 proceedings.

9.31 More prosaically, the docket Judge may not be available and the application may be an urgent one. In that case, of course, the appropriate course will be to approach the Duty Judge (if in New South Wales),[134] or the Duty Judge (in Queensland in a Corporations matter),[135] or otherwise, the Registry.

E DISPOSITION OF INTERLOCUTORY APPLICATIONS ON THE PAPERS

9.32 As noted above, appearances before the Court are costly, and the Court's rules and practices provide mechanisms for avoiding unnecessary court appearances by allowing for the disposition of interlocutory applications on the papers (that is, without an oral hearing).[136] Some practitioners are of the view that the mechanism is underutilised, and that legal representatives should give earlier and more careful consideration to whether an oral hearing is really necessary. The alternative view is that the costs savings of avoiding an oral hearing may turn out to be illusory if the parties approach determination on the papers in a manner that results in overlong or detailed written submissions. It may be that written submissions with appropriate page limits and a short oral hearing (conducted to appropriate time limits) better encourages efficiency and reduces costs.

Drafting interlocutory applications – the form of the order

9.33 The starting point before filing an interlocutory application is to identify the precise orders which you want the court to make at the hearing and which your client has a proper basis for seeking, based on the admissible evidence able to be adduced in the time available.

9.34 Once the orders to be sought are formulated, preferably by reference to the rule in the FCRs or the section or sections of applicable legislation pursuant to which each order is sought, the interlocutory application can be prepared in a form which states, briefly but specifically, each order that is sought as required by r 17.01(a).

F EVIDENCE IN SUPPORT OF INTERLOCUTORY APPLICATIONS

When should an application be accompanied by an affidavit?

9.35 Consistent with the principle of minimising the cost and formality of interlocutory hearings, the FCRs discourage the preparation and filing of unnecessary affidavits. An interlocutory application is required to be accompanied by an affidavit only 'if appropriate'.[137]

9.36 The general principle is subject to exceptions. There are some types of interlocutory application for which an affidavit is required under the FCR. They include some applications to set aside originating applications,[138] applications for security for costs,[139] applications for non-standard and more extensive discovery,[140] applications for discovery from a non-party,[141] applications for the administration of interrogatories[142] and applications for summary judgment.[143] There are other types of interlocutory applications where, though no affidavit is required under the rules, the application could not succeed without supporting evidence in the form of an affidavit. Many applications for extension of time, for instance, fall into this category.

134 NSW District Registry Administrative Notice NSW 1.
135 QLD District Registry Administrative Notice QLD 1.
136 At [4.12]–[4.13].
137 FCRs, r 17.01(1).
138 FCRs, r 13.01(2).
139 FCRs, r 19.01(2).
140 FCRs, r 20.15(3).
141 FCRs, r 20.23(2).
142 FCRs, r 21.01(2).
143 FCRs, r 26.01(2).

Affidavits merely exhibiting or annexing undisputed correspondence or other documents are no longer required

9.37 The FCRs now provide that 'an interlocutory application need not be accompanied by an affidavit if the party … wants to rely on correspondence or other documents, the authenticity of which is not in dispute'.[144] In that case, the parties are to exchange a list of documents which can then be filed. The documents are to be indexed and paginated if numbering more than six.[145]

9.38 The rule is directed to eliminating unnecessary affidavits and associated costs. It no doubt finds its most obvious and frequent application in relation to correspondence between solicitors. There is no longer any occasion (if there ever was) for an affidavit setting out the content of correspondence between solicitors in the format 'On [date] I received a letter stating in part… On [date] I sent a letter stating in part…'.

9.39 However, the rule is not limited to correspondence. Other types of documents that might come within the rule are official searches (company searches, real property searches and the like) and official documents produced or lodged by government departments, liquidators, company administrators and the like. In a sense, the rule is even more advantageous in relation to such documents because it avoids the need for costs to be expended preparing an affidavit explaining how the document was obtained.

9.40 The advantage of the new rule is that, if properly applied, it will result in the Court having before it a single, paginated, chronologically ordered bundle of documents on which the interlocutory application may be decided. The cost savings by reason of the parties not having to prepare unnecessary affidavits, and the Court not having to consider them, must potentially be enormous.

9.41 There is, however, a general perception that the new rule is underutilised. The new rule requires co-operation between the parties and some advance thought, given that the documents or bundle of documents needs to be filed before the hearing. The parties can, of course, be encouraged to agree upon and prepare a single bundle of documents (by exchange of lists) and simply tender it at the hearing. It may be that such a practice should be encouraged where the parties (due to pressures of time, or for some other reason) have not been able to agree upon and file a bundle of documents as required by the new rule.

9.42 In practice, of course, many uncontested documents are tendered (the non-tendering party electing, usually sensibly, not to put the tendering party to proof on the provenance or authenticity of the document). That practice is also probably to be encouraged, but it will not result in as ordered approach as the new rule, because the Court will still receive the evidence in an ad hoc way rather than in a single, paginated bundle.

Briefs to accompany interlocutory applications

9.43 A distinct approach to organisation of evidence on an interlocutory application is to require a party to file and serve a brief (or otherwise provide it to the relevant Judge's Associate) at the same time as it files and serves its interlocutory application or some time afterward.

9.44 The Fast Track System Practice Note states under the heading '*Requirement for briefs to accompany interlocutory applications*':[146]

> *Interlocutory applications, … must, unless otherwise directed, be in writing and must be accompanied by a written brief (not exceeding 5 pages) setting out a concise statement of the facts (if necessary verified by affidavit) and supporting arguments, with a citation of the authorities upon which the moving party relies. The opposing party must file a brief in response (not exceeding 5 pages) and such supporting documents as are appropriate within 5 days after service of the moving party's interlocutory application and brief. The moving party may file a short rebuttal brief within 2 days after service of the opposing party's brief in response.*

9.45 The requirement that a party file a brief in this way encourages the parties to get to the nub of the issue by taking the emphasis off unnecessary formalities and requiring focused attention to be given to a concise statement of the relevant facts and supporting arguments.

144 FCRs r 17.02.

145 FCRs r 17.02(2).

146 Practice Note CM8, at [9.1].

9.46 However, the success of this approach depends upon the parties conducting themselves sensibly and not using it as an opportunity to file/tender a vast number of irrelevant or marginally relevant documents. It can also be difficult to apply in the context of urgent applications.

Form and content of affidavits in support of interlocutory applications

9.47 Issues concerning the form and content of evidence are addressed above.[147] This section is concerned with affidavits in support of interlocutory applications only. A distinctive aspect of such affidavits is that they may be given on 'information and belief', taking advantage of the exception to the hearsay rule in s 75 of the Evidence Act.

9.48 Subject to the exceptions above in respect of uncontested documents, affidavits remain the preferred vehicle for the adducing of non-documentary evidence in chief on interlocutory applications.[148] It would be very rare for an interlocutory application to call into question the credit of a witness on an issue of such importance that the Court would regard itself as justified in requiring that the evidence in chief be given orally. Further, the liberalising effect of s 75 of the *Evidence Act* is such that, unlike at final hearing, a single affidavit can often be used to cover all issues raised by the application, even if factually disparate.

9.49 So far as form and content of supporting affidavits are concerned, drafting suggestions put forward by practitioners include:

(a) ensure that the affidavit contains evidence which is relevant to the relief sought in the interlocutory application – that is, it tends to prove or disprove the existence of the facts which need to be demonstrated for the relief to be granted or facts which are otherwise relevant to the decision of the court to grant the relief.

(b) do not use the affidavit to put into evidence or (worse) summarise documents that speak for themselves. As noted above, the FCRs now contain a specific rule to enable uncontested documents to be put into evidence other than through an affidavit. The 'brief' system also requires a concise statement of facts to be verified by an affidavit only 'if necessary'. The new approaches encourage parties to think first about what facts they need to prove and then whether those facts can be proved through uncontested documents. An affidavit is only necessary to prove any remaining facts. Viewing the affidavit in this context – rather than as the primary vehicle through which all facts, documents, and submissions will be put – has considerable advantages in terms of avoiding duplication and encouraging the efficient determination of interlocutory disputes.

(c) use headings that relate to the issues raised by the application. Typically, affidavits in support of interlocutory applications need to cover a number of topics (for instance, on an application for an interlocutory injunction – prima facie case, balance of convenience, undertaking as to damages and so forth). While not matters on which the deponent can usually offer admissible opinion evidence, it is convenient to arrange the material in the affidavit under headings that relate to the issues raised by the application.

(d) comply with the requirements of s 75 of the *Evidence Act*; in particular, the requirement to adduce evidence of the 'source' of the hearsay evidence, such as the person who provided information to the deponent.

(e) ensure that the content of the affidavit is otherwise admissible. An argument about objections to evidence is a waste of valuable time at the hearing of an interlocutory application and should be avoided if possible.

147 Chapter 10.

148 See [10.16] above.

G URGENT APPLICATIONS

9.50 Parties wishing to make an urgent application, whether in a proceeding which has not yet been commenced or in a proceeding which has been allocated to a docket, should contact the Registry of the court in which they wish to bring the application or, as noted above, the Duty Judge in New South Wales or the Duty Judge for Corporations matters in Queensland.

9.51 Information about contact with Registries outside of normal business hours can be found on the Court's website at www.fedcourt.gov.au in the 'Contact Us' information for each Registry on the 'Contact Us' menu.

10. EVIDENCE OF WITNESSES

by Steven Finch SC

A MEANS OF ADDUCING EVIDENCE

General rule

10.1 The FCAA and the FCRs disclose an apparent preference for oral evidence to be given at hearings other than interlocutory hearings. Provisions of this sort are common in modern courts.[149] The FCAA provides, *inter alia*:

(a) subject to s 47 itself and other provisions, testimony at the trial of causes shall be given orally in court – s 47(6);

(b) the court may at any time at the trial of a cause, for sufficient reasons and on such conditions as the court thinks necessary in the interests of justice, direct or allow proof, to such extent as the court thinks fit, by affidavit – s 47(3);

(c) testimony may also be given by affidavit at the trial of a cause if the parties so agree and the court does not otherwise order – s 47(5);

(d) in civil proceedings other than the trial of a cause, testimony shall be given by affidavit or as otherwise directed or allowed by the court – s 47(1).

10.2 It may be observed that the FCAA s 47 appears to contemplate, in so far as final hearings are concerned, that evidence may only be given orally or by affidavit. Nevertheless, it is suggested that it is clear that the court has power, generally pursuant to s 23 and the inherent power of the court to control its own processes, and specifically pursuant to s 37P and r 5.04(3) Item 2,[150] to give directions that evidence be given by means different to those contemplated by s 47.

10.3 Until relatively recently, the usual practice in the majority of cases heard in the Court has been to direct that evidence in chief be given by way of affidavit, with a timetable set to commence after the issues have been limited and defined (at least in theory) by the pleadings.

10.4 Enlivened by the individual docket system, there are now a number of differing approaches to the adducing of evidence in chief including:

(a) by affidavit: the usual practice is still the dominant one. Unless leave is given to supplement the affidavit by oral evidence, for example, upon a successful objection to a part of the affidavit or by reason of an oversight in the compilation of the affidavit, the evidence in chief of the witness is received wholly in writing;

149 See e.g. Rules of the Supreme Court 1971 (WA) *O 36 r 1*; Civil Procedure Rules (UK) r 32.2. Order 33 r 1 of the Old FCR provides that, unless the Court otherwise orders or the parties otherwise agree, the evidence of the witness at the trial of a cause (for present purposes – a non-interlocutory hearing) shall be given orally.

150 O 10 r 1(2)(a)(xvii) of the Old FCR

(b) by witness statement: in jurisdictions where this procedure is permitted, a witness statement is a signed but unsworn document provided in circumstances where it is expected that there will be an order that the statement (subject to exceptions) will stand as the evidence in chief of the witness.[151] In proceedings in the Court, s 21 of the *Evidence Act* applies to the effect that witnesses must take an oath or make an affirmation before giving evidence. Notwithstanding that provision, r 5.04(3) Item 21 provides that the court may make directions as to the filing and exchange of signed statements of evidence and their use in evidence at the hearing.[152] It is probably prudent to proceed on the basis that s 21 of the *Evidence Act* applies to the use of witness statements. Keeping the procedural implications of that limitation in mind, the usual effect of the written statement process discussed in this chapter will be that the evidence in chief of a witness will be given in writing (as to uncontested matters) and orally (as to contested matters);

(c) by outline of evidence. An outline of evidence serves as notice of the evidence expected to be given by witness, but usually will not stand as the evidence in chief of that witness. The usual effect of this procedure is that the whole of the evidence in chief of the witness is given orally.

10.5 It is unlikely that any one approach to the giving of evidence in chief will suit all of the very many different types of case that come before the Court, or the different Judges who hear those cases, or the different types of evidence that may be given, or the different types of witnesses the eliciting of whose evidence in an efficient but fair manner is, after all, the point of the exercise. An overview of some of the features of each of these approaches appears below. Prior to the first directions hearing, or so soon thereafter as the nature of the evidence to be given can be ascertained, the parties should be prepared to engage with the court in an exchange designed to determine which of these approaches, or which combination of them, is appropriate for the matter in question.

Affidavits

10.6 Assuming that it be accepted that it is desirable practice for the parties to litigation to be informed, prior to the hearing, of what evidence is to be deployed against them in support of the allegations made (or the defences raised) in the pleadings, there is no doubt that affidavits can be an efficient means of achieving this outcome. However, particularly where they deal with matters which are going to be in issue, they are not so effective.

10.7 The prohibition on asking leading questions of a witness in chief is not a quaint device designed to make legal proceedings more impenetrable to the lay observer or to the witness being questioned – although it sometimes appears that way. It remains useful as a prohibition because, ***inter alia***, it is a way of ensuring that the evidence given is the evidence of the witness, not of some other person. In practice, affidavits are drafted, redrafted and settled by lawyers – quite apart from whatever other defects may be instilled by this process, affidavits thus enshrine, in a way which precludes objection, the answers to questions which were likely, for the most part, to have been leading.

10.8 In addition, it is almost impossible to convey in an affidavit the tone, colour and quality of a witness' evidence. There are no pauses for thought, no glances to the body of the court, no uncertainties, no body language.

10.9 The result is that the Judge, who is required to assess, ***inter alia***, the demeanour of the witness as part of their consideration of the whole of the evidence, is deprived of seeing that demeanour except under the adversarial pressure of cross examination and the objection-strewn process of re-examination. It is suggested that it will generally be unsatisfactory for a Judge to be deprived of the opportunity to hear the evidence of any witness as to a contested event in their own words. Another common incident of the use of affidavits is that Judges are exposed to lengthy cross-examinations depending upon points of detail in circumstances where the witness is often too polite or intimidated to mention that the offending words were not his or her own.

10.10 It is not unimportant to observe that, simply in terms of the detailed preparation of affidavits (and of the witness statements referred to below);

(a) the cost to the parties of preparing affidavits and witness statements is often very high, even to the point where thousands of dollars are spent making minor alterations in language and correcting internal cross-references;

(b) many affidavits and witness statements repeat or substantially repeat others served by that party;

151 See e.g. WA SCR O 32 r 2; CPR UK r.32.4, 32.5.

152 O 10 r 1(2)(a)(xvii) of the Old FCR

(c) the requirement that affidavits and witness statements be expressed in admissible form (e.g., avoiding hearsay) means that, often, a number of different affidavits or statements have to be prepared in order to prove a relatively uncontroversial point (e.g. how a mass mail-out was effected, or how a cheque came to be drawn by a company); and

(d) since most cases settle, much of the cost spent on affidavits and written statements is wasted, and the feared extra court time involved with oral evidence never eventuates.

10.11 Another common failing of affidavits, even in relatively simple matters, is that they tend to incorporate, despite all of the exhortations in the FCRs and elsewhere, matters of argument and conclusion. This leads to a process of striking out or reading down portions of the affidavit or rulings that what is stated as one thing should be read as another. Oral evidence is then usually permitted to patch up what remains of the affidavit – a process which often leads to the same objection to the oral evidence. This is not an effective use of the court's time and results in an unsatisfactory 'patchwork' of evidence in chief, which may reflect unfairly on the witness.

10.12 The circumstance that an affidavit will stand as the evidence of a witness (subject to objection and cross-examination) and the fact that it is prepared at leisure has given rise to a practice where affidavits in reply (*ad infinitum*) deal, by way of denial, admission or otherwise, sequentially with all of the issues raised in the preceding affidavits. Although such a process can be useful in identifying a more detailed picture of the events in question, it more commonly results in a set of quasi pleadings.

10.13 As Emmett J, writing extra-judicially as long ago as 2000[153] pointed out:

> *further, after rulings on objections, it is often very difficult to determine what is in evidence and what is not. Such complexity usually results from the use of affidavits in proceedings where they are quite inappropriate. Where there is a real dispute that has to be resolved by the court, affidavit evidence is clearly undesirable.*

10.14 It is suggested that, except in matters already covered by the FCRs, such as interlocutory proceedings, or other matters where the facts are not substantially in dispute and where there is not likely to be cross examination, affidavits should not be the preferred vehicle for the adducing of evidence in chief in contested matters.

Witness statements

10.15 As noted above, typically a witness statement is an unsworn written statement from the witness which, with certain exceptions, will in due course stand as the evidence in chief of that witness. In jurisdictions subject to s 21 of the ***Evidence Act***, similar processes to those discussed below can be adopted in respect of affidavits or witness statements prepared in response to a direction pursuant to r 5.04(3) Item 21.[154] On the face of it, the witness statement process may give rise to an apprehension that a witness statement will suffer from the same defects as an affidavit – indeed, uncontrolled, it may well do so.

10.16 An expedient which has been adopted in the Court and in other jurisdictions in respect of affidavits, is to direct that parties may request that those parts of the affidavit or witness statement which are disputed must be the subject of oral evidence.

10.17 Most Judges will expect a running-in period during which the more aggressive practitioners will put everything in issue, but it may be observed that:

(a) in practice, this seems to die down quickly;

(b) the ability to require oral evidence is always subject to the Court's control – the parties can and should be prepared to defend requests in this respect before the hearing or at least before the witness gives evidence;

(c) the parties can be warned of a costs consequence if frivolous requests cause delay.

153 Justice Arthur R Emmett, 'Practical Litigation in the Federal Court of Australia: Affidavits' (2000) 20 *Australian Bar Review* 28, 32.

154 O 10 r 1(2)(a)(xvii) of the Old FCR.

10.18 It is suggested that this procedure is within the powers of the court referred to in paragraph 10.2 above. It is suggested further that there will be many cases in which the adoption of this process will:

(a) allow the written proof of uncontroversial matters of historical narrative which it would be tedious to extract orally;

(b) reduce the burden on witnesses of the 'memory test' involved in recollecting inaccurate historical order, all of that historical narrative and accordingly reduce the degree to which they are made defensive about any failings in that regard;

(c) give the Judge the advantage of seeing the witness' evidence about those parts of the case which are genuinely in dispute first hand and reducing the cross examination about those issues to a challenge to that witness' actual evidence, rather than someone else's formulation of it;

(d) preserve the ability of counsel to challenge the evidence that the Judge needs to see tested. It may be acknowledged that witnesses may feel a certain degree of pressure in the process of recalling, live, the important events of the case and even more so when cross-examined about their version of events – but it is suggested that the point of this exercise is the elimination of techniques and processes that waste time, not the elimination of processes which have, over the years, been demonstrated to be as a useful tool in the establishment and testing of a witness' evidence.

10.19 Views may differ, but it may be prudent to provide, for all the reasons already discussed, that once successful in requiring that part of a witness statement or affidavit be excluded on the basis that it should be given orally, the cross-examiner is not at liberty to cross-examine on the differences between what has been thus excluded and what evidence in chief is given orally.

Outlines of evidence

10.20 These are unsworn and unsigned written statements of what a party expects a witness will say and have been used for many years in circumstances where a party is unable to procure an affidavit or witness statement. Some jurisdictions have specific provisions in their rules about such outlines – see e.g. CPR UK r 32.9.

10.21 It is common to include in such outlines not only the evidence expected to be given but, in circumstances where that evidence is not known, details of the matters about which the party serving the notice propose to question the witness.

10.22 It is often the case that directions requiring the production and service of such outlines also provide that the witness is not to be cross examined on the contents of the outline without leave of the court.

10.23 There is no question as to the continuing utility of the outline of evidence process in the case of recalcitrant witnesses. However, consideration should also be given to whether the evidence of any or all of the lay witnesses in a case could or should be given in this manner. (It is suggested that it is unlikely that this process would be of great utility in connection with expert evidence.)

10.24 The procedure has the advantage that, to the maximum extent possible, whilst preserving the objective of informing the parties before hearing of the evidence to be deployed against them, it reduces the impact of third parties on the evidence of the witness.

10.25 The procedure also has the advantage that it at least offers the prospect of reducing the time taken by objections. Experience shows that, once a particular subject matter or type of evidence is successfully objected to, the examiner in chief moves on to other matters.

10.26 It is not suggested that one approach should be adopted for all cases. Quite apart from the sorts of matters discussed above, different Judges may have different personal preferences in such matters. It is suggested that there is no unfairness or inefficiency in this – given that the Judge is and should be in control of the court's processes, and that it is that Judge who must decide the contested matters, it would be odd to insist on a form of evidence which that Judge finds unhelpful. It may be that one Judge adopts a different process to another in similar matters, but given that for the most part, the same Judge is in control of Federal Court matters from the beginning to the end, the parties are not exposed to changing procedures in the same matter.

10.27 There may be a range of factors which impact on the choice of means of adducing evidence – the capabilities of the witness; the nature of the evidence to be adduced; the extent to which it is likely that there will be large amounts of uncontroversial evidence; the extent to which it is necessary to deploy diagrams and charts. Parties should expect that the court will enquire of them as to these matters at the first directions hearing. In the event and to the extent that it is not possible then to engage in a meaningful discussion on these matters, that is a position which should be explained, not merely asserted.

10.28 Although strictly outside the ambit of this chapter, a problem common to all the various forms of adducing evidence in chief is the practice of urging witnesses to give evidence of conversations in direct speech. This is a rule of practice (followed more in the some states than in others, but certainly still found in NSW) rather than one of law and it may be time to give the practice a respectful farewell, given that witnesses almost never (if they are honest) recall any such thing. Nor is the common expedient of interpolating the phrase '*words to the effect of*' much better, as it preserves the underlying problem and adds to that problem the fact that the witness is thereby being encouraged to do something which is normally objectionable – that is, to form a conclusion by reformulating what they actually remember into terms more acceptable to lawyers. Common experience suggests that the way in which people recall events tends to be in a form more amorphous, ambiguous and ill-constructed than is convenient for lawyers. It is suggested that practitioners and the court should endeavour to find a way to adapt their rules and practices to the way that people recall things, rather than insisting upon the reverse. Although it will no doubt lead to an increase in the number of submissions as to the weight of evidence, such an approach would at least avoid the unfortunate circumstance that, for most witnesses, their first experience of the process of giving evidence is that they are encouraged, no doubt implicitly and perhaps with the best will in the world, to be dishonest.

10.29 It must nevertheless be acknowledged that there is still considerable support amongst practitioners for the view that, in the case of disputed conversations, it is a useful discipline for witnesses to be asked to try to give their evidence in a form of direct speech (e.g., 'to the best of my recollection A said words to this effect, and I replied in words to that effect') and that lawyers should be expected to seek to elicit the evidence in that form (e.g., in oral examination in chief) and that when this is done, such direct speech evidence assists to ensure that the no doubt imperfect recollection of the witness is as clearly stated as it can be, and that witnesses with a fair recollection of a conversation can generally express their evidence in that form without making it up.

10.30 An alternative or additional approach to the proof of facts to those outlined above is to require the applicant to serve (probably after discovery) a detailed list of facts (not conclusions) which it will seek to prove at trial and to oblige the respondent to identify which of those facts it will dispute at trial. The respondent should be required to serve its own list if there are additional matters it wants to prove, and the applicant should respond by indicating its position. There should be requirements that solicitors or counsel certify that there is a proper basis for disputing the facts in question. There should also be cost consequences for disputing matters later proved (as with a notice to admit). Following that process, all of the undisputed matters can be set out in an agreed statement of facts binding on the parties. Everything else has to be proved by documents or oral testimony and there is no need for affidavits or witness statements because each side knows the disputed matters that the other will seek to prove at trial. Perhaps all that is necessary is a list of witnesses with an indication of which disputed fact each witness will be called to prove.

The problem of documents

10.31 Once the hurdles of discovery and inspection are cleared, the parties are still, even in moderately complex litigation, in possession of a very large number of potentially relevant documents. Inevitably, in cases where recollections are disputed (or where '*what happened*' is a live issue for any reason), Judges will wish to have recourse to the objectively verifiable contemporaneous record – i.e. documents.

10.32 Ideally, the documentary record should be presented to the Judge:

(a) in one place;

(b) without duplication;

(c) in chronological order;

(d) without the inclusion of documents not in evidence;

(e) without the inclusion of documents not referred to by witnesses or counsel;

(f) without the inclusion of documents which are only there 'in case';

(g) without the inclusion of documents which are not self explanatory but which are unaccompanied by any explanation;

(h) in the case of lengthy documents of which only a small part is relevant – without the inclusion of lengthy irrelevant parts.

10.33 In practice, what the court is frequently confronted with are:

(a) pleadings, which refer to some, but not all documents in circumstances where the pleading is usually unaccompanied by any documents;

(b) affidavits or written statements which variously annex and/or exhibit some, but not all, of the documents relevant to the witness's involvement in the case. The Judge is often unable to see the exhibited documents until the start of the case or later. To the extent that documents are annexed, they invariably do not form a complete record of the events being described by that witness;

(c) affidavits or witness statements from subsequent witnesses which refer to some, but not all, of the documents referred to by previous witnesses, but refer to different copies of those documents;

(d) applicant's tender bundles, which may or may not replicate their own exhibits and annexures together with other documents which they wish to tender;

(e) respondent's tender bundles, which do the same thing;

(f) sundry bundles in response;

(g) cross examination bundles, which contain some documents previously annexed, exhibited or bundled together with other documents not so favoured;

(h) documents incorporated into all of the above which replicate other documents in other of these bundles for no apparent reason;

(i) a Court Book, which may incorporate all of the above and which is added to by separate incremental volumes as the case goes on;

(j) indices and cross indices to all of the above.

10.34 The resulting blizzard of paper:

(a) makes it very difficult and time consuming for the Judge to answer simple questions – What do the documents say happened next? What do the documents say was happening just before?

(b) is not, as a matter of advocacy, persuasive;

(c) makes the process of compiling an accurate record of the facts for the purposes of writing a judgment much more difficult;

(d) is very costly and wasteful, given that most of the documents and all of the duplications are not performing any function.

10.35 Not all of these ills can be cured by recasting the approach to adducing evidence in chief in the various ways previously discussed, but a number of objectives are worth addressing at the first directions hearing:

(a) There is usually no good reason to annex or exhibit a document. At the conclusion of discovery and inspection, all potentially relevant documents should have a discrete number. Any form of written evidence, assuming there is a good reason to refer to a document at all, should refer to it by that discrete number. It can then be located in the document bundle described further below. The same approach can be taken to document references in pleadings. Where documents are referred to before discovery takes place (e.g., in cases where the filing and service of written evidence precedes discovery or where no discovery is ordered), the first party to refer to a document can still give it a discrete number using the same system of numbering as would be applied to its discovered documents.

(b) Any subsequent written statement (which expression will be used hereafter to mean any form of written evidence) which refers to a document already in the growing bundle should refer to that discrete number. Only if there is a real need to refer to a different version of a document should that be done. There is simply no good reason to have successive versions of a contract in evidence, one blank, one signed by the applicant, one signed by the respondent, one signed by both parties and another with irrelevant hand writing on it in evidence. In such matters, the parties should be encouraged to agree upon the version of the relevant document to be incorporated into the bundle.

(c) The document bundle should then grow incrementally, but by addition rather than replication. It should be in chronological order. Where it is provided electronically, it should be possible to examine it chronologically.

(d) Documents which are going to be tendered without benefit of a reference in a witness statement may be added in the same way. The court, in longer cases, would usually be assisted by an index telling the Judge where each document in the bundle is referred to, but this is a matter for discussion. Care must be taken not to adopt processes apt for very large cases to smaller cases, but there is no apparent reason why the same objectives – i.e. no annexures or exhibits, no duplications and a single source bundle of documents arranged chronologically, should not be achieved in most cases.

(e) The parties must also be prepared to adapt to the preferences of individual Judges. It may be that some Judges have found that an efficient way of reducing the volume of the document bundle is to avoid 'bulk tenders' entirely and to deal with the tender of documents incrementally at a time when counsel is prepared to justify the tender.

(f) At the close of the case (or along the way in longer cases) documents which are rejected or not pressed should be physically removed from the bundle.

(g) It may be acknowledged that some types of documents (notoriously, email chains which not only are replicated but usually run backwards) will need some care to achieve these aims, but the savings in photocopying costs should more than offset the costs involved in taking that care.

(h) The parties should be urged to consider whether and why it is necessary to file witness statements which simply annex or refer to documents without comment. The parties should be required to consult to seek to consent to the tender of such documents. The court should warn parties that costs consequences, regardless of the outcome of the case, may follow unreasonable refusal to give consent.

10.36 The result of the discussion set out above is that it is suggested that at the first directions hearing, or as soon thereafter as the nature of the evidence to be called is apparent, the court will make directions as to the manner and form in which evidence is to be adduced. Also, at the first directions hearing, the court will require the parties to have taken steps to agree upon a protocol for the tender of documents with a view to ensuring that, *inter alia*:

(a) witness statements refer to documents by a discrete document number;

(b) to the extent possible all references to a particular document should be to the same document;

(c) witness statements do not annex or exhibit documents;

(d) all documents should be incorporated into one chronological bundle;

(e) the court has an opportunity, once the extent and nature of the documents to be tendered is apparent, to make directions as to the time and manner in which documents will be tendered and at which the bundle should be delivered to the court.

B DEALING WITH OBJECTIONS

10.37 As is apparent from the discussion above, the manner in and time at which objections will be dealt with will vary considerably, depending upon how the evidence is to be adduced and the trial Judge's own preferences. Again, care needs to be taken to avoid protocols apt for large cases which may unreasonably add to costs in small cases. However, even in the smallest of cases, there appears to be utility in establishing a protocol for objections which has the effect that those objections are known well before the hearing, so that practitioners can give real consideration to whether they should press the matter, not press the matter, or not press and seek leave to adduce further evidence in another form. For the same reasons, some consideration should be given to a protocol which allows the parties to know, in advance of the hearing, the Judge's ruling (or draft rulings) on the objections.

Confining objections to matters of consequence

10.38 The court is frequently confronted with very long schedules of objections including many as to 'form', which have been drafted by a diligent and enthusiastic junior, many of which are not pressed when the matter comes before the court. There is perhaps nothing wrong with this, except that the inevitable Judge's question – 'Does it matter?' – should be asked and answered before the matter comes to court. It is possible that the court does not need to make any express directions about this topic, but solicitors and counsel (including, if possible, senior counsel) should not get to court without having asked and answered questions such as:

(a) why are we objecting?

(b) don't the documents establish this point anyway?

(c) does it matter that the conversation is not in direct speech?

(d) if we object and leave is given to adduce further evidence, what will have been achieved?

Schedules with suggested rulings

10.39 As suggested above, there is little doubt that there is utility in parties exchanging, well before the hearing date, schedules of objections. As a means of encouraging agreed positions, there is usually utility in attaching to such schedules suggested rulings with which the objecting party would be content. In many cases, this process disposes of the majority of the objections.

10.40 Judicial attitudes to such schedules vary widely, and it is not suggested that any general rule will or should be applied by Judges regardless of personal preference. Nevertheless, experience has shown in recent years a considerable willingness on the part of practitioners to reach agreed outcomes when suggested rulings are sensibly drafted. This process reduces the time necessary to be taken by the Judge in dealing with outstanding objections.

10.41 Judicial attitudes also vary widely when it comes to making rulings in response to such schedules prior to the date of the hearing. Nevertheless, it is suggested that it is at least worth considering setting out a timetable pursuant to which such schedules should be exchanged, subsequent to which draft rulings will be handed down prior to the hearing date, so that the parties can decide whether to press the matters. Even if draft rulings are not handed down prior to the hearing, a large amount of time may be saved if the handling of objections at the hearing commences with the delivery of draft rulings, with counsel then free to argue for a departure from any or all of them, rather than by the traditional approach of hearing submissions and then ruling on each objection seriatim.

10.42 Individual Judges will have different attitudes as to whether objections to all witnesses should be taken at the start of the hearing or whether they should be done incrementally, but many Judges have observed that an incremental approach not only saves time but allows later objections to be dealt with at a time when more is known of the nature of the case.

The relevance problem

10.43 Except in relatively short cases, Judges will often be in some difficulty dealing with relevance objections, as not all of the detail or nuance of the issues or of the evidence will have been made apparent at the start of the case. This problem applies both to witness statements and to documents. The incremental approach to dealing with objections referred to above is one method of dealing with this problem.

10.44 An obvious expedient, often adopted, is to simply defer rulings on relevance. Many Judges do not favour this process and a number of practitioners observe that it means that, until excluded, the evidence is in and must be, for example, cross examined upon until it is excluded.

10.45 In most cases, it may be observed that if a Judge is of the view that he or she is not yet sufficiently informed of the nature of the case to assess relevance, then there is a perfectly proper basis for deferral – indeed making a ruling upon relevance notwithstanding that state of mind would furnish grounds for complaint. In practice, it is suggested that it is relatively rare for an item of evidence to be so productive of delay if admitted (or in some usages, admitted 'provisionally' – which seems to mean merely that the parties are warned that the order admitting the evidence may be vacated) that it cannot be admitted on that basis.

10.46 It may be acknowledged that there are some theoretical and practical difficulties concerning the state of evidence where rulings are deferred in this way particularly in circumstances where the evidence is subsequently rejected, including what to do about any cross examination referring to such evidence – but these are practical difficulties which once recognised, can be dealt with on a case by case basis according to the individual Judge's preference.

10.47 The result of the discussion above is that it is suggested that, always subject to the personal preferences of the individual Judge, there is utility in adopting a process, even in smaller cases, of directing schedules of objections with suggested rulings culminating in the Judge handing down draft rulings prior to the commencement of the hearing. A frequent variant of this process will be that the schedules with the suggested rulings are exchanged and the Judge deals incrementally with the rulings as they become necessary.

C JUDICIAL CONTROL – THE SCOPE OF THE DISCRETIONS

10.48 The power of the court to make the kinds of directions and exercise the types of control referred to in this section have already been referred to.

10.49 By way of general summary, the court, as a superior court of record, has inherent power to control its own processes which will include the manner in which evidence may be adduced and the protocols to be adopted in respect of dealing with objections.

> Section 23 provides as follows:
>
> *Making of orders and issue of writs*
>
> *The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.*

10.50 Sections 37P(1), (2) and (3) provides:

> *Power of the Court to give directions about practice and procedure in a civil proceeding*
>
> *(1) This section applies in relation to a civil proceeding before the Court.*
>
> *(2) The Court or a Judge may give directions about the practice and procedure to be followed in relation to the proceeding, or any part of the proceeding.*

> *(3) Without limiting the generality of subsection (2), a direction may:*
>
> *(a) require things to be done; or*
>
> *(b) set time limits for the doing of anything, or the completion of any part of the proceeding; or*
>
> *(c) limit the number of witnesses who may be called to give evidence, or the number of documents that may be tendered in evidence; or*
>
> *(d) provide for submissions to be made in writing; or*
>
> *(e) limit the length of submissions (whether written or oral); or*
>
> *(f) waive or vary any provision of the Rules of Court in their application to the proceeding; or*
>
> *(g) revoke or vary an earlier direction.*

10.51 It may be observed that the scope for directing that there should be a limit to the number of witnesses who may be called is more likely to be exercised in connection with expert witnesses than in connection with lay witnesses.

10.52 The *Evidence Act* ss 11(1) and 21(1) provide as follows:

> *11. General powers of a court:*
>
> *(1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.*
>
> *...*
>
> *21. Sworn evidence of witnesses to be on oath or affirmation*
>
> *(1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence….*

10.53 Section 21 of the *Evidence Act* will produce no difficulty where the witness is to be called for cross examination, but if a witness statement process has been adopted and the witness statement is not objected to and there is no occasion for cross examination, consideration will need to be given by the parties for the need to comply with s 21. It may be that the witness statement is tendered, without a hearsay objection being taken, and admitted as documentary evidence, without its author becoming a witness in the proceeding for the purpose of s 21.

10.54 A number of provisions of the rules are also relevant, and in particular r 5.04 which provides for the giving of directions, and r 30.23 providing for applications to be made to limit aspects of the trial.[155]

155 For the Old FCRs, see e.g. O 10 r 1(1), O 32 r 4, O 32 r 4A.

D BROWNE V DUNN

Limits of the rule

10.55 Judges are frequently confronted with the task of listening to a cross examination which, exhaustively and *seriatim* puts to the witness every aspect in which the opponent's case is at variance with the witness' evidence. This practice stems from a misunderstanding of the rule in *Browne v Dunn* (1893) 6R 67. In *Scalise v Bezzina* [2003] NSWCA 362 at [98] Mason P (Santow JA with Brownie AJA agreeing) said:

> *The rule does not undermine the adversary nature of proceedings or make one party the other's keeper. Thus, a party who proves facts sufficient to establish a cause of action or a defence upon which that party bears the onus does not have to confront the other side's witnesses with the issue if they do not address it in their own evidence. To require this would invert that aspect of the rule grounded in what I have described as judicial economy. There is no unfairness in letting the sleeping dog lie and also invoking Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298 so long as the moving party has by pleadings or otherwise signalled the matter sought to be proved and led necessary evidence on the topic. There is no need to confront an opponent's witnesses by cross-examination if they fail to contradict evidence earlier called by the moving party in support of an issue raised in the pleadings or otherwise (Flower v Hart (a firm) v White Industries (Qld) Pty Ltd [1999] FCA 773; (1999) 87 FCRs 134 at 148-9, Stern & Anor v National Australia Bank Ltd [2000] FCA 294; (2000) 171 ALR 192 at 203 [42]).*

Avoiding inefficiency

10.56 An expedient commonly adopted is that counsel inform the court of an agreement reached between them as to the extent to which the rule in *Browne v Dunn* will or will not apply. It is suggested that, in the event and to the extent that a witness simply fails to deal with a subject matter, the parties should be mindful of the remarks of Mason P set out above. In the event and to the extent that a witness does deal with a previous witness' treatment of a matter in issue, it is suggested that there is no need slavishly to put the opposing version to that witness, who has already considered it when postulating his or her own version.

10.57 Again, as with many other issues of this type, it does not seem necessary to suggest the imposition of one rule to apply to all parties in all different types of cases. It is only where there is an incomplete contest between witnesses on a particular point that there is practical scope for the rule to have operation.

Dealing with breach

10.58 The practical problem in dealing with a *Browne v Dunn* point is that a potential breach of the rule often does not appear until final submissions, when some or all of the witnesses may have left the court, although occasionally one sees objections taken to cross-examination of a witness on the basis that a previous witness' recollection on the same topic was not challenged. The usual consequence of breach is that the party in breach will not be permitted to advance the proposition which depends upon the matter in question – although it should be observed that in New South Wales at least, there is also authority for the proposition that a failure (by a Defendant) to challenge evidence-in-chief may disentitle the Defendant from calling contrary evidence.[156]

10.59 Very occasionally, it can be agreed that if a witness had been asked a particular question, there would have been a particular answer. Given the requirements of the admissibility of evidence, it may be that this process really operates by way of admission. Another option which is possible, but rarely encountered, is for the Court to give the party in breach a chance to correct the error. Although such an approach looks at first glance as if it would advance the cause of just outcomes accompanied by as little technicality as possible, a number of problems may arise in this connection. First, the witness may be out of reach for any number of reasons. Second, the party which has the 'benefit' of the breach may have taken forensic decisions of its own based upon the failure to put certain propositions, such that it would be difficult to unwind the state of play to the position it would have been in had the breach not occurred. In the circumstances, there do not appear to be good grounds for departing from the traditional means of dealing with breach of the rule – rather, there appear to be good reasons for clearly establishing the extent to which, either generally or for each witness, the parties wish to be governed by the rule.

156 See *Hull v Thompson* [2001] NSWCA 359, [24].

11. DOCUMENTARY EVIDENCE

by Steven Finch SC

A IDENTIFICATION OF KEY DOCUMENTS

11.1 This issue has been discussed in Chapter 5. It is likely that the parties will, by the time of the hearing, already have determined to incorporate such key documents into the tender bundle, either pursuant to references in witness statements or as stand-alone documents. It will be a matter for individual Judges to decide whether it is of utility for them to be provided (either at the commencement of the hearing or earlier) with copies of or at least a list of such key documents – experience suggests that it may be that asking parties to agree upon a such list (particularly at an early stage) will simply produce a lengthy 'just in case' list.

B DEALING WITH OBJECTIONS

11.2 This issue has been discussed in Chapter 10. It may be emphasised that this is an area where practices vary greatly within the court. It is not suggested that this variation is problematic – some Judges, for a number of reasons, do not encourage the bulk tender of documents at the outset of the hearing (or at any other stage of the hearing) and prefer to attempt to limit the number of documents in the case by requiring counsel to deal with each tender incrementally. The process of objection will generally be governed by the preferred process of tender, but it may still be useful for the parties in all cases to be directed to exchange lists of proposed tender documents and proposed objections to such documents, so that when the time does arrive for tender, the objections have, to the maximum extent possible, been resolved.

C ELECTRONIC DOCUMENTS

11.3 This issue has been discussed in Chapter 7. CM 23 provides guidance on e-documents prepared for and filed in the Court, including how to anonymise personal and sensitive information and redact documents.

11.4 Once an electronic document is tendered, it will be a matter for individual Judges to decide whether they prefer it to be printed and added to the physical tender bundle, or whether they are content simply to have it listed as an exhibit with a hypertext link to the document database.

11.5 An issue which will need early resolution in this connection (and which is best resolved at the discovery stage) is the establishment and maintenance by the parties of compatible electronic storage, retrieval and numbering protocols. A number of cases, large and small, have proceeded on the basis that a common commercially available document management program is used by all parties (and the court) to ensure that, from discovery up to and past the time of tender;

(a) a discrete document numbering system is maintained;

(b) documents can be tendered from the database, if necessary, without producing a physical copy;

(c) documents can be searched and;

(d) documents can be read remotely.

11.6 The documents placed on such a system commonly include the pleadings, witness statements and transcripts. It is relatively simple then to attach hyperlinks to each document reference in any of those documents.

D SUMMARIES

11.7 This issue has been discussed in Chapter 7.

12. EXPERT EVIDENCE

by Steven Finch SC

A SCOPE OF THE COURT'S POWERS

12.1 In addition to the inherent power of the Court to control its own processes and the general power of the Court to make orders of such kinds as it thinks appropriate (FCAA s 23), the Court has a number of specific powers of utility in connection with the giving of expert evidence.

12.2 The Court may give directions about the practice and procedure to be followed in relation to the proceeding, or any part of the proceeding (FCAA s 37P(2)).

12.3 Those directions may include:

(a) requiring things to be done (FCAA s 37P(3)(a));

(b) setting time limits for the doing of anything or for the completion of any part of the proceeding (FCAA s 37P(3)(b));

(c) limiting the number of witnesses who may be called to give evidence (FCAA s 37P(3)(c)).

12.4 The Court, in the event that these directions are not complied with, has a range of powers including, most relevantly, to strike out, amend or limit any part of a party's claim or defence, and to disallow or reject any evidence (s 37P(6)).

12.5 Specific powers to give directions include that:

(a) expert witnesses confer;[157]

(b) expert witnesses produce for use by the Court a document identifying the matters and issues about which they agree or differ;[158]

(c) expert witnesses give evidence after all or certain factual evidence relevant to the question has been led;[159]

(d) parties close their case in relation to evidence relevant to an expert question, subject to preserving the ability to call their expert on that question;[160]

(e) after all or certain factual evidence has been led, each expert indicate whether, in light of that factual evidence, he or she adheres to or wishes to modify any opinion earlier given;[161]

(f) each expert be sworn one immediately after the other;[162]

(g) an expert when giving evidence occupy any position in the court room that is appropriate to the giving of his or her evidence;[163]

(h) each expert give an oral exposition of his or her opinions on the question;[164]

(i) each expert give his or her opinion about the opinion given by another expert witness on the question;[165]

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157 FCR r 23.15(a); O 34A r 3(2)(a) of the Old FCR.

158 FCR r 23.15(b); O 34A r 3(2)(b) of the Old FCR.

159 FCR r 23.15(d); O 34A r 3(2)(c)(i) of the Old FCR.

160 FCR r 23.15(d); O 34A r 3(2)(c)(ii) of the Old FCR.

161 FCR r 23.15(e); O 34A r 3(2)(d) of the Old FCR.

162 FCR r 23.15(f); O 34A r 3(2)(e)(i) of the Old FCR.

163 No new rule; O 34A r 3(2)(e)(ii) of the Old FCR.

164 FCR r 23.15(c); O 34A r 3(2)(f) of the Old FCR.

165 FCR r 23.15(h); O 34A r 3(2)(g) of the Old FCR.

(j) the expert witnesses be cross examined in a certain manner or sequence;[166] and

(k) cross-examination or re-examination of expert witnesses be conducted by completing the examination of one before starting the examination of another or by putting to each expert witness in turn questions relevant to one subject or issue at a time, until the cross-examination or re-examination of all experts is completed.[167]

12.6 The FCRs makes provision for similar powers and directions – see rr 1.31–1.33; r 5.04, Items 14–22 and; rr 23.11–23.15. It should be observed that these rules provide for the making of a number of directions not specifically mentioned in the old rules, for example:

(a) a direction that the parties jointly instruct an expert to provide a report of the expert's opinion in relation to a particular issue in the proceeding (r 5.04, Item 17) and;

(b) a direction that an expert's report be received by way of submission, and the manner and form of that submission, whether or not the opinion would be admissible as evidence (r 5.04, Item 19).

B DEFINING ISSUES

12.7 In practice, most of the useful work which will be done in connection with the definition of issues is that part of the process discussed in Section F below – 'Refining Issues – Expert Conferencing and Joint Reports'. Nevertheless, there are still occasions upon which the Court is found asking 'Is this really a matter for expert evidence?'

12.8 The first directions hearing will in some cases be too early a stage to address the question of which, if any, of the issues in the case ought to be the subject of expert evidence, but the parties should come to that directions hearing prepared for a direction that they are to consider, prior to revisiting these issues at a case management conference of the type contemplated by r 5.04, Item 32 or a subsequent directions hearing convened for that purpose:

(a) which issues in the case may be the subject of expert evidence;

(b) what type of expert evidence is envisaged;

(c) whether or not the appointment of a single joint expert is possible or whether the Court should appoint an expert or assistant;

(d) how many experts are to be called and whether more than one expert from parties in the same interest ought to be permitted; and

(e) the manner in which the experts should give their evidence.

12.9 The parties should expect any party wishing to retain an expert to be directed to provide to the other party or parties, the name of the proposed expert and a copy of that person's resume together with a list of the materials to be shown to the expert and a list of the questions proposed to be asked of the expert. The opposing party or parties will be given an opportunity to review those matters, to object and/or to suggest additional matters. In the event of any inability to agree, the matter can be relisted (for the sake of efficiency, a telephone conference should be sufficient) so that the court can resolve any outstanding issues.

12.10 The parties should not expect that the Court will simply accept the views of the parties concerning which issues may be the subject of expert evidence. Accordingly, parties should ensure that a practitioner of sufficient seniority and familiarity with the issues in the case is retained to debate the question of why an expert is necessary in connection with a particular issue. Quite apart from saving time in court, the limitation of issues in this way has the potential to save clients substantial amounts of money in connection with the preparation of expert evidence which normally goes through a lengthy and expensive process of drafting and clarification only to end up being rejected.

166 FCR r 23.15(i); O 34A r 3(2)(h) of the Old FCR.

167 FCR r 23.15(g); O 34A r 3(2)(i) of the Old FCR.

C HOW MANY EXPERTS?

12.11 Probably because of the very high costs of retaining experts and of the forensic undesirability of conflicting opinions, it is relatively rare for a party to seek to call multiple experts on the same question. What is more common is that a party engages a number of experts, including one or more 'dirty' experts – who are asked to work the problem up, to cast about for solutions, to talk about possible solutions with lawyers, to consult about the assumptions which should be proffered to the 'clean' expert and to advise during the cross-examination of the opposing expert – who are then not called for fear of being exposed to what is expected to be damaging cross-examination about their involvement in those respects.

12.12 It is suggested that, for the most part, these fears are ill-founded – that having done this work does not constitute them a mere 'hired gun' and that 'knowing where the bodies are buried' is not a bad thing, as long as there is a reasoned approach to support the view now adopted by that expert. It is also commonly feared that calling the 'dirty' expert may result in the waiver of sensitive privileged information.

12.13 Whilst it is not suggested that this problem is illusory, it should be borne in mind that if the facts which give rise to this perception are relevant, it is usually prudent to deal with them up front, rather than waiting for them to be revealed or discovered by the other side, and that if they are referred to in documents, they should already have been disclosed in the course of discovery. In any event, it may help to reduce the expense of engaging 'dirty' experts if Judges (assuming that they agree with the foregoing) raise the matter and their attitude to it at an early stage. It may also be observed that it has already become apparent that the utility of the practice diminishes greatly if the technique of concurrent examination (discussed below) is adopted.

12.14 The question of the number of experts more commonly arises in connection with cases where there are multiple parties – usually respondents – who have what appear to be similar interests. There is no doubt that the Court has the power to require, as an extreme example, that such parties (even taken together) be limited to one expert per issue. In practice, a couple of examples may serve to show that such a direction should not lightly be made, as it may be attended by difficulties which are almost impossible to resolve. First, even respondents who appear to have similar issues often have very different views about how to answer those issues, including the precise nature of the question to be put to the expert, what sort of expert to brief and the identity of the expert thought best qualified to assist them. Second, there may be real difficulties in such an expert maintaining information barriers when respondents (as is often the case) are themselves at logger heads.

12.15 It is suggested that it is likely to be a less fraught exercise if the Court, in most cases, confines itself first to requiring a convincing explanation of why a party requires more than one expert (assuming that they need one at all) on an issue and then to enquire whether it is possible for parties in similar interests (or even parties with opposing interests) jointly to instruct a single expert on particular issues. In any event, it may be observed that if different parties genuinely believe that different answers to expert questions can be given, and if they have instructed experts who, complying with their obligations (as set out in Practice Note CM 7) are able to assist in that respect, it is difficult to see why those parties should be prevented from ventilating those answers merely in the name of efficiency. Adopting processes such as the concurrent evidence approach described below will usually be a better means of achieving that efficiency – even and perhaps especially when there are a large number of experts on the question.

12.16 There have been a number of attempts to reduce the number of experts by expressly providing for the use of 'joint' experts – in this connection it may be observed that the FCRs provide that a direction may be made that the parties jointly instruct an expert to provide an opinion on a particular issue – r 5.04, Item 17. The UK CPR provide at Part 35 (and the associated Practice Direction 35) provides that, where possible, matters requiring expert evidence should be dealt with by a single expert. Contemporary experience suggests that much effort (and, of course, expense) is expended by parties in persuading the Court not to make such orders.

12.17 Notwithstanding the remarks set out above, it is suggested that the question of whether there is scope for a joint expert report on one or more of the issues in the case remains a useful one which may be asked at the case management conference or at a directions hearing dealing with expert evidence. The matters in paras 12.7–10 above should also be addressed.

D COURT EXPERTS

12.18 Although it is rare to see the Court appointing its own expert in modern litigation, it is worth summarising the procedure involved, perhaps to highlight why other techniques are now more popular.[168]

12.19 The Court's expert's report is sent to the Registrar and each party interested in the question.[169] The report is, unless the Court otherwise orders, admissible in evidence, but it is not binding on any party except to the extent that such a party agrees.[170]

12.20 The Court expert may be cross examined by any party, and it is provided that the Court may order that such cross-examination take place before an examiner, or before the Court, either at the trial or at some other time.[171]

12.21 Despite the fact that the parties do not have control over who the expert is (or even what he or she reports into) they are jointly and severally liable to pay the expert's remuneration, which is fixed by the Court.[172]

12.22 Where a Court appointed expert has made a report, any party may adduce evidence of one expert on the same question, provided that reasonable notice has been given to the other parties. Any additional expert evidence on the question (beyond the 'one each' contemplated by the Rule) may not be adduced without the leave of the Court.[173]

12.23 It is suggested that there are a number of readily observable reasons why the procedure of appointing a Court expert is not often used, amongst them being:

(f) it involves the Court choosing a witness (or at least, being involved in the choice). There is no reason to expect the Court to be particularly well-equipped to do this – and having done it, even relatively sophisticated litigants may think that the Court has reason to favour its own choice;

(g) similarly, there is no reason why a particularly able expert should not appear regularly before a Judge when instructed by parties (indeed in some areas, such as valuation, the field of regular experts is quite small) – it would on the other hand look unfortunate if the same expert witness was repeatedly nominated by a Judge;

(h) given that each party may call its own expert on the question, it is very likely that the process simply adds one witness (the Court appointed expert) to an already expensive witness list; and

(i) a simpler expedient is for the Judge to indicate, if it is apparent that the parties have missed an expert question, that that question should be addressed by the experts to be called by the parties.

12.24 Some of the difficulties with the process are perhaps ameliorated in the FCRs providing for the appointment of court experts (rr 23.01–23.04) where, for example, parties will need leave to adduce the evidence of even one of their own experts. This change, together with a change in the method of appointment (now to be done upon application by a party) reduces the severity of some, but not all of the points identified in paragraph 12.23 above.

168 FCR r 23.01. Order 34 r 2 of the Old FCR provides that the Court may, at any stage of a proceeding, appoint an expert as Court expert to inquire into and report upon a question for an expert and any facts relevant to that inquiry.

169 FCR r 23.02. O 34 r 3(1), (2) of the Old FCR.

170 FCR r 23.03. O 34 r 3(3) of the Old FCR.

171 FCR r 23.03. O 34 r 4 of the Old FCR.

172 FCR r 23.01(2). O 34 r 5 of the Old FCR.

173 FCR r 23.04.

E EXPERT ASSISTANT

12.25 A procedure seen even more rarely than the court appointed expert is the expert assistant. It is suggested that there are few reasons for the procedure to become more common. Indeed, that part of the Old FCRs dealing with expert assistance does not appear in the FCRs – although the Court's wide powers would still enable the use of the procedure.[174]

12.26 Courts have used expert assistants for many years. Judges sitting in admiralty matters in England have sat with experts in marine matters since the 16th century. In Australia, Courts of Marine Inquiry have adopted similar practices, as have courts sitting in valuation matters – for instance concerning the valuation of land in the Western Lands Division in New South Wales.

12.27 Notwithstanding this long history, and without suggesting that the procedure could or should be eliminated, it is suggested that there remains something troubling about a process (particularly where the parties are not given leave to adduce evidence on the question) which expressly is put in place to assist the Court in writing a judgment, but is yet not evidence and not able to be tested in cross-examination. Again, it is suggested that here, if the parties cannot agree upon a joint expert report, a better solution is for the Judge to preside over a process which identifies the issues upon which separate experts can opine.

F REFINING ISSUES – EXPERT CONFERENCING AND JOINT REPORTS

12.28 It is now common for the Court to exercise the powers referred to above and to direct that experts on similar issues confer (usually before but occasionally during the hearing) with a view to producing a report – sometimes in the form of a schedule – setting out the issues on which they agree and disagree. It is often useful, if possible, for the report to contain a short statement of the reasons for these views. It is suggested that the production of such a joint report will prove useful no matter what technique is to be adopted for the testing of the expert evidence.

12.29 It is usually prudent to ensure (by way of instruction if not by way of direction) that the experts are to be left alone for the purposes of producing the joint report, except perhaps for whatever word processing assistance is necessary. It is fair to say that many clients and lawyers do not, at least initially, relish the loss of 'control' involved in this restriction, but given that the purpose of the exercise is to identify what is really in dispute between the experts, as opposed to what others would like to dispute, there is no doubt that such conferences are better held without client or lawyer assistance. This is not to say that, once the report is produced, there cannot be suggestions from the parties or from the Court as to further issues which might usefully be addressed.

12.30 A difficulty which arises from time to time is that the differences between the experts arise more from the assumptions which they are asked to make than from their approach to the expert question. The experts should specifically be asked to consider whether this is the case – in which circumstance they can then identify the assumptions in question and the reasons why the different assumptions affect the analysis. Unless the assumptions are themselves informed by further expert analysis, it may then be clear that there is no need for further testing of the expert evidence, and that the resolution of the questions of fact underlying assumptions can be seen as the real task for the Court.

12.31 A possibility which is sometimes overlooked is that there may be utility in directing that there be an expert conference and joint report even between experts who are not giving evidence on precisely the same issue. For example, in cases involving the *Australian Human Rights Commission Act 1986* (Cth), there may be experts across a range of disciplines who may be able to identify areas where their individual specialities or recommended courses of action overlap or interact, where it would be helpful to know if there were positive or negative aspects of these possibilities.

12.32 It is common experience for the factual underpinning of assumptions to change during the course of a hearing. If and when that happens, there is nothing to stop the Court requiring the experts to confer again to consider

174 O 34B r 1–6 of the Old FCR

the ramifications of assumptions different to those informing their earlier report.

12.33 A further benefit of a pre-trial expert conference and report is that it allows a precise identification of the factual questions relevant to the expert analysis before the lay witnesses (whose evidence, together with documents and other evidence will presumably establish the relevant facts) are examined.

12.34 Individual approaches may vary, but it is often observed that preparation for the expert conference should not necessarily involve the posing of precise questions because the framing of those questions may involve misconceptions or prejudgments about the nature of the issues to be considered. If, by agreement, the experts can be presented with a list of issues defined at a relatively high level of generality and if they are instructed to add to that list if they feel it necessary, with an overriding instruction to identify all issues upon which they agree and disagree, then there is usually a solid foundation for the free exchange of views between the experts.

12.35 Accordingly, parties should expect that the Court may make directions, either at the first directions hearing or so soon thereafter as the experts are identified, that an expert conference should occur, to be held in the absence of clients and lawyers, with a view to producing a joint report, to be signed by all participants, identifying all matters upon which there is agreement or disagreement, accompanied by short reasons for those views.

G TESTING THE EVIDENCE – TRADITIONALLY, SERIALLY OR CONCURRENTLY?

12.36 A traditional approach to eliciting expert evidence involves, in broad summary:

(a) asking the expert to address a number of questions;

(b) providing the expert with assumptions upon which to base his or her analysis;

(c) the expert providing (usually after a lengthy process of redrafting and fine tuning) a written report including reports in response to earlier expert reports and reports in reply;

(d) calling the expert, usually at the conclusion of the lay evidence given on behalf of a party, so that in longer cases it may be weeks or months between the times when the two sets of experts (assuming there to be only two parties) give evidence;

(e) the experts being cross examined by counsel for the opposing party, with little intervention from the Judge (although usually more so than when a lay witness is being examined), and no intervention by the opposing expert – except, in many cases, by way of whispered instructions to cross examining counsel;

(f) re-examination of the expert by the party calling the expert;

(g) the possibility of limitation on cross-examination to topics not agreed upon in any joint expert report.

12.37 In longer cases, it is inevitable that, by the time the second party's expert is called, not only has the evidence in the case developed, but the detail and impact of the evidence of the first expert has faded.

12.38 Even more importantly, the adversarial atmosphere and techniques associated with the rest of the hearing are present throughout the expert evidence part of the hearing.

12.39 There can be no doubt that for many years there has been growing dissatisfaction, both amongst Judges and, perhaps more importantly, amongst experts, with this traditional process of eliciting expert evidence and in particular with traditional cross-examination of experts. The following particular concerns have been identified:[175]

(a) each expert is taken tediously through all his or her contested assumptions and then is asked to make his or her counterpart's assumptions;

(b) considerable court time is absorbed as each expert is cross-examined in turn;

175 These concerns, together with the summary of techniques of giving concurrent expert evidence set out below, are taken from Justice Steven Rares, 'Using the 'hot tub' How concurrent expert evidence aids understanding issues' (FCA) [2010] *FedJSchol 20*.

(c) the expert issues can become submerged or blurred in a maze of detail;

(d) the experts feel artificially constrained by having to answer questions that may misconceive or misunderstand their evidence;

(e) the experts feel that their skill, knowledge and, often considerable, professional accomplishments are not accorded appropriate respect or weight;

(f) the Court does not have the opportunity to assess the competing opinions given in circumstances where the experts consider that they are there to assist it – rather experts are concerned, with justification, that the process is being used to twist or discredit their views, or by subtle shifts in questions, to force them to a position that they do not regard as realistic or accurate;

(g) often the evidence is technical and difficult to understand properly; and

(h) juries, Judges and tribunals frequently become concerned that an expert is partisan or biased.

12.40 It may be observed that, in practice, a number of these concerns are caused by or at least thrive in the sometimes aggressively adversarial atmosphere of the traditional form. This is not to say that all or any of the concerns listed above necessarily or inevitably arise when traditional techniques are adopted – the Judge may deploy a number of strategies to reduce or eliminate them as and when they become apparent. Nevertheless, the increased degree to which a Judge must intervene to ensure that outcome sits somewhat uneasily with the maintenance of the traditional form, particularly of cross examination, and some areas of concern will be difficult to address with any amount of judicial intervention.

12.41 One technique which has been adopted with success is for the experts to give evidence serially. The usual steps up to the commencement of the hearing (including the preparation of a joint expert report if that be ordered) are followed, but the expert evidence is then deferred until the end of the case when they are examined and cross-examined one after the other. This approach has a number of advantages including:

(a) the lay evidence has usually closed – and indeed there may well be a direction to that effect – so that the necessary factual foundation can be observed more accurately than is the case when proceeding upon assumptions about evidence which may not come up to scratch;

(b) the Judge has the opportunity to hear and consider the expert evidence in one segment of the hearing, when the detail and impact of each expert's evidence remains fresh;

(c) the ability to test the evidence in cross-examination is unaffected; and

(d) the step of requiring the experts to confer and produce a report on issues upon which they agree or disagree remains of utility.

12.42 One reason why further efforts have gone into developing techniques beyond serial examination is that this technique does little to resolve the more serious of the concerns listed in the paragraph above – particularly those produced by the manner in which adversarial techniques tend to or at least may obscure rather than reveal the real positions of the expert. Those efforts have resulted in the rapid growth, particularly in Australian courts and tribunals, which lead the world in this respect, of the concurrent, or 'hot tub', technique of eliciting expert evidence.

12.43 It may be acknowledged that some Judges and many counsel are, initially at least, dubious about the benefits of concurrent evidence. There are a number of reasons for this, but two important concerns are the potential for evidence given by a number of people at once to develop into an ill-controlled rabble, and the perceived diminution in the role of traditional cross examination in the testing of expert evidence. In practice, it is suggested that, particularly if the exercise is conducted along the lines summarised below, not only is there little reason for these concerns, but it has been observed that the evidence tends to come out in a more focused way than is usual in traditional techniques and the necessity for aggressive cross-examination (whilst still available) diminishes, particularly because 'position taking' seems to reduce.

12.44 The following outline of a typical 'hot tub' process is taken from Justice Rares' paper referred to above, which may be consulted by practitioners for a detailed description of the process and for a guide to further reading. In addition, practitioners should take steps to review '*Concurrent Evidence – New Methods With Experts*', a joint production of the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, in which Justice McClellan (CJ at CL, NSW Supreme Court) presides over a re-enactment of an actual hearing using the technique. The production is available on DVD and on the internet (on the website of the Judicial Commission of NSW) and is a valuable resource for both counsel and experts.

12.45 The process commences in a traditional way with the preparation of expert reports. Even at this stage, concurrent evidence techniques can have a beneficial effect, because if experts know that their views will be subject to a process of live peer review in the witness box, there is less incentive to take extreme positions designed to withstand a less well informed challenge by counsel in cross-examination.

12.46 There should then be a direction for a pre-trial conference between experts to produce a joint report in the manner already described, listing the areas of agreement and disagreement together with a short statement of reasons in each case. Again, lawyers and clients should be excluded from this conference. Although, as suggested above, it may be useful for lawyers to suggest additional issues if they have been missed, it is suggested that it is prudent to direct that the initial report should be signed by the experts before any such suggestions have been made, which can then be adopted if there is agreement. It is of course possible that parties are so at odds that they disagree even on any such additional issues – one solution is then to ask the experts to opine on each party's requested additions.

12.47 Very occasionally, the experts agree on the approach to be adopted, leaving only the differing assumptions to be dealt with. In those circumstances, there is usually no need to call the experts at all, as the assumptions will be established (or not) by witnesses of fact and/or documents in the manner described above.

12.48 Once the joint expert report has been prepared, identifying the issues about which there is a contest, the Court is in a position to consider the making of (if it has not already made) a concurrent evidence direction. This will usually occur at a directions hearing well prior to the hearing. It may be convenient at the same hearing to set the agenda for the concurrent evidence process – although some Judges defer this until the actual hearing. The agenda usually consists of the disputed issues identified in the joint report, together with such other issues as the Court considers relevant, presented in a logical order. At the same hearing, consideration should be given to the physical layout of the Court. If there are, for example, four experts involved, there will usually not be room at or near the witness box for all of the experts. It is prudent to direct, ahead of time, that convenient arrangements be made – often by the provision of a table set up at the end of the bar table, or in the jury box if there is one, for the seating of the experts, ensuring that they have access to such presentational aids as they may require. Some Judges like to provide for one microphone to be handed about between experts (to assist in reducing the chance of all speaking at once), but this is a matter of personal preference.

12.49 At the hearing, all experts are called, sworn and take their places. The Judge will then give a short overview of the process and what he or she expects to happen. Particular attention should be given to reassuring the experts about their ability to comment on the evidence of others in the ways summarised below.

12.50 The first step is to confirm that the agenda sets out all the issues which the experts wish to address together with such other issues as the parties may have persuaded the Court ought to be the subject of expert evidence. Each of the items in the agenda is then addressed in turn.

12.51 Each expert is asked (by the Judge) to identify and explain the issue as they see it. There is no magic in the order of play – if no particular expert wishes to start, the process can go according to party order. Once each expert has finished, the other experts can then comment on what has just been said, to agree, disagree, amplify or whatever. That process continues until all experts have had a chance to state their view on the issue.

12.52 Each expert is free to ask questions of the other experts during this or indeed any other part of the hearing. Although one may fear excessive zeal in connection with this exercise, the process of live peer review seems to reduce both the incidence of extreme 'position taking' and the tendency of experts to become advocates. It often occurs that Judges intervene to obtain explanation or amplification during this stage of the process. This is not very different from the approach which most Judges take to expert evidence in traditional forms of eliciting evidence, but it allows the Judge to get input from all the experts on a particular issue at the same time and in the same place.

12.53 This process can continue until the Judge is clear in his or her own mind that they have a grasp of what the experts say on each issue. Counsel usually (some with difficulty) stay relatively quiet during this process – although interjections to clarify or correct may well be appropriate. Some Judges request counsel, at the outset, to identify the issues upon which they will seek to cross-examine, others simply ask at the conclusion of the initial session whether anyone seeks to ask any questions.

12.54 Approaches will vary from Judge to Judge, but it is often convenient, once the Judge feels they have a grasp of the point, to invite cross examination. This too can be done in party order if there is no agreement to the contrary. Counsel can then ask questions of any of the experts. There is still room for searching and if need be, robust questioning, including questioning as to matters of credit, but there is less room for questions which are artificially constructed or involve the positing of assumptions which are unrealistic, because these defects will quickly be revealed in the exchanges between the experts or between the experts and the Judge, which are likely to follow such questioning. Counsel will need to become more flexible in their cross-examination techniques. It is suggested that this is no bad thing, as whole new techniques of cross-examination will now become common. For example, to engage the process of live peer review, if an unfavourable answer is obtained to a particular question, counsel can (if they are brave enough) ask other experts immediately whether or not they agree.

12.55 It is possible that the apparent reduction in the number of opportunities to take forensic advantage of expert witnesses is one reason for the reluctance of some to embrace concurrent evidence – but it is suggested that such a reason does not carry much weight.

12.56 Other counsel may then follow, asking questions of their own and other experts. The Judge can continue to ask questions as and when he or she thinks fit. Some Judges like to 'wrap up' on an issue, with a request that any misconceptions be cleared up then and there.

12.57 Each of the issues in the agenda is dealt with in the same way. Once all of the issues have been dealt with, it is common to ask whether any outstanding matters have come up during the session which any expert wishes to comment upon.

12.58 Quite apart from the effect on the sorts of concerns outlined in paragraph 12.39 above, it has already been observed that technique of concurrent evidence can save a great deal of time and accordingly expense, because it has been found that the expert evidence is concluded much more quickly than is the case with traditional techniques.

H SURVEY EVIDENCE

12.59 Parties should not be put to the expense of commissioning and carrying out surveys only to find out at the hearing that the survey is inadmissible or unpersuasive. The risk of this happening is reduced if parties take care to adopt the practice set out in Practice Note CM 13, which sets out the steps that the Court expects will be followed in this connection. In particular, CM 13 provides as follows:

> 1. *Notice should be given in writing by the party seeking to have the survey conducted to the other parties to the proceeding.*
> 2. *The notice should give an outline of:*
>   a. *the purpose of the proposed survey;*
>   b. *the issue to which it is to be directed;*
>   c. *the proposed form and methodology;*
>   d. *the particular questions that will be asked;*
>   e. *the introductory statements or instructions that will be given to the persons conducting the survey;*
>   f. *other controls to be used in the interrogation process.*
> 3. *The parties should attempt to resolve any disagreement concerning the manner in which the survey is to be conducted and any of the matters mentioned in 2 above.*
> 4. *The matter of the survey should be raised with the Court at the directions hearing as soon as possible after the steps mentioned above have been taken.*

I OTHER MATTERS

12.60 Parties should ensure that they have particular regard to the requirements of r 23.02 and 23.13[176] as to the form of the expert report and Practice Note CM 7 as to the obligations of the expert and the form of their evidence. It is unnecessary to set out the content of these matters here.

176 O 33 r 20 of the Old FCR.

13. REPRESENTATIVE PROCEEDINGS – CLASS ACTIONS

by John Emmerig, Ben Slade and Assoc Prof Michael Legg

A INTRODUCTION

13.1 Part IVA of the FCAA establishes a procedure for the prosecution of group claims via a statutory representative proceeding (representative proceeding) that is commonly known in Australia as a 'class action'.

13.2 This chapter describes practical measures that should be considered in the conduct of this form of litigation in the Court.

13.3 Parties contemplating or involved in a representative proceeding should familiarise themselves, in particular, with the following:

(a) The requirements of Part IVA of the Act;

(b) Division 9.3 of the FCR; and

(c) Practice Note CM 17 dated 1 August 2011 (CM 17).

13.4 Other useful sources for further information are cited throughout this chapter.

13.5 Save where otherwise stated, it is intended that defined terms in Part IVA carry the same meaning in this chapter.

Definitions

13.6 In this chapter:

(a) 'Applicant' means the applicant or potential applicant in a class action.

(b) 'Shareholder class action' means a potential action to be commenced under Part IVA of the FCAA on behalf of security holders arising from, relating to or in connection with securities listed on the Australian Securities Exchange (ASX) or Chi-X Australia or other financial market within the meaning of the *Corporations Act 2001* (Cth).

(c) 'Parties' means applicant(s) and respondent(s).

(d) 'Respondent' means the respondent or potential respondent in a class action.

13.7 While Part IVA refers to 'representative proceedings', 'group members', 'representative party' and 'sub-group', the language that tends to have more meaning to clients is 'class action'. Related terms include 'class members', 'class representative' and 'sub-class' or 'sub-classing'. The risk with the loose application of litigation terminology used in the US to Part IVA concepts is that there are important points of distinction between the two procedures that may be misunderstood by non-lawyer participants. That said, the use of the US terminology is so pervasive in the media and the public arena (and increasingly in the case law) when referencing Part IVA cases that a sensible balance needs to be achieved for effective communication to a prospectively wide range of client types on both sides of the litigation. This is implicitly recognised by the Court in the terminology employed in the 'Sample Opt Out Notice' in Schedule A of CM 17 (which speaks of 'class action', 'class members' and the like). In dealings with the Court, it is appropriate that the correct language of Part IVA is employed as the default position by practitioners when addressing the bench orally or in written submissions, unless the Court proposes otherwise. This chapter will use the language of the legislation.

B IS PART IVA THE RIGHT MECHANISM?

13.8 Before commencing a representative proceeding, due consideration should be given to the alternative means by which group or related proceedings might be resolved by litigation. Specifically:

(a) the traditional form of representative proceeding under Division 9.2 of the FCR;

(b) the use of a multi-applicant format where all of the prospective group members are applicants in their own right.[177]

(c) test cases;

(d) joinder of plaintiffs under rule 9.02 of the FCR;

(e) consolidation of related proceedings under rule 30.11 of the FCR; and

(f) joint trials/joint hearing/joint evidence orders.

13.9 The commentary in 'Competing Class Actions' (Section P) below discusses the use of consolidation and joint trial/joint hearing/joint evidence orders in conjunction with representative proceeding procedures to facilitate the efficient management of matters involving multiple representative proceedings covering a common claim matrix.

C SUITABLE TYPES OF CASE

13.10 Litigants and legal advisers wishing to understand in detail the types of cases in which the Part IVA procedure has been used will be greatly assisted by Professor Morabito's two major studies of class action litigation in Australia.[178]

13.11 Over the course of the last 20 years, the pattern of usage of the Part IVA procedure for different case types has changed. This appears to be due to a number of factors. Among them are: legislative changes creating new causes of actions (e.g. the amendments to the *Corporations Act 2001* (Cth) establishing the continuous disclosure regime), law reform modifying the size or availability of remedies (e.g. tort law reforms in the early 2000s introducing damages caps and liability limits, and the constraints imposed by the *Migration Act 1958* (Cth), judicial developments concerning the role of litigation funding in representative proceeding litigation (e.g. decisions in *Fostif*,[179] *Multiplex*,[180] and *Chameleon Mining*[181]), the investment patterns of litigation funders, as well as historic, social, technological and financial developments spanning the global financial crisis, complications with pharmaceutical products and medical devices, improvements in technologies and studies that map their impact and the availability of a wide range of financial products and investment schemes.

13.12 In recent years, a factor dictating the types of Part IVA proceedings that have been brought has been those that are commercially viable for third party litigation funders. In many senses, litigation funding has proven to be the life-blood of much of Australia's representative proceeding litigation at federal and state level. Not all cases are funded by third party litigation funders but a sufficiently large number of class actions have been funded in this manner that it has had a major impact on the sorts of cases being conducted. Representative proceedings funded by the group members are rarely heard of, and actions funded by law firms on a conditional fee basis are the exception rather than the rule. This is a consequence of the time, cost and complexity of most representative proceedings and the risk burden, carried by the representative applicant, of an adverse costs order.

177 See for example: *Ackers v Austcorp International Ltd* [2009] FCA 432

178 V Morabito, *An Empirical study of Australia's Class Action Regimes – First Report: Class Action Facts and Figures* (Dept of Business Law and Taxation, Monash University, 2009) and V Morabito, *An Empirical study of Australia's Class Action Regimes – Second Report: Litigation Funders, Competing Class Actions, Opt out Rates, Victorian Class Actions and Class Representatives Figures* (Australian Research Council, Victorian Law Foundation, 2010).

179 *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* [2006] HCA 41; (2006) 229 ALR 58; (2006) 80 ALJR 1441.

180 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited* (No 4) [2010] FCA 1029 ('Multiplex').

181 *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45, 246 CLR 455, (2012) 86 ALJR 1289, 292 ALR 233.

13.13 Representative proceedings in more recent times have been in the following areas:

(a) Shareholder class actions (e.g. GIO,[182] Aristocrat,[183] AWB,[184] Centro,[185] Multiplex,[186] OZ Minerals,[187] Gunns,[188] Sigma,[189] Nufarm,[190] NAB, [191]GPT[192]);

(b) Investment and property schemes class actions (Lehman Brothers Australia,[193] Standard & Poors,[194] MFS/Octaviar,[195] TimberCorp MIS,[196] Tracknet MIS,[197] Storm Finance[198]);

(c) Product liability class actions (pacemakers[199], Vioxx,[200] prosthetics[201]);

(d) Cartel class actions (vitamins,[202] corrugated cardboard,[203] rubber,[204] air cargo[205]);

(e) Class actions against governments (Pan Pharmaceuticals,[206] equine influenza[207], people in care facilities,[208] Queensland floods);

(f) Consumer class actions (bank fees,[209] pay-day loans,[210]and

(g) Environmental and other disaster class actions (gas plant explosion,[211] Victorian bushfires,[212] Queensland floods[213]).

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182 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980.

183 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19.

184 *Watson v AWB Limited (No 7)* [2010] FCA 41.

185 *Kirby v Centro Properties Limited (No 6)* [2012] FCA 650.

186 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029.

187 *Hobbs Anderson Investments Pty Limited v Oz Minerals Limited (No 2)* [2011] FCA 1506.

188 *Foley v Gunns Limited ACN 009 478 148* [2012] FCA 595.

189 *Earglow Pty Ltd v Sigma Pharmaceuticals Ltd* [2012] FCA 1496.

190 *Hadchiti v Nufarm Limited* [2012] FCA 1524.

191 *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited (No 3)* [2012] VSC 625.

192 *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626.

193 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028.

194 *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65

195 *Mercedes Holdings Pty Ltd v Waters (No 6)* [2012] FCA 1412.

196 *Woodcroft-Brown (in liq) & Ors v Timbercorp Securities Ltd* [2011] VSC 427.

197 *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2005] FCA 298.

198 *Richards v Macquarie Bank Limited (No 5)* [2013] FCA 1442.

199 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [2002] FCA 957 and *Darcy v Medtel Pty Ltd (No 4)* [2004] FCA 1599.

200 *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128.

201 *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370 (knees); *Stanford v DePuy International* [2013] FCA 1304 (hips).

202 *Darwalla Milling Co Pty Ltd v F Hoffman* La Roche Ltd (No 2)*[2006] FCA 1388, (2006) 236 ALR 322.

203 *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671.

204 *Wright Rubber Pty Ltd v Bayer AG (No 3)* [2011] FCA 1172.

205 *De Brett Seafood Pty Ltd v Qantas Airways Limited (No 6)* [2013] FCA 591.

206 *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277.

207 *Clasul Pty Ltd v Commonwealth of Australia* No NSD368 of 2013.

208 *McAlister bhlr NSW Trustee and Guardian v State of NSW Federal Court* No 1968 of 2013.

209 *Paciocco v Australia and New Zealand Banking Group Limited* [2014] FCA 35.

210 *Gray v Cash Converters International Limited Federal Court* [2014] FCA 420.

211 *Johnson Tiles Pty Ltd (ACN 004 576 103) v Esso Australia Ltd* [2000] FCA 1572.

212 *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corporation Limited* (Ruling No 5) [2012] VSC 66; *Thomas v Powercor Australia Ltd* [2011] VSC 614.

213 *Rodriguez & Sons Pty Lty v Queensland Bulk Water Supply Authority trading as Seqwater and others* CL2014/200854 Supreme Court of NSW.

D OPERATIONAL FEATURES OF A PART IVA PROCEEDING

13.14 A number of key features of the Part IVA process are materially different to other forms of litigation. As such, a key challenge for those advising clients in this terminologically-challenged environment is to ensure that clients are properly informed about how Part IVA operates, how it will affect their position and any relevant differences in the legal effect of the formal and colloquial terminology. The Sample Opt Out Notice provides a convenient and plain-English summary of key aspects of the Part IVA procedure. Practitioners and clients are likely to find the summary helpful as a base document for this purpose.

13.15 In contemplating the suitability and use of a representative proceeding as the preferred mode of litigation, practitioners should be fully acquainted with the core operational features of the Part IVA regime. These include the following:

(a) One or more members of a group of claimants commence the proceedings as the representative of the group on whose behalf the proceeding has been filed: ss 33A and 33C. The representative applicant is a party to the proceeding. There can be more than one representative appointed to represent the group, but this is optional and generally tends to be the course taken only when sub-groups are required (see further below).

(b) A group member is generally not a party to the proceeding.[214] That said, under Part IVA, they are treated akin to parties to the proceeding for some purposes (e.g. as regards being bound by a settlement or judgment unless they opt out).[215] Group members are not required to be identified by name in the application. They play, as Finklestein J has said, an 'essentially passive role' in the conduct of the litigation.[216] However, on the application of a group member, the court may replace the representative if it appears that the representative is not adequately representing the interests of the group members: s 33T. A group member may, with leave of the court, be appointed to represent a sub-group.

(c) A core feature of the Part IVA representative proceeding regime is its use of the 'opt out' model. Under this model (1) the consent of a person to be a group member is not required unless they fall into one of the defined categories in s 33E (i.e. the Commonwealth or a State or Territory, a Minister or governmental officer or a public purpose body corporate) and (2) all those persons who fall within the definition of a 'group member' in the representative proceeding who do not opt out prior to the date appointed by the court for so doing, will be bound by any judgment: s 33ZB. Those who do opt out retain whatever pre-existing entitlement they had to pursue individual litigation.

13.16 Section 33C of the Act sets out what the High Court has described as 'threshold requirements'[217] which must be met if an action is to be validly commenced under Part IVA.

214 *Mobil Oil Australia Pty Ltd v The State of Victoria* (2002) 211 CLR 1, [50]; *Johnson Tiles Pty Ltd v Esso Australia* (1999) 94 FCR 167, [31].

215 s 33ZB.

216 *P Dawson Nominees v Brookfield Multiplex Limited (No 2)* [2010] FCA 176, [16]–[17].

217 *Wong v Silkfield Pty Ltd* [1999] HCA 48, [26].

13.17 First, there must be at least 7 persons with claims against the same person for a representative proceeding to be commenced: s 33C(1)(a) (the numerosity requirement). There has been significant controversy about what this section requires, most of which has been recently resolved by the Full Court in *Cash Converters International v Gray* [2014] FCAFC 111, in which the Court held [at 13]:

> *It is common ground that the applicant must have a claim against each respondent. But does s 33C(1) of the FCA require that each group member have a claim against each respondent to the proceedings? The answer is no.*[218]

(a) The *Cash Converters* decision has resolved the issue first raised by the Full Court in *Phillip Morris (Australia) Ltd v Nixon*.[219] The decision was approved or applied in a number of cases[220] but not followed in *Bray v Hoffman La Roche*.[221] Various single judge Federal Court judgments before and after *Bray* went both ways on the issue.[222]

(b) The interpretation of s 33C(1)(a) adopted in *Cash Converters* is now clear and is binding on a single judge of the Federal Court.[223]

(c) Whether all group members must have a claim against at least one respondent remains uncertain, although it is possible to read the judgment of Justice Finkelstein in *Bray* as suggesting that this is required.[224]

(d) If there is any uncertainty or a practitioner anticipates any issue arising out of s 33C(1)(a), perhaps as a result of a claim provoking applications for joinder and cross claims, consideration might be given to whether the case could be structured in a different way, for example: when filing claims against more than one respondent a practitioner might consider:

i. The use of case structuring techniques, such as parallel class actions supported by joint hearing/evidence orders or consolidation orders, which may provide a means of circumventing the complications created by some of these issues, providing that their use in a given context would not otherwise constitute an abuse of process.

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218 Section 33D requires the applicant to have standing or "sufficient interest" to commence and continue a representative proceeding against each respondent.

219 Phillip Morris (Australia) Ltd v Nixon (2000) 170 ALR 487 in which Sackville J, with whom Spender and Hill JJ agreed, *stated: '[Section] 33C(1)(a) is not satisfied if some applicants and group members have claims against one respondent (or group of respondents) while other applicants and group members have claims against another respondent (or group of respondents) … Of course, if there are two sets of claims against two sets of respondents, it may well be that each can be the subject of representative proceedings*. It may even be that directions can be made for them to be heard together: Ryan v Great Lakes Council (1997) 149 ALR 45, 48 per Wilcox J. But they cannot both be the subject of the same representative proceedings', 514, [127] per Sackville J; 489, [1] per Spender J, 491, [13] per Hill J.

220 See *Kirby v Centro Properties Ltd* (2010) 189 FCR 301; *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166; *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342; *Guglielmin v Trescowthick (No 2)* (2005) 220 ALR 515; *Johnstone v HIH Ltd* [2004] FCA 190, [38]; *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 326; *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209.

221 *Bray v Hoffman La Roche* (2003) 130 FCR 317, [248]; *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153 (15 July 2003), [248].

222 For example *Johnstone v HIH Insurance Ltd* [2004] FCA 190, *Auskay International Manufacturing & Trade v Qantas Airways Ltd* (2008) 251 ALR 166 and *Kirby v Centro Properties Ltd* [2010] FCA 1115 support the *Phillip Morris* interpretation whereas *Milfull v Terranora Lakes Country Club Ltd* (in liq) (2004) 214 ALR 228, and *McBride v Monzie Pty Ltd* (2007) 164 FCR 559 and *Gray v Cash Converters International Limited* [2014] FCA 420 support the alternative interpretation as preferred by two judges in Bray.

223 As held by Farrell J in *Gray v Cash Converters International Limited* [2014] FCA 420 and upheld on appeal in *Cash Converters International v Gray* [2014] FCAFC 111

224 Finkelstein J in *Bray v Hoffman La Roche* (2003) 130 FCR 317 said, [248]: '*It can immediately be acknowledged that a properly constituted representative proceeding must involve a group of seven or more persons each of whom has a claim or claims against one person. But that is all the section requires.*'

For example, one could seek orders under s 33ZF, s 23225 and/or FCRs r 1.32 that a proceeding be made into two separate proceedings, one against the first respondent and the other against the second respondent and that the two separate proceedings be heard and determined together.[226] The court is also empowered to give directions under Part VB of the Act that support these structures if to do so would promote the efficient use of court time and resources.

ii. Framing the pleaded claims so as to ensure that all group members have at least one claim against one of the respondents.[227]

13.18 Secondly, the claims of all group members must be 'in respect of, or arise out of, the same, similar or related circumstances': s 33C(1)(b) (the connectivity requirement).

(a) The case law emphasises that the 'circumstances' need not be identical.

(b) The 'connectivity' or 'relatedness' requirement was originally interpreted narrowly by the court, but that trend has changed and it increasingly appears to be interpreted more liberally. By way of illustration, in the *Harris Scarfe* class action,[228] the Court held that the requisite degree of 'relatedness' was present for a class of 11,300 members relying on more than 70 relevant documents produced over a five year period.

13.19 Thirdly, there must be at least one substantial issue of law or fact that is common to the group members' claims: s 33C(1)(c) (the commonality requirement). This standard to satisfy this limb of the threshold test for commencing a Part IVA proceeding is set very low. 'Substantial' does not indicate a large or significant issue but instead is 'directed to issues which are 'real or of substance".[229] The idea is that the common issue not be trivial or contrived. Further, only one substantial issue is required. In the *GIO shareholder* class action,[230] the Court held that an adequate common question was whether the respondents' conduct was misleading or not. That differences were likely as between group members on issues such as causation (i.e. specifically, the proof of reliance) and the individual damages suffered by different group members did not prevent the requirement from being satisfied.

13.20 Part IVA imposes other requirements that a practitioner should be aware of before commencing proceedings. The primary matters are:

(a) A representative proceeding commenced in the Court must attract federal jurisdiction by making at least one genuine federal claim, in the sense that the federal claims are 'not obviously doomed to fail': s 33G.[231] Once jurisdiction is grounded, the Court can determine claims under the laws of the states or territories under s 79 of the *Judiciary Act 1903* (Cth) and the common law by operation of s 80 of the Judiciary Act.

(b) Notice (the form and content of which must be approved by the Court)[232] of the filing of the class action must be given to group members of the commencement of representative proceeding and the right to opt out before the date fixed by the Court: s 33J. Personal notice is only required where it is reasonably practical and not unduly expensive, otherwise notice may be given by press advertisement, radio or television broadcast, as directed by the Court. The Court can dispense with notice requirements if the claim does not include a claim for damages: s 33X(1) and (2). A group member opts out by giving written notice to the court or to the applicant's solicitors. It is suggested that a notice informing of the action and providing an opportunity to opt out should be given to all group members soon after the close of pleadings.[233]

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225 As to the breadth of the power in s 33ZF: see e.g. *Vernon v Village Life Ltd* [2009] FCA 516, [64]–[67] per Jacobson J; *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 3–5 per Wilcox J; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [48], per Sackville J; *TMAC Pty Ltd t/as Northstar Property Services v Thomas Ford Trading Pty Ltd t/as Fresh Telecoms* [2010] FCA 445, [43]–[44] per Cowdroy J.

226 Restructuring of proceedings in this manner was raised by Branson J in *Bray*, [200] as being a potential solution to the problem wrought by *Philip Morris* (which her Honour followed).

227 Such as a claim for a declaration of misleading conduct as in the *GIO* class action (*King v GIO Australia Holdings Ltd* [2000] FCA 617 and *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342 in the Supreme Court of Victoria.

228 *Guglielmin v Trescowthick (No 2)* [2005] FCA 138.

229 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

230 *King v GIO Australia Holdings Ltd* [2000] FCA 617.

231 *Cook v Pasminco Ltd* [2002] FCA 677.

232 s 33X and 33Y.

233 Although care should be taken to avoid embarking on the opt out process if the pleadings are likely to be substantially amended.

(c) While the s 33C requirements for commencing a representative proceeding may be readily met in a given factual context, a separate and important further consideration is whether the court will permit the proceeding to be *continued* after it is commenced as a Part IVA procedure. Section 33N provides the Court with an express power to order that a proceeding no longer continue under Part IVA where it is satisfied that such an order should be made in the interests of justice for any one of four reasons:

i. Overall excessive cost – the costs of conducting the action as a representative proceeding are likely to exceed the costs of separate proceedings;

ii. Inappropriateness – all the relief sought could equally be obtained in an action other than representative proceeding;

iii. Inefficiency/ineffectiveness – the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

iv. Other – it is otherwise inappropriate to have the claim dealt with as a representative action, including where the cost to the respondent of identifying the group members and distributing damages to them would be excessive in view of the total damages at stake.[234]

(d) Where there are issues common to some but not all group members, the Court has power to establish sub-groups of group members and to appoint a sub-group representative party or make other appropriate directions. The Court can direct that an individual or sub-group commence a separate proceeding to deal with issues relating only to that member or sub-group: s 33S.

(e) A broad range of remedies may be sought in a representative proceeding under statute, in equity or at common law. A single representative action can also be brought where different people who are part of the represented group require different remedies.[235] Damages may be claimed, even if they must be separately assessed for each individual group member.[236] The Court may make an aggregate damages award without specifying the amounts awarded to individual group members, but only where a reasonably accurate assessment of the amount to which individual group members is entitled is possible.[237]

(f) If the Court orders the payment of damages, it may also specify the manner in which a group member is to establish his or her entitlement to damages and how the money is to be paid to group members, for example by setting up and administering a fund for distribution to eligible group members.[238] If the Court orders the establishment of a fund, it must also order notice to be given to group members, specifying a date by which they may make claims against the fund and the manner in which they are to make their claims.

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234 See *Bright v Femcare Ltd* (2002) 195 ALR 574 and *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 for detailed discussion of how s 33N is to be interpreted and applied.

235 Care must be taken to ensure that this does not create difficulties for the representative party in providing adequate representation. See *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398.

236 See for example: *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370.

237 Sections 33Z(1)(f) and 33Z(3).

238 See, for example: *Hadchiti v Nufarm Limited* [2012] FCA 1524 as to the administration of a 'Settlement Distribution Scheme'.

(g) Appeals against judgments in representative proceedings may be brought where they relate to issues common to group or sub-group members: s 33ZC[239] If the representative party does not institute an appeal proceeding within the 21 day limitation period, another member of the group or sub-group may institute an appeal representing the group members, within a further 21 day period: s 33ZC(6). If the issue relates only to the claim of an individual group member, that individual can appeal against the judgment in the representative proceeding.

(h) The use of the representative proceeding procedure has been expressly prohibited in relation to migration proceedings.[240] Beyond this, providing the threshold requirements of Part IVA are met for the commencement and maintenance of a representative proceeding, there is no limit on the types of action that may utilise the representative proceeding procedure.

E THE CHOICE AND ROLE OF THE REPRESENTATIVE PARTY

13.21 Important aspects of the role of the representative party have been described earlier.

13.22 In advising the appropriate person whether or not to be the representative party for the group, practitioners may see merit in giving weight to the following considerations:

(a) Extent to which the proposed representative's claim is sufficiently representative of the group member claims CM 17 articulates the Court's expectation that: '*The statement of claim should be drawn so that the applicant's personal claim can be used as the vehicle for determining the common questions in the action*'.[241] A representative applicant's claim should therefore be carefully considered and understood, before pleading the representative claim, as the court and the respondent will expect that the representative's claim will be heard during the trial of common issues and determined in the initial judgment. If the representative's circumstances are not sufficiently representative of the claims of the group members, there is a risk of:

i. The representative being challenged under s 33T as being not able adequately to represent the interests of group members (see below); or

ii. The representative proceeding failing for all or many group members consequent on negative findings or an inability of the court to make findings on key issues that impact on many group members in the initial judgment.[242]

(b) Willingness to serve as the representative and commitment to doing so for the duration of the litigation[243]

i. A representative applicant must have the requisite standing to commence and continue a proceeding against each respondent: s 33D;[244]

ii. A representative applicant must be willing and able to give the necessary instructions to prosecute the claim to the expiration of the trial of common issues as well as any appeals;

iii. A representative applicant should have the temperament, honesty and poise to give the required evidence in support of the individual claim, including evidence of reliance if needed;

iv. The representative applicant's claim should be considered to have good prospects of success, be representative of those of most group members and it should not be overly factually or legally complex, such as one that presents the court with difficult decisions on reliance, causation or loss;

v. A representative applicant must understand and accept the exposure to costs. This is discussed at (d) below;

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239 See for example: *Medtel Pty Ltd v Courtney* [2003] FCAFC 151 and *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128.

240 s 486B(4) *Migration Act 1958* (Cth).

241 See cl 2.2.

242 See for example: *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128.

243 For a comprehensive discussion of these factors see: Peter Cashman, Class Action Law and Practice (Federation Press 2007), 193.

244 *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 167.

vi. The representative applicant's claim must not be time barred;

vii. The representative applicant's circumstances should not present any conflict with those of the group members, or, if they do, this conflict can be resolved by the use of sub-group representatives;

viii. Changing a representative party during the course of a proceeding is possible but can be disruptive to the orderly conduct of the case;

ix. A representative may not withdraw without the leave of the court: s 33W;

x. A representative may not settle his or her individual claim without leave: s 33W(1), a constraint that does not apply to group members; and

xi. A representative party may be substituted by the Court, on the application by a group member where the representative party is not able adequately to represent the interests of group members: s 33T. In *Tongue v Council of the City of Tamworth*, for example, Jacobson J ordered the substitution of a representative who was suffering ill health and had lost the confidence of approximately half of the group members.[245]

(c) The representative's discovery and evidentiary burden

i. The scale and cost of the discovery obligation may differ significantly depending on whether an institution or an individual occupies the representative role. This is particularly so in cases involving financial dealings as institutional investors, such as large superannuation funds, may have many funds with many fund managers who make investment decisions for many beneficiaries. The documents associated with those decisions and actions may be of interest to a respondent, they may be relevant to the dispute and they may therefore be discoverable.

ii. The scale and cost of presenting a claimant's lay evidence will differ substantially between potential representatives. For example, if the state of the applicant's mind when entering a transaction is likely to be relevant it is often easier to satisfy the evidentiary burden if the representative applicant is a natural person rather that a corporate entity.

(d) Financial position of the representative and the availability of litigation funding

i. The representative party will need to consider in advance of taking on the role how he, she or it will pay for the legal representation and meet any prospective final or interlocutory adverse costs order or security for costs order.

ii. The representative party, and not the group members, is liable for meeting an adverse costs order in respect of the representative proceeding: s 43(1A). The court is not authorised to make such an award against a group member save where the limited exceptions arising under s 33Q (where a group member becomes a sub-representative party) and 33R (where a group member is permitted to appear for the purpose of determining an individual issue) apply. Where the Court is satisfied that reasonably incurred costs of the representative party are likely to exceed the costs recoverable from the respondent, it may order an amount equal to the whole or part of the excess to be paid to that person out of the damages awarded: s 33ZJ.[246]

iii. Large scale representative proceeding litigation can be highly expensive to run for both parties. If the representative party is impecunious or in a weak financial position, this may enhance the prospects of a security for costs order being made.[247] If such an order is made and cannot be met it may result in the proceeding being stayed.

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245 *Tongue v Council of the City of Tamworth* (2004) 141 FCR 233; [2004] FCA 1702.

246 See *Wingecarribee Shire Council v Lehman Bros Aust Ltd* (in liq) (No 8) [2013] FCA 411, [8].

247 Although a court is unlikely to imposed a security for costs order against an impecunious natural person who is the representative of an open class of natural persons (see Cook v Pasminco Ltd [2000] FCA 677).

iv. Clearly, much of this cost risk can be removed or ameliorated if the representative is able to put in place an effective litigation funding arrangement. Indeed, not seeking litigation funding may be a factor to be weighed in the exercise of the discretion to order security.[248] Such arrangements usually involve all members of the class agreeing to share a portion of any damages award at a contractually agreed rate of return. This can commonly be between 20% and 40% of the damages recovered.

(e) Sub-group representative party

i. Similar considerations to those applicable to representative applicants will apply mutatis mutandis in respect of a group member seeking to take on the role of a sub-group representative party.

F GROUP MEMBER ARRANGEMENTS – CLOSED CLASS AND OPEN CLASS REPRESENTATIVE PROCEEDINGS

13.23 A critical strategic choice for the representative applicant and claim group is whether the representative proceeding should be commenced for a closed or open class.

13.24 A closed class representative proceeding is where the group members are defined, not just by their being a member of the group who claims a right to a remedy, but by a limiting characteristic, such as being one of the members of that group who has also entered into a funding agreement with a litigation funder or a retainer with a particular law firm. In this sense, the term is used in the manner discussed in *Dawson Nominees Pty Ltd v Multiplex Limited*.[249]

13.25 An open class representative proceeding is where the group members are not defined by a characteristic unrelated to their claim, such as that they have entered into a funding agreement with a litigation funder or a retainer with a particular law firm.

13.26 Thus, in the *Gunns* class action,[250] by way of illustration, the group was defined in the application as follows:

> *…persons who:*
>
> *(a) during the period from 31 August 2009 to 19 February 2010 inclusive (Relevant Period) acquired an interest in shares in [Gunns];*
>
> *(b) at the close of business on 19 February 2010 held an interest in shares in Gunns obtained during the Relevant Period;*
>
> *(c) have entered into a litigation funding agreement with IMF (Australia) Limited in relation to this proceeding on or before 20 April 2011; and*
>
> *(d suffered loss and damage by reason of or resulting from one or more of the Contraventions, as defined…*

13.27 This definition is a closed class format. Had cl (c) of the group definition not been included, it would have been an open class representative proceeding.

13.28 Where a class action is commenced as a closed class representative proceeding, the court may nevertheless make an order at any stage in the proceeding to open, and possibly, close the class. This is usually done in response to an application aimed at facilitating settlement discussions and a resolution of the proceedings by this means. See Section R below for more details on this process.

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248 See *Madgwick v Kelly* [2013] FCAFC 61, [77]–[78].

249 *Dawson Nominees Pty Ltd v Multiplex Limited* (2007) 242 ALR 111 [NB: The term has been used in a different sense in the cases in the settlement context to refer to a representative proceeding (be it of a closed class or open class kind) where an order has been made by the court requiring group members to make an election as to whether they wish to be included in a settlement (with the attendant consequence that if they do not notify their positive election they are precluded from participating in the settlement). See *Dorajay Pty Ltd v Aristocrat Lesiure Limited* (2008) 67 ACSR 569, 13]; *Winterford v Pfizer Australia Pty Limited* (2012) FCA 1199.

250 *Foley v Gunns Limited* ACN 009 478 148 [2012] FCA 595.

G LITIGATION FUNDING

13.29 Litigation funding is generally permissible to support the conduct of a representative proceeding.[251]

13.30 There are a range of different types of funding products available in the market. They include full funding arrangements where the costs (including disbursements) of the prosecution of a claim, together with any security for costs orders and adverse costs orders are covered by the funder, through to more selective arrangements that cover only a portion of the costs (e.g. to a capped sum) or only the prosecution costs (but not adverse costs orders) and others that cover only adverse costs orders; and all manner of variations in between.

13.31 The presence or absence of litigation funding may be a material consideration on the issue of whether a security for costs order is made.[252]

13.32 Unless the court orders otherwise, a copy of any funding agreement by which a litigation funder is required to pay or contribute to the costs of proceeding for any party, or any security for costs order or adverse costs order, must be disclosed to the court and the opposing parties.[253] The funding agreements may be redacted to 'conceal information which might reasonably be expected to confer a tactical advantage on the other party' (cl 3.6 of CM 17).

Dealing with conflicts of interest

13.33 ASIC has recently identified some of the circumstances in which conflicts of interest between funders, lawyers and funded group members in the litigation funding context may arise, including when:

- the lawyers act for both the funder and the members;
- there is a pre-existing legal or commercial relationship between the funder, lawyers and/or members; and/or
- the funder has control of, or has the ability to control, the conduct of the proceedings.

13.34 *ASIC's Regulatory Guide 248 – Litigation schemes and proof of debt schemes: Managing conflicts of interest (the ASIC Guide)* provides guidance to funders on compliance with the new obligations in the Corporations Regulations in relation to managing conflicts of interest.[254] Many of the issues relevant to funders in this context are, however, equally relevant to lawyers involved in funded proceedings.

The terms of funding agreements

13.35 The *ASIC Guide* also specifically addresses the terms that ASIC expects that lawyers and funders will consider including in funding agreements,[255] such as:

- an obligation on the funder to comply with the new regulations relating to litigation funders having adequate practices in place to manage conflicts of interest (and to disclose any breach);
- an obligation for the lawyers to give priority to the instructions given by the member over those of the funder;
- how disputes in relation to the funding agreement will be resolved; and
- an obligation to provide clear and full disclosure to group members of the terms of the agreement between the funder and the lawyers.

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251 *Campbells Cash and Carry v Fostif* [2006] HCA 41; (2006) 229 ALR 58; (2006) 80 ALJR 1441.

252 *Madgwick v Kelly* [2013] FCAFC 61, [77]–[78].

253 See cl 3.6 of CM 17.

254 *Corporations Amendment Regulation 2012* (No 6), r 7.6.01AB.

255 *ASIC, Regulatory Guide 248*, paras 69–75.

13.36 As the regulatory regime for litigation funders does not extend beyond maintaining adequate practices for managing conflicts of interest practitioners should consider whether additional protective measures might be recommended to their clients in the course of negotiating the terms of funding agreements (including, for example, in relation to the risk of a funder taking steps to avoid liability for an adverse costs order).

H PRE-ACTION PROTOCOLS

13.37 The CDRA applies to representative proceeding litigation. As such, potential representative proceeding litigants are required to take genuine steps to attempt to resolve the dispute before commencing the representative proceeding. It is recommended, unless there are exceptional circumstances, that prior to the filing of a representative proceeding, the representative applicant's lawyers inform the respondent that a claim will be made. If the respondent indicates willingness to attempt to resolve the dispute then genuine steps should be taken to do so.

13.38 The nature of this obligation is discussed in more detail in Chapters 5 and 6.

13.39 For representative proceeding litigation, a practical barrier to achieving an early resolution of meritorious claims can be the limitation of the type, scope and availability of claimant information about the applicant and group members.

13.40 For a closed class representative proceeding, where the membership of the group is known, there should be a greater ability for the applicant to furnish detailed collective claim information, than will be possible with an open class. For example, in a closed class shareholder representative proceeding, some trading data of group members could possibly be provided to a co-operative respondent on an appropriate basis (e.g. subject to confidentiality arrangements if necessary). This information will assist the respondent to assess loss quantification independently and formulate a commercial settlement. A 'Shareholder Class Actions Genuine Steps Suggestion' appears at the end of this section for practitioners to consider.

13.41 Open class shareholder representative proceedings present difficulties for the early sharing of loss data as its availability is necessarily limited. In these circumstances the parties are encouraged to attempt to identify a process by which the respondent might be given enough information about the strength and size of the potential claim to put it in a position to assess whether or not it is prepared to attempt to resolve the claims against it. It may be, for example, that some members of the class who are clients of the applicant's law firm will be able to supply enough data to satisfy a respondent that the potential claim is one worth settling before the commencement of litigation.

13.42 In some forms of representative proceeding litigation, such as product liability claims, it may be that relevant information can be provided so the respondent can assess and understand the financial elements of the applicant/group claims in order to promote early settlement. While it may not be possible for an open class claim to be settled without judicial intervention, parties are encouraged to reach an early pre-action agreement between the parties to seek approval under s 33V of the settlement as soon after filing and the giving of the notices (ss 33J, 33X and 33Y) as possible.[256]

13.43 As such, practitioners conducting both closed and open class representative proceeding litigation should be mindful when entering into engagements with their group member clients, and acquiring information from them about their claims, to consider the most effective means of gathering information that may assist both the genuine steps for pre-litigation party engagement and/or early settlement post filing.

13.44 At a practical level, the sharing of group member information both pre-filing and post-filing presents difficulties in representative proceeding litigation. One example arises because group member identities are not generally revealed at the commencement of a Part IVA proceeding whereas identities of litigants are known to respondents in ordinary litigation. One solution is the use of a confidentiality and contact agreement under which the identity of group members is shared on the basis that it is kept confidential and that the respondent agrees not to make contact with group members. If the respondent is not comfortable with the contact limitation a practitioner could consider a solution that involves the use of redaction methods so that unique data linked to the individual group member such as age, sex, corporate/individual status, geographic location, and so on, can be shared, but

256 See for example: *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370.

not the group member's identity.

Example of a shareholder class actions genuine steps document

Introduction

(a) The purpose of this document is to provide parties to shareholder class actions with guidance as to some of the matters which may be considered in determining appropriate genuine steps prior to the commencement of proceedings in the Federal Court. The document is not intended to be prescriptive or exhaustive and what constitutes genuine steps will vary from action to action and from circumstance to circumstance.

(b) An Applicant would ordinarily notify a Respondent of the issues which are or may be in dispute. This might be done by way of provision of a draft pleading or any other document which sufficiently sets out the nature of the issues in dispute in summary form.

(c) Where an Applicant has notified a Respondent of the issues in dispute it would ordinarily be appropriate for the Respondent to indicate whether it wishes to meet to discuss those issues as promptly as possible. Any such meeting would usually occur within 7–14 days of the initial notification.

The first meeting

(d) If a meeting is convened the parties may wish to consider whether any informal process may facilitate the resolution of the dispute without the institution of proceedings. Such a process may include:

i. a response from the Respondent, or a draft defence, providing its substantive response to the real issues in dispute;

ii. the exchange of appropriate documents which may include:

- share trade data on the part of the Applicant;
- relevant documents on the part of the Respondent;

iii. agreement as to the timetable for the steps referred to in (i) and (ii) above and, if appropriate, any further meeting.

iv. agreement in relation to the suspension of limitation periods for the duration of any agreed process;

(e) agreement that any costs incurred in the agreed process will be costs in the cause should the process be unsuccessful and proceedings be commenced;

(f) agreement regarding:

i. whether any discussions at the initial meeting and/or subsequently are confidential and/or without prejudice; and

ii. the use, if any, which may be made of any documents provided by one party to another in any subsequent proceedings.

Other steps

(g) Following any initial meeting and the taking of any steps which have been agreed at that meeting, the parties may, but need not, meet further to discuss other steps for the resolution of their dispute. In particular, the parties may wish to consider a mediation or other independently assisted alternative dispute resolution process. If this is agreed, the parties will need to determine between them the appropriate procedural steps for that process and a timetable for those steps.

I INTER-PARTY CO-OPERATION

13.45 The conduct of class action litigation for both sides is a logistically challenging exercise. The stakes are often very high – both financial and reputational – with the attendant pressures and challenges that that can bring to bear on inter-party relations.

13.46 It cannot be emphasised too strongly that the parties need to be co-operative from the outset.

13.47 It is highly desirable that the legal teams co-operate in the conduct of representative proceedings. In practice, steps ranging from the simple to the complex can be deployed. One of the aims of these steps is to remove from the equation any unnecessary logistic pressures that will add tension to what can often being a highly charged inter-party environment. These steps might include:

- an early meeting between the senior members of both legal teams without the clients in attendance to discuss engagement logistics;
- nominating points of contact on both sides, and establishing email groups and protocols for information flow (who gets what and in what form) to ensure effective communications;
- legal team members on each side ensuring they avoid the use of hyperbole or inflammatory language in their correspondence and that expressions of timing expectations for responses to communications are reasonable and couched in reasonable terms;
- agreeing to meet to try to resolve issues, by phone or in person, in preference to exchanging lengthy letters, and ensuring good access to legal team leaders by both sides as part of this commitment;
- using external facilitators (e.g. mediators) for interparty dealings or key negotiation sessions, possibly involving the clients, if the issue is one that might benefit from mediation, such as reaching agreement on discovery;
- scheduling regular meetings between the law firms to discuss case preparation issues and an action items list that is shared between the teams. The first meeting post filing should be held before the initial case management conference.

13.48 It is important that the lawyers who participate in representative proceeding ensure their clients are aware of both the lawyer and client obligations under Part VB of the Act, including the 'overarching purpose'. Parties should note that the consequences for non-compliance with Part VB can be severe. The time to provide this advice to the clients is ideally before the genuine steps engagement and not to leave it until litigation is or has been commenced.

13.49 Early introduction of an effective interparty co-operation regime will promote the overarching purpose, including the efficient use of court time and resources, and the minimisation of party costs.

J COMMENCEMENT OF A REPRESENTATIVE PROCEEDING

Pleading the claim

13.50 Section 33H(1) of the Act provides that the application commencing the representative proceeding, or a document filed in support of it must:

(a) Describe or otherwise identify the group members to whom the representative proceeding relates (noting that s 33H(2) expressly provides that in identifying group members it is not necessary to name or specify the number of them);

(b) Specify the nature of the claims made on behalf of the group members;

(c) Specify the relief claimed; and

(d) Specify the questions of fact or law common to the group member claims.

13.51 Section 33H(1) is mirrored in the terms of cl 2.1 of CM 17. The Practice Note further provides in cl 2.2 that the 'the statement of claim should be drawn so that the applicant's personal claim can be used as the vehicle for determining the common questions in the action'.

13.52 Beyond this, the usual requirements for pleadings in the Federal Court apply.

13.53 The election between an open and closed class is expressed through the group definition pleaded in the statement of claim.[257]

13.54 Care needs to be taken with the framing of the common questions.[258] There are several reasons for this. First, much of the value of a representative proceeding for the parties, but particularly the applicant/group members, is derived from the answers to the common questions (if the matter proceeds to trial and judgment). Secondly, while the requirements for commencing a representative proceeding set out in s 33C are set at a relatively low level the court has discretion under s 33N to order that a proceeding should not be allowed to continue under that Part. If the common questions proposed are not truly common, or there are arguably insufficient common questions so as to warrant consideration of whether the matter should be permitted to continue under Part IVA, the prospect that court may make a s 33N order increases. Due consideration should be given, when formulating common questions, to whether some questions might be more effectively stated in relation to a sub-group. An example of this approach can be found in the *Lehman Brothers Australia* class action.[259]

K STEPS POST FILING

13.55 In Practice Note CM 17, the Court has indicated that, once a representative proceeding is filed, the Court's general expectation is that the representative proceeding will be managed in a manner consistent with that Practice Note. As such, CM 17 provides that a 'practitioner who anticipates problems in complying with any aspect of this Practice Note is expected to raise the matter with the Court as early as is practicable.'

13.56 Practice Note CM 17 supplements Part IVA and the Court Rules. Its aim is to:

(a) address some of the practical issues which frequently arise in representative proceedings, and to indicate the Court's expectations regarding the management of those issues; and

(b) facilitate the efficient and expeditious conduct of representative proceedings, in particular by ensuring that the issues that are in contest are exposed at an early date and that representative proceedings are not unnecessarily delayed by interlocutory disputes.'

13.57 However, the docket Judge retains the general case management discretion under the Court Rules and Part VB of the Act, including to give directions (see s 37P) which depart from CM 17, if that best promotes the 'overarching purpose'.[260]

Initial case management conference

13.58 An initial case management conference is required by CM 17 to be fixed by the registry for a date within six weeks from the date on which the application is filed.[261]

13.59 The initial case management conference takes place before a Judge.

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257 Examples of group definitions for open and closed representative proceeding can be conveniently found in Appendix 8 of Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed 2012) and in the precedents section of Michael Legg and Lachlan Armstrong, 'Representative Proceedings' in K Lindgren and C Branson, *Federal Civil Litigation Precedents* (LexisNexis looseleaf).

258 A sample of the types of common questions used in a range of representative proceeding matters is set out in Appendix 8 of Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed 2012) and in the precedents section of Legg and Armstrong, ibid.

259 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd* (in liq) [2012] FCA 1028.

260 Being to facilitate the just resolution of the representative proceeding according to law and as quickly, inexpensively and efficiently as possible – s 37M of the Act.

261 It may be that an initial case management conference cannot practically be held on the first return date because the issues raised by the proceeding may be complex and the respondents may need more time to determine if and when defence may be filed or whether to attack the pleadings. If this is the case, the court will fix a later date for the initial case management conference.

13.60 CM 17 provides for the option of the initial case management conference being held in a conference room and, so far as it is appropriate, being conducted along relatively informal lines. The emphasis is on an 'exchange' rather than having only counsel speaking and then only in a fixed sequence. The lawyer with primary responsibility for the proceeding within the applicant's and respondent's law firms must attend. The proceeding at the case management conference will usually be recorded, whether held in a conference room or in court, and a transcript is to be taken and to be available.

13.61 Anecdotal evidence suggests that very few, if any, representative proceedings filed since CM 17 first came into operation in 2012 have had an 'initial case management conference' held in a conference room. Rather, the predominant practice still appears to be to be to deal with the matter in the court room as a traditional directions hearing. This may be in recognition of the existence of group members and the public generally having an interest in being able to attend directions hearings. To achieve the benefits of a case management conference while still ensuring fidelity to open justice may require compromises in terms of the room/court used and the availability of transcripts.

13.62 The conference format is likely to be very effective if constructively utilised by the parties. It is, of course, open to the parties to request a conference room format or for the court to proceed that way of its own volition. The conference room format has proven an effective way to conduct case management engagement in other contexts.[262]

13.63 At the initial case management conference the parties will be asked to outline the issues and facts that appear to be in dispute. Usually, the parties will also be asked to indicate whether the matter should be referred for alternative dispute resolution and, if so, a timetable within which the alternative dispute resolution might proceed.

13.64 In addition, CM 17 provides that parties should be in a position to address the following:

(a) any issues regarding the description of group members (see ss 33C(1) and 33H(1));

(b) any pleading issues including whether the respondent will be requesting further and better particulars of the applicant's claim and why;

(c) the timing and form of a notice to group members of the proceeding and the opt out notice;

(d) discovery, including the utility of orders for the provision of affidavits by any party as to where relevant documents are stored, what types of documents exist (from high level down to particular), in what form they are held, and as to the costs of making discovery of particular categories of documents;

(e) evidence, including the utility of requiring that affidavits of lay or expert witnesses be filed at an early stage of the proceeding to enable a better understanding of the issues in dispute and the proper identification of individual and common questions;

(f) the joinder of additional parties;

(g) to the extent possible, the appropriateness of a split trial and the issues to be determined at a split trial;

(h) whether the respondent proposes to seek an order for security for costs; and

(i) the timetabling of any interlocutory applications.

13.65 At the time of the initial case management conference, it would not normally be the case that the defendant has filed its defence. A further case management conference should be held once the pleadings have closed to discuss some or all of the above issues that could not sensibly be discussed at the initial case management conference.

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262 The Hon Kevin Lindgren QC, '*Some Current Practical Issues in Class Action Litigation*' (2009) 32(3) *UNSW Law Journal* 900, and Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011), 66–70.

Opt out notice

13.66 CM 17 refers to the parties being in a position to address 'the timing and form of the opt out notice' at the initial case management conference.

13.67 A sample opt out notice is set out in Schedule A of CM 17.

13.68 The final form of the notice needs to be approved by the Court. The manner of distribution also requires approval: s 33X, s 33Y and cl 7.2 of CM 17. See also section M below for more detail on the opt out process.

13.69 It is considered sensible for the notice to be sent out soon after the close of pleadings. Parties should generally work to that timeline. A discussion as to the most effective manner of distribution can be usefully commenced at the initial case management conference. It may be that the form and manner of distribution cannot be resolved until a second or third case management conference.

13.70 Ideally, the applicant should attend the conference with a draft opt out notice for the court and parties to discuss which has been circulated several days before the conference.

Discovery

13.71 Clause 3.5 of CM 17 provides that the parties should be in a position to address at the initial case management conference the 'utility of orders for the provision of affidavits by any party as to where relevant documents are stored, what types of documents exist (from high level down to particular), in what form they are held and as to the costs of making discovery of particular categories of documents.'

13.72 Discovery is one of the most costly aspects of class action litigation. It is critical that the parties approach discovery discussions in a constructive and co-operative manner. Commonly, the discovery burden falls most heavily on the respondent, which means that one party is likely to bear a substantially higher discovery cost obligation than the other. Close involvement of the court in the management of discovery provides the best prospect for the overarching purpose being achieved and fair and reasonable outcomes for all parties involved.

13.73 Chapter 7 contains a helpful discussion on the topic of discovery in litigation before the Court. Parties should also be mindful of the relevant court practice notes on discovery of electronic records and the use of discovery plans.[263]

Oral depositions

13.74 As a result of the December 2012 amendments, s 46 of the FCAA, now enables a Judge to make an order for a pre-trial examination 'for the purposes of any proceeding before it or him or her'.[264] 'Proceeding' is defined in the following way:

> ***proceeding*** *means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal.*
>
> Example: Discovery is an example of an incidental proceeding

263 Federal Court of Australia, Practice Note 6 – Electronic Technology in Litigation, 1 August 2011.

264 The oral deposition amendment results from a recommendation made in the ALRC's report No 115 *Managing Discovery: Discovery of Documents in Federal Court* (2011), '*the Federal Court Rules (Cth) should be amended to provide expressly the limited circumstances in which the Court or a Judge may order pre-trial oral examination about discovery.*' Examples given by the ALRC of those 'limited circumstances' were to identify the existence and location of potentially discoverable documents; to assess the reasonableness and proportionality of a discovery plan; and to resolve any disputes about discovery.

13.75 Oral depositions are likely to be a useful tool in dealing with discovery in Part IVA proceedings because they have the potential to facilitate effective information flow about the sources of records relevant to the issues in the case. This may address some of the problems routinely faced in litigation such as that a party will often be unfamiliar with an opponent's systems and key documents required are generally not stored by an opponent in a manner that conveniently matches the issues involved in the litigation. The oral deposition process potentially enables company officers with knowledge of the records base or dealings key to the claim to be examined as an aide to assisting the court and the parties to limit the size of the discovery obligation and the cost, while promoting proper discovery.

Cost shifting[265]

13.76 Section 43(3)(h) of the FCAA provides:

> *Without limiting the discretion of the Court or a Judge in relation to costs, the Court or Judge may do any of the following:*
>
> *(h) do any of the following in proceedings in relation to discovery:*
>
> *(i) order the party requesting discovery to pay in advance for some or all of the estimated costs of discovery;*
>
> *(ii) order the party requesting discovery to give security for the payment of the cost of discovery;*
>
> *(iii) make an order specifying the maximum cost that may be recovered for giving discovery or taking inspection.*
>
> *Note: For further provision about the award of costs, see subsections 37N(4) and (5) and paragraphs 37P(6)(d) and (e).*

13.77 It is expected that the costs shifting focus will result in the narrowing of discovery due to the clear risk that the party requesting discovery will need to meet the cost up-front.

13.78 Example discovery orders appear below as an aide to practitioners and parties. These have been the subject of discovery orders in different forms of representative proceedings. They are examples of what a respondent might expect to be requested by the applicant to provide.

An example first tranche order in a shareholder class action

1. The discovery of documents be given in an electronic format in accordance with the proposed Electronic Discovery Protocol.

2. By 4.00pm on 14 October 2011, the respondent make discovery (as an initial tranche of discovery):

(a) from the documents provided to or received from the [agency] concerning the matters alleged in the amended statement of claim, including (but not limited to) correspondence and any transcripts of examination.

(b) of Board Packs provide to [company's] Board of Directors and Management Accounts prepared or otherwise maintained during the period 1 July 2009 to 1 December 2010.

3. On or before 11 November 2011, the legal representatives of the parties to meet to confer on the content, mode and timing of the second tranche of discovery that may be required and seek to reach agreement as far as possible on these issues.

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265 The *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) Schedule 1 item 2 inserted para (h) into s 43(3) of the FCAA. The cost shifting powers also result from an ALRC report recommendation, although it is probable they do no more than make express a power the court already had under the Act.

An example first tranche order in a product liability class action

Design specifications and manufacture

1.1 Documents in which the components (and their product codes) of the [product] are specified.

1.2 Documents in which the instrument kits (and their product codes) for the [product] are specified.

1.3 Documents which stipulate the design specifications for the [product] including geometry, sizing and surface finish or surface roughness of the [product].

Regulatory approval documents

1.4 Documents submitted by or on behalf of [the respondent] to the [agency] in Australia for the purpose of obtaining regulatory approval to supply the [product] for use in Australia.

1.5 Documents submitted by or on behalf of [the respondent] to the [agency] or a 'Notified Body' in the United Kingdom for the purpose of obtaining regulatory approval (including a 'CE marking') to market the [product] in the United Kingdom.

1.6 Training manuals and other documents prepared for training of or provided to sales representatives in relation to the [product].

Documents relating to withdrawal from sale or recall

1.7 All correspondence between [the respondent] and the [agency] in relation to:

(a) the withdrawal of the [product] in about [date];

(b) the preparation and circulation of a Safety Alert Notice in [date] in relation to the [product];

(c) the preparation and circulation of the Urgent Medical Device Hazard Alert dated [date] in relation to the [product].

An example first tranche order in a consumer class action

(a) all High Level documents recording any estimate of loss or damage to be suffered by the respondent arising from an event after 22 September 2004 in respect of which an exception fee might be payable.

(b) all documents taken into account by the person or persons who decided the level of the exception fees arising from an event after 22 September 2004, including all records of the consideration of that decision.

(c) all documents by which the respondent analysed the effect of the exception fees arising from an event after 22 September 2004 (including any analysis of the extent to which the fee was intended to or actually did operate to recover the respondent's costs).

(d) instructions to staff current in either or both of the financial year ending 30 September 2005 or the financial year ending 30 September 2009 in relation to the exception fees (including any relevant part of any manual).

L INTERLOCUTORY APPLICATIONS

13.79 Before making any application for an interlocutory order the parties' lawyers should confer and attempt in good faith to identify those orders that can be proposed by agreement and those that cannot. If the parties are unable to agree on all orders, any application will usually be accompanied by an affidavit of the applicant's lawyer.[266] Practice Note CM1 provides that the court may permit only those interlocutory steps that are 'directed to identifying, narrowing or resolving the issues in dispute between the parties.'

266 FCR r 17.01. See also r 17.02 which provides that affidavits are not needed if correspondence and documents, 'the authenticity of which is not disputed' is all that is relied on in support of the interlocutory application.

13.80 The Court will fix dates as early as are practicable for the filing, service and return of any interlocutory application:

(a) challenging the commencement of the proceeding as a representative proceeding (see ss 33C(1) and 33H);

(b) seeking an order under s 33M or s 33N, or otherwise modifying or removing the representative character of the action;

(c) seeking summary dismissal under s 31A or R 26.01 of the FCR;

(d) seeking a striking out under R 16.21 of the FCR;

(e) seeking an order that the applicant provide security for costs;

(f) seeking an order under s 33ZF; or

(g) seeking an order for discovery.

13.81 Any interlocutory application that is not filed and served within the time required is not permitted to be subsequently filed without leave of the Court.

13.82 The Court has indicated in CM 17 that it will endeavour to give judgment on any interlocutory application within 6 weeks of the hearing (cl 5.3).

M COMMUNICATIONS WITH GROUP MEMBERS AND OPT OUT NOTICES

Respondent communications with group members

13.83 CM 17, at paragraph 6, provides that:

> *6.1 The applicant's lawyers should inform the other parties whether group members are its clients. Where group members are not clients of the applicant's lawyer (ie where no notice of acting has been given) then all other parties should use reasonable endeavours to ensure that any communications with group members are in writing.*
>
> *6.2 Where a party communicates with a non-client group member suggesting that the group member do or not do something, the communication should explain the consequences of following the suggestion and encourage the non-client group member to obtain legal advice.*
>
> *6.3 The Court may make orders establishing a protocol for communications between parties and non-client group members.*

13.84 A respondent or its lawyers may wish to communicate with group members to:

(a) find out who they are;

(b) ask for particulars of some or all of the group members;

(c) obtain discovery or specific information from some or all of the group members; or

(d) offer to settle individual group member claims.

13.85 Subject to the exceptions noted below, group members in a class action are generally entitled to remain passive until after the trial of common issues because:

(a) they are not parties to the action and should not be treated as such;[267]

(b) they can choose to opt out when the time comes;[268]

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267 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, [31].

268 *Mobil Oil Aust Pty Ltd v Victoria* (2002) CLR 1, [38]–[41].

(c) it is not consistent with the overarching purpose[269] to require the class representative's lawyers to spend time and resources interrogating group members or to cause non-party group members to be inconvenienced before:

i. a reasonably well informed opportunity to opt out is given to group members; or

ii. a genuine attempt at mediation is offered by the defendant; or

iii. the trial of common issues has resulted in a positive outcome for the representative party.

(d) CM 17 at [2.2] requires that a statement of claim in a representative proceeding be drawn so that the applicants' personal claim can be used as the vehicle for determining the common questions in the action. The trial of common issues is designed to resolve all common questions together with the non-common questions raised by the applicants' personal claim, after which details of the identity and individual circumstances of group members may become relevant;

(e) for the reasons provided by the courts in *Multiplex and NAB v Pathway*[270] that is, that the class actions regime is designed to require little or no active involvement by group members. As Finkelstein J noted in *Multiplex*

> *A group member is a group member principally for the limited purposes of taking the benefit, or suffering the burden, of findings on common questions (ie questions that are common to the claim brought by the named applicant and claims that may be pressed by group members). In an action where money relief may be sought by a group member, the group member will generally only be required to provide specifics about the quantum of his or her claim after the common questions have been resolved and that may be in a separate action.*
>
> *Given the intent of the class action regime, there must be some compelling reason demonstrated before a court will order group members to go beyond their otherwise essentially passive role.*[271]

13.86 This is not to say that there will not be exceptional circumstances where the Court will order the disclosure of group member claimed losses, identities, particulars or documents. The Court has the power to so order under s 33ZF and s 33P of the Act.[272]

13.87 *Grave et al* suggest that:[273]

(a) '*the proposition that in some cases, the passive nature of the group members'* role may justify limiting their involvement in proceedings does not mean that they could not be required to provide further information about their claims in appropriate circumstances, particularly where the provision of such particulars (for example, particulars of quantum) may assist the parties to mediate or otherwise attempt to resolve the proceedings; and

(b) an order for discovery from group members will more likely be made where it is limited to a subset of group members; 'extraordinary circumstances' would be required to justify an order for discovery against all group members in an open class.'

13.88 Whether or not it is permissible for the respondent or its lawyer to communicate with group members depends, to some degree, on the purpose of the communication and by whom the communication is to be conducted.

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269 s 37M of the Act: to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

270 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 2)* [2010] FCA 176, [16]–[17]; *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168, [49].

271 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 2)* [2010] FCA 176, [16]–[17].

272 *King v GIO Holdings Ltd* [2002] FCA 1560; *Hurley v McDonalds Australia Ltd* [2001] FCA 209; *Wright Rubber Products Pty Ltd v Bayer AG* [2010] FCAFC 85; *Meaden v Bell Potter Securities Ltd* [2011] FCA 136; *National Australia Bank Limited v Pathway Investments Pty Ltd* [2012] VSCA 168; *Hopkins v AECOM Australia Pty Ltd (No 2)* [2013] FCA 115, Michael Legg, '*Discovery and particulars of group members in class actions*' (2012) 36 *Australian Bar Review* 119–136.

273 Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed, 2012), [11.255].

13.89 A respondent may wish to communicate directly with group members or it may wish to instruct its lawyers to contact group members. It may be that the respondent wants the representative applicant or those acting for the applicant to communicate with some or all group members.

13.90 Practice note CM 17 says [at 6.1] that the representative applicant's lawyers should '*inform the other parties whether group members are its clients*'. While the terminology of 'notice of acting' is not particularly clear, practitioners should assume that if group members have retained the representative applicant's lawyers, that those lawyers will, soon after commencement of the proceeding and regularly thereafter, provide the lawyers for the respondent(s) with a list of those group members who have retained them. This should be done unless there are good reasons to keep the identity of group members confidential.[274]

13.91 Ethical rules governing the conduct of legal practitioners in Australia prevent lawyers contacting the client of another lawyer but if there is no retainer with a group member the constraint does not apply as group members are not clients of the representative applicant's lawyer. As well, the solicitor-client relationship between a group member and a lawyer does not restrain the respondent itself from communicating directly with that client.

13.92 Where the respondent wants group member identities, particulars or discovery from group members, the Court will need to be satisfied that the circumstances justify a departure from the general entitlement of passivity. Respondents and their lawyers should avoid making contact with group members for these reasons without first informing the applicant's lawyer and, if permission to do so is not forthcoming, the respondent should apply to the Court for the appropriate orders. Cases in which the Court has seen fit to order that group members reveal something of their circumstances include:

(a) *Meaden v Bell Potter*[275] where the pleadings alleged that certain representations, both oral and in writing, were made both to the class representative and to each group member. Edmonds J concluded that it was consistent with the pleaded case that each group member be required to discover aspects of their dealings with the respondent.

(b) The Victorian Court of Appeal in the Abalone class action held that orders requiring 14 of the group members to provide particulars of loss and damage and discovery of various documents was, in the circumstances, considered not too burdensome for the applicants as it was '*proposed to mediate the whole class action in advance of the trial of the representative party's claim' and it made sense 'to order such particulars and discovery as [would] provide the defendants with sufficient information to formulate rational settlement offers*.'[276]

(c) In *Hopkins v AECOM Australia* a questionnaire was ordered to be administered by the applicant to a sub-set of group members asking whether or not group members had read a Product Disclosure Statement before investing; what other documents the group members had read and the identity of any financial advisor who may have advised the group members about their investment. This information was found to be needed to enable the respondent to consider the joinder of financial advisors for contribution where the advice had been given in two jurisdictions in which the limitation period could expire before the trial of common issues.[277]

13.93 If the respondent wishes to settle group member claims, it is not required first to obtain the approval of the applicant, the lawyers or the Court but it is recommended that this be done to avoid any impression of circumventing the representative proceeding.

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274 CM 17, [1.3] asks practitioners who anticipate problems with complying with the Practice Note to raise the matter with the Court as early as practicable.

275 *Meaden v Bell Potter Securities Limited* [2011] FCA 136.

276 *Regent Holdings Pty Ltd v State of Victoria and Southern Ocean Mariculture Pty Ltd* [2012] VSCA 221, [15].

277 *Hopkins v AECOM Australia Pty Ltd (No 2)* [2013] FCA 115.

13.94 In *Courtney v Medtel Pty Ltd*[278] Sackville J held that the respondent could communicate settlement offers to group members if it was 'communicating with a group member in a manner which is not misleading or otherwise unfair and which does not infringe any other law or ethical constraint'. Justice Sackville noted that the Court might intervene pursuant to s 33ZF where that was not the case.[279] Sackville J set out guidelines[280] for a court considering whether a settlement offer is misleading or unfair. He suggested that the offer must meet the following standards:

(a) the offer and any accompanying material should be in writing (see now also Practice Note CM 17 at [6.1]);

(b) the documentation should accurately explain the consequences of accepting and not accepting the offer (see now also CM 17 at [6.2]);

(c) the offer should allow a period for acceptance that is sufficient to provide the group member with a genuine opportunity to obtain legal advice; and

(d) the documentation should make it clear that the group member is entitled to seek and might benefit from independent legal advice.

13.95 CM 17 provides, at [6.3], that the Court may make orders establishing a protocol for communications between parties and non-client group members. This provides a sensible basis for either party to approach the Court for orders governing communications with group members.

Opt out

13.96 A judgment in a representative proceeding binds all group members who have not opted out under s 33J of the Act (s 33ZB). It is therefore important that there be an opportunity given to group members to opt out of the proceeding.

13.97 Section 33X(1)(a) requires that notice be given to group members of the commencement of the proceeding and the right to opt out before a specified date, being the date fixed under s 33J. Section 33Y provides that the form and content of such a notice must be approved by the Court and the Court must order who is to give the notice, the way it will be given and who should pay for it. If the notice requires that something must be done, the period in which it should be done must be specified.

13.98 An application at the appropriate time should be made by the applicant for such orders. This will usually be after the pleadings have closed and when the lawyers for the parties are relatively confident that the pleadings will not be amended in any substantive way in the future.

13.99 An example of one such interlocutory application might be:

(a) Pursuant to s 33J of the FCAA, 4.00 pm on 16 May 2013 (Opt Out Date) is fixed as the time and date before which a group member may opt out of this proceeding.

(b) The form and content of the notice (Notice to Group Members) in Schedule B to this interlocutory application is approved for the purpose of s 33(Y) of the Act as the notice that must be given to group members pursuant to s 33X(1)(a) of the FCAA.

(c) From no later than 4.00pm on 16 March 2013 until the Opt Out Date, the applicant's solicitors are to display the statement of claim and defence on their websites.

(d) Pursuant to s 33Y and 33ZF of the Act, the Notice to Group Members is to be given no later than 4.00pm on 30 March 2013 by the solicitors for the applicant:

(i) sending a copy of the Notice to Group Members by ordinary mail to each group member who is a client or of whom they are otherwise aware;

278 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168.

279 Ibid [52].

280 Ibid [64].

(ii) causing the Notice to Group Members to be published in one weekday edition of the following newspapers:

i. The Sydney Morning Herald;

ii. The Age;

iii. The Daily Telegraph;

iv. The Sun Herald; and

v. The Australian Financial Review

(iii) causing the Notice to Group Members to be displayed on the website of the applicant's solicitors until the Opt Out Date.

(e) For the purpose of r 9.34 a group member who wishes to opt out of the proceeding must do so by filing an Opt Out Notice in accordance with Form 21, the form and content of which is at Schedule C to this interlocutory application, and providing it to the Registrar of the Court by the Opt Out Date.

(f) No later than 14 days after the Opt Out Date the Registrar of the Court is to provide to the applicant's solicitors with a list that names each person who has provided the Registrar with an Opt Out Notice.

13.100 The notice that informs group members of the commencement of the proceeding (s 33X(1)(a)) is, more often than not, the same as the opt out notice although that does not need to be so.

13.101 A sample opt out notice is provided by Schedule A to CM 17. It should be followed relatively closely as it captures the qualities that such a notice should have, including that it:

(a) balances the need to be accurate yet it is relatively simple to understand;[281]

(b) explains what the case is about;

(c) offers an explanation of the potential exposure of group members to costs;[282] and

(d) identifies the consequences of a group member either doing nothing or opting out.

Closed classes, opening classes and opt out

13.102 Where membership of a class is not open to all those who are affected by the respondents' alleged wrongful conduct but is limited to those persons who also take a positive step, such as entering into an agreement with a litigation funder or signing a retainer with a particular firm, the class is often referred to as a 'closed class'.[283] Practitioners might consider whether the opt out process in these actions is of any utility if it is the case that the group members:

(a) by joining the group, made a clear choice to opt in to the action;

(b) were given clear and sensible information about the action when making the decision to join;

(c) are regularly updated about developments in the action; and

(d) have been informed in writing after the pleadings have closed:

i. that they can opt out if they wish and that they should do so within a reasonable time;

ii. of the consequences of opting out if they do so, including any costs that might be incurred and any ongoing liability to a funder if that is the case;

iii. that they will be bound by any judgment if they remain in the class; and

iv. whether they have any potential exposure to costs and what that exposure is if they remain in the class.

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281 *Sackville J in Courtney v Medtel Pty Ltd* [2001] FCA 1037, [11] stressed that these notices must be accurate but drafted with sensitivity to the recipients who may become anxious when they learn of the proceedings.

282 *King v GIO Australia Holdings Ltd* [2001] FCA 270, [17].

283 The closed class mechanism was held not to be inconsistent with Part IVA by the Full Court of the Federal Court in *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200. The terminology is not to be confused with the process of closing an otherwise open class.

13.103 If the information detailed above is provided to members of a closed class and there is no intention to open the class a Court might exercise its discretion under s 33ZF to dispense with the s 33J and s 33X notification requirement of the right to opt out.[284]

13.104 Where a representative proceeding has been commenced with a closed class, it may be that the parties decide to open the class.[285] This may be done by amendment of the group member definition to remove the limiting criteria. If such an amendment is approved, it would be usual for consequential orders to be made under s 33X and s 33Y that a notice be issued informing the new group members of the commencement of the proceeding and of the right to opt out by a date set by the Court.

Service of opt out notice

13.105 As noted above, s 33Y not only requires the Court to approve the form and content of a notice of opting out but, by s 33Y(3), provides that the Court must specify who is to give the notice and the way in which the notice is given.

13.106 Section 33Y(4) provides that the notice may be given by press advertisement, radio or television broadcast, or by any other means, but s 33Y(5) states that the Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practical, and not unduly expensive, to do so.

13.107 Practitioners should consider the characteristics of the class of group members when proposing a manner of service of an opt out notice. Where the action is on behalf of an open class of shareholders, it might be reasonable to advertise in the business media and to serve the opt out notice on all security holders recorded on the respondent's Australian share register on a particular date or dates.

13.108 If the action is a closed class for which the opt out process is considered necessary or an open class of group members who can be found relatively easily, it may be best for the opt out notice to be served personally as it may be 'reasonably practical, and not unduly expensive, to do so': s 33Y(5). A medical product liability claim may be such an example if the distributor of the product is required to keep a register of all those who are implanted with the device.[286]

13.109 The general rule is that the costs of serving the opt out notice are to be borne by the representative applicant[287] although there are many examples in which the cost has been shared and even borne completely by the respondents. Practitioners are encouraged to weigh up the various factors that might encourage a divergence from the general rule and if sense would suggest a sharing of the cost, co-operating to facilitate effective service (by, for example, using a data base to find group members) or retaining a mail house to manage the process, then this should be done. Factors that might influence the manner in which opt out is processed include:

(a) financial hardship suffered by any party if solely responsible for the cost of service;

(b) whether one party may be able to facilitate service relatively simply while another might face time consuming difficulties if left to its own devices; and

(c) the likelihood that the cost will be borne eventually by the respondent given the strength of the liability case, as the costs associated with the opt out process are costs in the cause.

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284 *See Vernon v Village Life Ltd* [2009] FCA 516, [62]–[69]. The exercise of this discretion may also be consistent with the overarching purpose (s 37M), depending on the circumstances.

285 For example, to give a respondent some certainty that a settlement will be binding on a complete class of those group members who have not opted out rather than just those persons who have signed a litigation funding agreement.

286 For example see: *Courtney v Medel Pty Ltd* [2001] FCA 1037 where the respondent had a register of all those who had been implanted with a pacemaker and the applicant's lawyers and the respondents' lawyers agreed to co-operate, share costs and to ensure effective service by prepaid registered mail.

287 *Johnson Tiles Pty Ltd and Ors v Esso Australia Pty Ltd and Esso Australia Resources Pty Ltd* [2001] VSC 284, [19]

13.110 To ensure justice is done, as provided by s 33ZF(1), the Court can exercise its discretion to reinstate a previous group member who has filed an opt out notice if it was filed in error and an application is made within a reasonable time for reinstatement and, by making such orders, the respondent will not suffer material prejudice.[288] Reinstatement may not be permitted where a group member has simply changed their mind[289] or if reinstatement is sought after a settlement is reached due to a change in commercial considerations.[290]

O SHAPE OF HEARING ON SUBSTANTIVE ISSUES

Preliminary questions and summary judgment

13.111 To narrow the scope of the dispute, at the earliest practicable date the Court may consider the utility of either:

(a) determining any common question in the proceeding as a preliminary question: see R 30.01 FCRs; or

(b) giving summary judgment on any common question in the proceeding under s 31A of the FCAA.

Trial of common questions

13.112 Clause 2 of CM 17 contemplates the representative proceeding will be litigated in a manner that involves various hearings for determining claims.

13.113 Clause 9 of CM 17 suggests that the trial of common questions may be heard in the appropriate case with not only the applicant's personal claim and all common questions but possibly other non-common issues, including sub-group issues, if that is consistent with practical and legal considerations.

13.114 Only a few representative proceedings have proceeded to first stage trial and judgment. The approach outlined in cl 2 of CM 17 was adopted in, for example, the Vioxx class action.[291] The court made orders in respect of the applicant's claim and published its reasons for judgment. Submissions were then invited from the parties on the content and form of the answers to the common questions and a separate judgment setting out those answers was given. A similar, albeit slightly modified, approach was utilised in the Lehman Brothers Australia class action.[292] In that case, reasons were published prior to final orders in respect of applicants' claims and the common questions. Following submissions on the answers to the common questions, a separate judgment was delivered in relation to those questions ahead of making final orders on the applicant claims.

13.115 It is suggested that the parties cooperate in the settlement of the common issues for determination at the trial of common issues.[293]

13.116 Parties should also give careful consideration to the determination of separate questions, if to do so will assist to resolve issues that might otherwise cause delay, expense and uncertainty. In *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 Branson J encouraged such a procedure and set out the following principles:

(a) The term 'question' in O 29 r 1 (now r 30.01 FCR) includes any question or issue of fact or law in a proceeding;

(b) A question can be the subject of an order for a separate decision under O 29 r 2 even though a decision on such a question will not determine any of the parties' rights, however, the judicial determination of a question under O 29 r 2 must involve a conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties;

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288 *King v GIO Australia Holdings Ltd* [2002] FCA 364, [6].

289 *Darcy v Medtel Pty Ltd* [2002] FCA 925, [11].

290 *Paxtours International Travel Pty Ltd v Singapore Airlines Ltd* [2012] FCA 426.

291 *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* [2010] FCA 180.

292 *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200.

293 See *Merck Sharpe & Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26

(c) Where the preliminary question is one of mixed fact and law, it is necessary that the question can be precisely formulated and that all of the facts that are on any fairly arguable view relevant to the determination of the question are ascertainable either as facts assumed to be correct for the purposes of the preliminary determination, or as agreed facts or as facts to be judicially determined;

(d) Care must be taken in utilising the procedure provided for in O 29 r 1 to avoid the determination of issues not 'ripe' for separate and preliminary determination. An issue may not be 'ripe' for separate and preliminary determination in this sense where it is simply one of two or more alternative ways in which an applicant frames its case and determination of the issue would leave significant other issues unresolved;

(e) Factors which tend to support the making of an order under O 29 r 1 include that the separate determination of the question may:

i. contribute to the saving of time and cost by substantially narrowing the issues for trial, or even lead to disposal of the action; or

ii. contribute to the settlement of the litigation;

(f) Factors which tell against the making of an order under O 29 r 2 include that the separate determination of the question may:

i. give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial;

ii. result in significant overlap between the evidence adduced on the hearing of the separate question and at trial — possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding. This factor will be of particular significance if the court may be required to form a view as to the credibility of witnesses who may give evidence at both stages of the hearing of the proceeding; or

iii. prolong rather than shorten the litigation.

13.117 A recent example of the use of the separate question mechanism in the class action context was employed in *Andrews v Australian and New Zealand Banking Group Ltd* (the Bank Fees class action).[294] The applicants sought the trial of separate questions pursuant to ss 33Z(1), 33ZF(1) and/or s 37P(2) of the FCA and further or alternatively, O 29 r 2 of the FCR. The separate questions sought by the applicants concerned the issue of whether certain amounts payable by customers in defined situations (known as 'exception fees') were capable of amounting to a penalty.

13.118 In ordering a separate question approach, Gordon J made the following observations:[295]

(a) The determination of the separate questions will not lead to a disposal of the action.

(b) They will however provide a proper basis for the parties to be better able to assess their risk and that will inevitably contribute to a better prospect of settlement.

(c) The issues raised will be narrower because the applicants' other causes of action will not be addressed.

(d) If the separate questions are determined adversely to the applicants, the applicants would need to reconsider whether to continue to press the broader and other causes of action.

(e) A trial of the separate questions could be prepared and brought to trial in the next 12 months.

(f) Such an outcome is consistent with and will promote the overarching purpose in s 37M of the FCAA

(g) It will not inevitably resolve all or a substantial part of the proceeding. But it might.

(h) To adopt the alternative, is to permit ANZ to incur substantial costs (which if it is successful it will seek to cast on the applicants) and, necessarily, to delay the hearing for years.

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294 *Andrews v Australian and New Zealand Banking Group Ltd* [2011] FCA 388. (Note: This action proceeded to trial and determination as Paciocco v ANZ [2014] FCA 35.

295 *Andrews v Australian and New Zealand Banking Group Ltd* [2011] FCA 388, [71]–[74].

P DEALING WITH COMPETING CLASS ACTIONS

13.119 The filing of a representative proceeding does not act, of itself, as a bar to another similar action being filed by a different representative applicant. There are various sorts of competing class actions, including:

(a) Open classes with the same definition of 'group member' who are making the same claims against the same respondent(s);

(b) Open classes with similar but distinct claims, such as:

i. where the same group is defined but in which the claims are reliant on some shared causes of action and some not common;

ii. where each action defines the group differently but who have similar causes of action against the same respondent;[296] and

iii. where the actions sue one common respondent for the same claims but one action also claims against other respondents.

(c) A closed class followed by an open class;

(d) A closed class followed by another closed class where the group membership for each is exclusive of the other but where the claims are against at least one common respondent and are similar.

13.120 For each of these examples the competing class actions may be filed in the same registry and be before the same docket Judge but it may be that they are filed:

(a) in different registries of the Court; or

(b) in different jurisdictions.

13.121 There is no legislative guidance and very little judicial direction for practitioners who must confront a competing class action or those who are instructed to commence one.[297] The usual practice in civil litigation is for multiple actions raising the same or similar issues to be consolidated, if that is possible, with one firm representing the applicants or, if not possible, for one action to be identified as the 'test case' and for the others to be stayed until the resolution of the first.[298] But this is not always the case for class actions.

13.122 There will be occasions in which one action will be stayed so that the respondent(s) do not have to face more than one action, so there is no duplication of costs that more than one class action will attract and so that the Court can avoid a multiplicity of decisions concerning the same subject matter.

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296 Such as the different classes of persons who claimed losses in *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 or shareholders who acquired an interest in shares in the same company but in time periods that overlap but are not the same

297 See Michael Legg, 'Entrepreneurs and Figureheads – Addressing Multiple Class Actions and Conflicts of Interest' (2009) 32(3) *UNSW Law Journal* 90, 911 and V Morabito, '*Clashing Classes Down Under – Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives*' (2012) 27 Connecticut Journal of International Law 245 - 318 which states there have been 45 competing class actions since 2000, 39 of which were in the Federal Court over 17 legal disputes.

298 *Justice Finkelstein in Kirby v Centro Properties Limited* [2008] FCA 1505 stated, [10]: 'In ordinary civil litigation there are several ways in which a court deals with multiple actions raising the same or similar issues. The court can single out one of several actions for trial and stay proceedings in the others until that one has been tried. This usually requires the party applying for the stay to undertake to abide the result of the action that is allowed to proceed: The *Strathgarry* [1895] 264; *Cameron v McBain* [1948] VLR 245, 246–247. In effect the action becomes a test case. Another possibility is to consolidate the actions, that is, combine them so that they can proceed as one action. This procedure can be quite cumbersome. There is a special difficulty where the plaintiffs have separate representation. There is a rule of practice that, without leave, separate representation is not permitted on the plaintiff's side.'

13.123 But when the Court will stay one proceeding is not clear. The interests of the lawyers or the funders are not considered relevant. The first case filed is not given priority over the second as this might encourage undue haste.[299] The experience or size of the firms conducting the claims are relevant factors but not determinative[300] and the action that has the greater the number of group members who have 'signed up' with a firm or that has the greatest potential loss claimed has also been rejected as irrelevant to this decision.[301]

13.124 One of the multiple open class representative proceedings was held to be an abuse of process in *Johnson Tiles Pty Ltd v Esso Australia Ltd* where there were three competing representative proceedings against the same respondent for losses alleged to have been caused by an explosion at the Longford gas plant in Victoria. Merkel J acknowledged that it would be vexatious and oppressive for the respondent to be subjected to more than one class action.[302] Merkel J overcame the vexation by ordering that the first and second proceedings be consolidated, and the third proceeding be stayed.[303]

13.125 Where a closed class is followed by a second competing representative proceeding by another party represented by a different law firm, the later proceeding may utilise either an open or closed class and may exclude the members of the original closed class.[304] In these circumstances, the later proceeding may not be held to be an abuse of process. The multiple representative proceedings may still cover common ground and will therefore need careful case management to avoid duplication of cost and effort in such matters as discovery, witness statements, experts, cross-examination etc.[305]

13.126 Practitioners faced with competing class actions are encouraged to work together, in the interests of all group members, whether represented or not. Practitioners should be willing to be on the record together, to use the same counsel and to agree to a written protocol that identifies the roles to be performed by each firm to minimize duplication and to avoid imposing financial and other unnecessary burdens on the respondents.

13.127 Where practitioners for each action cannot work out how to work together in the interests of the group members, the Court will need to intervene. Criteria that might be influential in deciding which action should proceed are the:

(a) adequacy of the representative;

(b) quality of pleaded case and the identification of common issues;

(c) degree of preparation and analytical rigor applied to the pleaded case, for example, to the claim period in a shareholder action or the causes of action in a product liability claim;

(d) experience and ability of the firms conducting the class actions;

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299 *Kirby v Centro Properties Limited* [2008] FCA 1505, [28].

300 Justice Murray Wilcox, *Challenges for Applicant Representatives* 4–5 (paper presented at the Australian Plaintiff Lawyers Association National Conference, Sydney, Oct 21–23, 1999) as cited in *Grave et al, Class Actions in Australia* [9.205] suggested that to give the bigger firm the right to conduct the class action would give one firm monopoly power over time, yet in *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56, [68], the experience of the two firms whose client's claims were ordered to be consolidated, was relevant: 'The evidence establishes that both firms have a substantial body of support from the represented persons. Further, I am satisfied that the combined resources of Slater & Gordon and Maurice Blackburn & Co are likely to be necessary to efficiently conduct the proceeding and adequately represent the interests of the group members (see s 33T of the Act).'

301 *Kirby v Centro Properties Limited* [2008] FCA 1505, [29].

302 *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56, [64]. See also Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press 2011), 224 where the author notes that the vexation can be avoided if each group member opts out of all but one proceeding. Such a process is likely to create confusion and still leave many group members who are in more than one proceeding.

303 *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56, [73]–[74].

304 An example of this is illustrated by the three proceedings commenced against the Centro group. Richard Kirby, as the representative party, commenced two actions, one brought against Centro Properties Limited (CPL) and CPT Manager Limited for the period 9 August 2007–15 February 2008 and another against Centro Retail Limited and Centro MCS Manager Limited for 7 August 2007–15 February 2008. The Kirby proceedings were closed as the group was defined by reference to each member having entered into a litigation funding agreement. The proceedings comprised 955 members. The third action was issued by Nicholas Vlachos, Monatex Pty Ltd and Ramon Franco, as the representative parties, and had all four Centro companies as respondents. This proceeding was an open representative proceeding but excluded those entities in the Kirby proceedings. It covered shares purchased in the period 5 April 2007–28 February 2008. Finkelstein J canvassed a number of ways to move forward, including: (a) allowing one proceeding to go to trial as a test case with the others being stayed; (b) consolidation; or a joint trial. Ultimately a joint trial was held.

305 Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011) 227.

(e) number of group members and the size of individual and collective claims who have 'signed up' with a particular firm;

(f) existence and role of a third party funder;

(g) resources available to prosecute the claims; and

(h) choice of respondents and whether those respondents are able to meet a judgment debt if found liable.

13.128 The orders to consolidate competing representative proceedings is illustrated by the Nufarm class action:[306]

(a) Pursuant to R 31.11 of the FCR, the proceeding *Gaby Hadchiti & Ors v Nufarm Pty Ltd* (VID 24 of 2011) (before consolidation the *Hadchiti Proceeding*) be consolidated with this proceeding (NSD1847 of 2010) (before consolidation the Verbatt Proceeding) and that the consolidated proceeding be known as *Gaby Hadchiti and Ors v Nufarm Ltd* (NSD 1847 of 2010) (the Consolidated Proceeding).

(b) The applicant in the Verbatt Proceeding and the applicants in the Hadchiti Proceeding be the applicants in the Consolidated Proceeding.

(c) The applicants in the Consolidated Proceeding be granted leave to file an application and amended statement of claim substantially in the form attached to the letter from Maurice Blackburn to Arnold Bloch Leibler dated 5 August 2011.

(d) Pursuant to Rule 4.01, Maurice Blackburn Pty Ltd and Slater & Gordon Ltd be granted leave to represent the applicants in the Consolidated Proceeding jointly.

(e) The costs of the Verbatt Proceeding be treated as the costs in the Consolidated Proceeding.

(f) The costs of the Hadchiti Proceeding be treated as the costs in the Consolidated Proceedings.

Q EVIDENCE IN REPRESENTATIVE PROCEEDINGS

13.129 The mode of evidence, as explained above, CM 17 articulates the Court's expectation that: '*The statement of claim should be drawn so that the applicant's personal claim can be used as the vehicle for determining the common questions in the action*.' (See cl 2.2). The requirement for the pleadings carries over to the trial where it is the representative's claim that will be heard during the trial of common issues and determined in the initial judgment.

13.130 The shape of the hearing, as discussed above, will determine which matters are in issue and therefore the evidence that needs to be led.

13.131 Any lay evidence presented from the applicant's side, will be that of the applicant or, in the case of a corporation, the agents through which they act. From the respondent's side it will usually be officers or employees of a corporation or government entity that will give evidence. There are a number of differing approaches to the adducing of evidence in chief in the Court, including use of affidavits, witness statements, outline of evidence and oral testimony. The representative proceeding procedure does not necessitate one or other of those approaches. Rather the subject matter of the underlying dispute and the allegations in the pleadings will be of greater importance.

13.132 The discussion of expert evidence in Chapter 12 is equally relevant to representative proceedings as to other forms of litigation. Experts have been used extensively in representative proceedings, including *Wingecarribee Shire Council v Lehman Brothers Australia Ltd* (in liq) [2012] FCA 1028 (three finance experts who gave their expert evidence concurrently), *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671 (economists opining on the amount of overcharge in an alleged cartel) and Peterson v Merck Sharpe & Dohme (Australia) Pty Ltd (2010) 184 FCRs 1; (2010) 266 ALR 1; [2010] FCA 180 (expert evidence from rheumatologists, biostatisticians and cardiologists).

306 *Verbatt Pty Ltd v Nufarm Limited* (NSD1847/2010), Orders, Middleton J, 9 August 2011.

R SETTLEMENT

13.133 Representative proceedings cannot be settled or discontinued without the Court's approval: s 33V. This is because a settlement of a representative proceeding binds the parties and all of the group members who did not opt out by the due date. The court's role is protective: '*It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises*'.[307] As noted by Justice Emmett in July 2011:

> *The Court's task under s 33V is an onerous one. Before granting approval, it is appropriate for the Court to be satisfied that any settlement has been undertaken in the interests not merely of the lead plaintiff and the defendant, who will ordinarily be represented by solicitors and counsel, but also of the other group members, many of whom will not be so represented. The Court must determine whether the proposed settlement or compromise is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement. The Court must take into account the amount offered to each group member, the prospects of success in the proceeding, the likelihood of group members obtaining judgment for an amount significantly in excess of the proposed compromise amount, the terms of any advice received from counsel and solicitors in relation to the issues that might arise in the proceeding, the likely duration and cost of the proceeding, and the attitude of the group members to the proposed settlement or compromise.*[308]

13.134 Clause 11.1 of CM 17 'Court approval of settlement' states that the parties will usually need to persuade the court that:

(a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and

(b) the proposed settlement has been undertaken in the interests of group members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s).

13.135 A settlement or discontinuance of an entire representative proceeding without an order of the Court approving it, is without legal effect.[309] A settlement of the claims of individual group members is permissible without Court approval as long as the communication with the group member is not 'misleading or otherwise unfair'.[310] The representative party needs leave of the court to settle his or her individual claim and to withdraw from being the representative party: s 33W.

13.136 A settlement or discontinuance of part of a representative proceeding will require Court approval under s 33V if that part could stand alone as a representative proceeding. As Dixon J held, when considering the same provision in the Supreme Court Act 1986 (Vic) in Matthews v SPI Electricity[311]

> *At first blush, it might be thought that s 33V is only concerned with settlement or discontinuance of the entire group proceeding . . .'*

But he concluded:

> *In my view, it is clear that the legislature intended that the settlement or discontinuance of a claim requires court approval if that claim, but for the rules of convenient and permissive joinder of claims and parties, could be a separate group proceeding.*

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307 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8]; *Collin v Aspen Pharmacare Australia Pty Ltd* [2013] FCA 1336, [4] ('*The court's role is to protect those group members who are not represented and whose interests may be prejudiced by their absence*').

308 *Hobbs Anderson Investments Pty Limited v Oz Minerals Limited* [2011] FCA 801, [3].

309 *King v AG Australia Holdings Ltd* (2002) 121 FCR 480.

310 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168.

311 *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd* (Ruling No 16) [2013] VSC 74, 9, 12. See also *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258.

13.137 As well, a settlement or discontinuance of part of a representative proceeding will require Court approval under s 33V if 'substantive claims of certain categories of group members have been settled or discontinued by the representative party, notwithstanding that there may remain extant some claims for relief by other categories of group members.'[312]

13.138 Practitioners should consider whether a potential settlement of a representative proceeding can be achieved with the class remaining open or whether the class should be closed either as part of the settlement process or earlier.

13.139 There is no express power in the FCAA that permits the court to close a class. However, it has been established that s 33ZF, which confers on the court the power to do whatever is appropriate or necessary to ensure that justice is done in the proceeding, permits 'an order fixing a date by which claimants must identify themselves'.[313]

13.140 Orders of this kind have been made in a number of class actions in the Court at various stages of the proceedings.[314]

13.141 A Court exercising the power under s 33ZF to close a class (or even a sub-class) will also make an order, under s 33X, that a notice be sent to all group members requiring registration if a group member wishes to participate in the settlement of a claim. The form and content of such a notice must be approved by the Court under s 33Y.

13.142 Practitioners should be aware that class closure orders should not be sought until there is '*some compelling reason*' for the Court to 'order group members to go beyond their essentially passive role'.[315] That is, that closing the class can be demonstrated as a step with some reasonable prospect of bringing the proceeding to finality.[316]

13.143 Alternatively, it may be in the interests of all group members for the class to be left open and for approval to be sought for a settlement scheme in which group members are invited to participate in a process. This may include a process in which group members apply to have their liability claim assessed by a panel or within an approved regime and, if successful, their compensation is paid according to an approved process or in accordance with an approved scale. Such 'process' settlements are within the contemplation of s 33V and s 33ZF.[317]

13.144 The terms of settlement are particular to the claims made in the proceeding. A settlement might be for a lump sum with a request that the Court order the distribution of money in accordance with a scheme of settlement that is considered and approved (in accordance with s 33V(2)).[318]

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312 *Bray v F. Hoffman-La Roche Ltd* [2003] FCA 1505, [23].

313 See *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1. See also *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 1560, [5]–[6], [15]; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212, [65]; *Thomas v Powercor Australia Ltd* [2011] VSC 614, [34]; *Perry v Powercor Australia Ltd* [2012] VSC 113, [32]; *Johnstone v HIH Insurance Ltd* [2004] FCA 190, [103]–[104].

314 See, for example, McMullin v ICI Australia Operations Pty Ltd (1998) 84 FCR 1 (class closed following a judgment on liability); *Courtney v Medtel Pty Ltd (No 4)* [2004] FCA 1233 (class closed following an agreement to settle); *Lopez v Star World Enterprises Pty Ltd* (1999) ATPR 41–678 (class closed following an agreement to settle). See also *Scott and Taws v Oz Minerals Limited* (Federal Court of Australia, Proceeding No (P) NSD1433/2010, Order 22 October 2010 and 23 November 2010); *Vlachos v Centro Properties Ltd* (Federal Court of Australia, Proceeding No (P)VID366/2008, Order 17 December 2008); *Watson v AWB Ltd* (Federal Court of Australia, Proceeding No (P)NSD2020/2007, Order 26 March 2009).

315 *Winterford v Pfizer Australia Pty Ltd* [2012] FCA 1199, [5] citing Finkelstein J in *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176, [17].

316 As explained in *Matthews, in Winterford*, Bromberg J, concluded that the proceedings had not yet advanced sufficiently towards finality when compared to: *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* (the trial of the common questions had been completed); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (opt-out notices had been sent); *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 (the Court had determined the common questions concerning liability and was in the process of determining what damages members of the group might be awarded); *Perry v Powercor Australia Pty Ltd* (the parties had reached agreement and applied to the Court for approval of proposed terms of settlement); *Thomas v Powercor Australia Ltd* (five weeks into the trial of the proceeding, the parties agreed to terms of settlement).

317 See for example: *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370.

318 For example: *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671.

13.145 A settlement might be conditional on more than just Court approval and it might also impose conditions on the parties and participating group members, not only to register but to provide information to a scheme administrator[319] or contribute to the costs of the applicant's lawyers from payments received.[320]

13.146 The Practice note sets out the matters a party seeking approval will be required to address, the expected content of the affidavit evidence accompanying the application for approval and the usual content of the notice of settlement to group members. The criteria are now embodied in cl 11.2 of CM 17:[321]

(a) the complexity and duration of the litigation;

(b) the reaction of the group to the settlement;

(c) that stage of the proceeding;

(d) the risks of establishing liability;

(e) the risks of establishing loss or damage;

(f) the risks of maintaining a representative proceeding;

(g) the ability of the respondent to withstand a greater judgment;

(h) the range of reasonableness of the settlement in light of the best recovery;

(i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

(j) the terms of any advice from counsel and/or any independent expert in relation to the issues which arise in the proceeding.

13.147 Clause 11.3 of CM 17 provides that an application for the Court's approval of a proposed settlement must be made by interlocutory application. The orders that are commonly made on such an application include orders:

(a) for the confidentiality of evidence;

(b) for notice to group members of the proposed settlement;

(c) approving any scheme for distribution of any settlement payment; and

(d) disposing of the proceeding (e.g. by dismissing the application).

13.148 Parties seeking approval should consider whether the proceeding may be at such a stage, and the settlement proposed be of such a nature, that the Court should be asked to have a Judge, other than the Judge who will decide the common issues, hear the approval application. This may be thought necessary if substantial resources of the Court have been allocated to the proceeding to the date of the approval application and the docket Judge, having determined a number of interlocutory applications or even heard part of all of the common issues trial, may risk refusal if, having considered the confidential opinions of the applicant's counsel, denies the settlement application.

13.149 If the Court gives its approval to a settlement, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court: s 33V(2).

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319 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029.

320 *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370.

321 Justice Goldberg proposed a list of nine criteria against which the reasonableness of a proposed class action settlement should be assessed by the court in determining the application for approval: *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925. These criteria are now in the practice note.

13.150 Clause 11.4 of CM 17 provides that, to the extent relevant, the affidavit or affidavits in support should state:

(a) how the settlement complies with the criteria for approving a settlement;

(b) why the proceeding have been settled on particular terms;

(c) the effect of those terms on group members (ie the quantum of damages they are to receive in exchange for ceasing to pursue their claims and whether group members are treated the same or differently and why);

(d) the means of distributing settlement funds;

(e) the terms of fee and retainer agreements including the reasonableness of legal costs;

(f) a response to any arguments against approval of settlement raised by group members;

(g) any issues that the Court directs be addressed;

(h) a hearing of the application for settlement approval, including consideration of any group members' objections to the settlement and an order dealing with costs.

13.151 Particular attention needs to be paid to how much is paid on settlement and how a settlement fund will be distributed to group members. These steps become particularly salient in a proceeding containing group members with claims with varying degrees of merit. Where claims have different prospects of success the court will expect that to be reflected in the settlement. In the Vioxx product liability class action a settlement was rejected by the Court because it treated group members with weak claims the same as those who had strong claims.[322] The settlement calculation can seek to take account of a number of variables within the group that relate to the strength of a claim so as to provide compensation that reflects the strength of that claim. Equally, fine-tuning settlement allocations may increase legal costs and disbursements. The more intricate the calculation the greater the delay in having a settlement approved or distributed to group members. There is therefore a trade-off between accurately allocated settlement payments based on the relative strength of group members' claims and minimising the cost and delay in concluding the settlement.[323] Further, a settlement that treats group members with the same claims differently may not be regarded as fair and reasonable.[324]

13.152 The Court will not determine an application for approval of a settlement unless a notice, approved by the Court, has been given to the group members: see ss 33X(4) and 33Y. A failure to provide notice of a particular aspect of a settlement may see a court reject the settlement.[325]

13.153 Clause 11.5 of CM 17 states that when it is appropriate that notice of the proposed settlement be given to group members, the notice should usually include the following:

(a) a statement that the group members have legal rights that may be affected by the proposed settlement;

(b) a statement that an individual group member may be affected by a decision whether or not to remain as a group member (where the opt-out date has not already passed or where there is a further opportunity to opt out);

(c) a brief description of the factual circumstances giving rise to the litigation;

322 *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447 (Settlement took place after a trial and appeal in relation to the representative party's claim, who was ultimately unsuccessful due to risk factors (his age, gender, hypertension, hyperlipidemia, obesity, left ventricular hypertrophy and history of smoking) that defeated causation. The settlement treated group members without the risk factors the same as those with the risk factors). See also *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, [65]–[73] which addresses the same issue in the context of a cartel class action.

323 Michael Legg, '*Class Action Settlement Hurdles*' (2013) 2 Journal of Civil Litigation and Practice 131, 135–139.

324 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [45], [51] (recovery increased by a 35% uplift for a group member who was a client of the solicitor on the record and had made some contribution towards legal fees so that they recovered 42% of losses while other group members recovered 17.6% of losses but the merits of group members claims were 'relevantly identical').

325 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [47] (a term of a settlement that provided for a premium to certain group members who had funded the costs of the litigation was rejected, inter alia, because not all group members had received notice of the term); *Richards v Macquarie Bank Ltd (No 5)* [2013] FCA 1442, [12].

(d) a description of the legal basis of the claims made in the proceeding and the nature of relief sought;

(e) a description of the group on whose behalf the proceedings were commenced;

(f) information on how a copy of the statement of claim and other legal documents may be obtained;

(g) a summary of the terms of the proposed settlement;

(h) information on how to obtain a copy of the settlement agreement;

(i) an explanation of who will benefit from the settlement;

(j) where all group members are not eligible for settlement benefits – an explanation of who will not be eligible and the reasons for such ineligibility;

(k) an explanation of the Court settlement approval process;

(l) details of when and where the Court hearing will be and a statement that the group member may attend the Court hearing;

(m) an outline of how objections or expressions of support may be communicated, either in writing or by appearing in person or through a legal representative at the hearing;

(n) an outline of any steps required to be taken by persons who wish to participate in the settlement (in the event that affirmative steps are required);

(o) an outline of the steps required to be taken by persons wishing to opt out of the settlement if that is possible under the terms of the settlement; and

(p) information on how to obtain legal advice and assistance.

13.154 Many settlement approvals will require the Court to consider the detail of the administration of a settlement. This will usually require the preparation of a document that gives the Court details of exactly what steps will be taken to communicate with group members, identify their entitlements and to obtain and distribute the settlement monies. Aspects of the administration that might be covered by a 'Settlement Distribution Scheme' include:

(a) The appointment of 'Scheme Administrators' (who may be the law firm that acted for the representative party);

(b) The form and content of any notification to group members, including the applicable time frames for the provision of those notices;

(c) The details required to be provided by those group members who chose to participate in the settlement;

(d) The accounts into which the settlement monies will be paid and the time frames for such payments;

(e) The treatment of any interest earned on the monies in the settlement accounts;

(f) The time frames by which the scheme administrators must take certain steps, such as processing notifications, advising group members of their entitlements etc;

(g) The rights of participating group members to correct information and to have determinations reviewed, by whom and for what cost, if any;

(h) The obligations of the scheme administrator to inform the respondent(s) and/or the Court of agreed information, such as the intended date for the distribution of funds;

(i) The amount and the timing of the payment of approved costs and disbursements of the representative applicant's lawyers and any the payment of any approved reimbursement claims;

(j) Payments that are to be made to a litigation funder, if there is one;

(k) The process by which costs of the scheme administrators are to be paid and claimed; and

(l) Any releases granted or any restraints imposed or agreed to by any parties, the lawyers or participating group members.

14. COMPETITION LAW

by Ruth Higgins, Glenn Owbridge, Lici Inge and Linda Evans

A INTRODUCTION

14.1 This chapter deals with some particular issues which arise in competition law cases which are heard by the Court. In that sense it complements the more general chapters which are contained in this handbook.

14.2 Competition cases in the Court arise principally under the *Competition and Consumer Act 2010 (Cth)* (CCA) but also from matters arising under the National Gas Law and the National Electricity Rules, with most of the latter matters arising following proceedings in the Australian Competition Tribunal.

14.3 Proceedings under the CCA may be as a result of private litigation between parties, proceedings commenced by the Australian Competition and Consumer Commission (ACCC) for relief (including pecuniary penalties), or criminal proceedings commenced by the Commonwealth Director of Public Prosecutions. This chapter does not address matters related to criminal practice in competition law cases and it does not address matters relating to the Australian Consumer Law, which would normally arise as consumer protection rather than competition matters.

14.4 This chapter examines:

(a) the nature of competition law proceedings and forms of relief which are commonly sought in competition matters;

(b) the role of market definition in competition cases and how the application of case management principles may be used to deal most efficiently with the matters substantively in dispute between the parties;

(c) the role of economic evidence and methods of adducing it;

(d) approaches which may be taken to resolve proceedings commenced by the ACCC; and

(e) issues of confidentiality which inevitably arise in competition cases.

B NATURE OF PROCEEDINGS AND FORMS OF RELIEF

14.5 Jurisdiction is conferred on the Federal Court in respect of civil matters arising under the CCA by s 86(1) of the CCA.

14.6 Proceedings may be brought by commercial parties, the ACCC or the relevant Minister. Whilst the substantive issues are likely to be the same whoever institutes the proceedings, the relief which is available, and likely to be sought, will vary depending on whether the matter is purely one between commercial parties or is in the nature of enforcement proceedings commenced by the ACCC.

14.7 It is common for issues of liability to be heard separately from questions of the appropriate relief in proceedings commenced by the ACCC given the inherent tension in matters of this kind between putting on evidence relevant to relief, particularly pecuniary penalties, whilst contesting liability.

14.8 The CCA itself provides for a wide range of relief to be sought by parties in addition to the powers of the Court to grant relief under the FCA. Some forms of relief are only available in proceedings commenced by the ACCC, for example, non-punitive orders under s 86C of the CCA may be made only by the Court in response to an application by the ACCC. The orders which may be made under s 86C are community service orders, probation orders,[330] orders requiring the disclosure of information and orders requiring the publication of advertisements in a prescribed form. In addition, injunctions for breaches of ss 50 and 50A of the CCA can only be brought by the responsible Minister or the ACCC.

14.9 In addition to specific powers of this type, s 87 of the CCA enables the Court to make certain types of orders against the person who engaged in the conduct, or any person involved in the contravention, if it considers that doing so will compensate in whole or in part for the loss or damage, or will prevent or reduce the loss or damage. These orders include orders:

(a) declaring a contract void;

(b) varying a contract or arrangement; and

(c) refusing to enforce any or all of the provisions of a contract.

14.10 The forms of relief expressly provided for by the CCA supplement those which are available under the FCA.

14.11 The types of relief most commonly sought in proceedings between private parties are:

(a) declarations under s 21 of the FCA as to contraventions of the CCA, if the alleged conduct occurred on or after 1 January 2011 (or under the *Trade Practices Act 1974* (Cth) (TPA), if the alleged conduct preceded that date);

(b) interlocutory or final injunctions either under s 80 of the CCA or s 23 of the FCA;

(c) damages under s 82(1) of the CCA;

(d) compensation or other remedial action under s 87 of the CCA; and

(e) costs orders.

14.12 In enforcement proceedings, the ACCC will usually seek:

(a) declarations under s 21 of the FCA as to contraventions of the CCA, if the alleged conduct occurred on or after 1 January 2011 (or under the TPA, if the alleged conduct preceded that date);

(b) interlocutory or final injunctions either under s 80 of the CCA or s 23 of the FCA;

(c) the imposition of pecuniary penalties under s 76 of the CCA;

(d) a wide range of non-punitive orders (such the imposition of an audit and the introduction or enhancement of a trade practices compliance program) under s 86C;

(e) an adverse publicity order under s 86D of the CCA; and

(f) disqualification orders for individuals involved in the conduct.

14.13 The injunctions sought under s 80 of the CCA or s 23 of the FCA may be either prohibitory or mandatory, whereas the injunctions sought under ss 87, 86C and 86D are, by their nature, mandatory. Parties will need to pay careful attention to the framing of all orders sought, but this is particularly the case in relation to mandatory injunctions, since the Court has previously expressed some reluctance to impose them.[331]

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330 A probation order is one designed to ensure that the person does not engage in the same or similar conduct. Under the definition contained in s 86C, it includes orders for the implementation of a compliance program; orders for the establishment of an education and training program for employees or other persons involved in the person's business, and orders directing the revision of the internal operations of a business which lead to the person engaging in the contravening conduct.

331 See for example *Parmalat Australia Pty Ltd v VIP Plastic Packaging Pty Ltd* [2013] FCA 119 or *Tritech Technology Pty Ltd v Gordon* [2000] FCA 75 as to interlocutory mandatory injunctions; and *Rural Press Ltd v Australian Competition & Consumer Commission* [2002] FCAFC 213 as to difficulties seeking an order for a trade practices compliance program.

14.14 The Court may consider the need for an injunction to be obviated by the respondent proffering a suitably drafted undertaking. Parties may be able to avoid significant dispute, particularly at an interlocutory stage, by reaching agreement as to the terms of an undertaking, thus freeing up the parties and the Court to focus on the substantive dispute.

14.15 Parties should also bear in mind that the Court will sometimes order other alternatives to injunctions. In at least one enforcement proceeding, the Court considered it beneficial to give the respondent an opportunity to provide information to the ACCC as to the efficacy of revised compliance policies, after which the ACCC could renew its application for injunctive relief. That information was provided by way of an independent expert report reviewing the operation of the revised policies and the Court was ultimately satisfied, on the basis of that report, that further injunctive relief was not appropriate.[332]

14.16 Further, relief must be directed to the conduct which is found to have contravened the CCA. Accordingly, an order for the introduction of a compliance program must be for a compliance program relating to the conduct of the type the subject of the proceedings and not a broad compliance program extending beyond the scope of the matters in issue in the proceedings.

14.17 Since 1 January 2007 the determination of the pecuniary penalties which can be ordered for contraventions of Part IV of the CCA require the Court to give consideration to the benefit derived from the relevant conduct. Section 76(1A) of the CCA provides that the pecuniary penalty for each act or omission is not to exceed the greatest of the following:

> *(i) $10,000,000;*
>
> *(ii) if the Court can determine the value of the benefit obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;*
>
> *(iii) if the Court cannot determine the value of that benefit — 10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the act or omission occurred.*

14.18 This provision requires the parties to consider whether there is evidence available which can be used to establish whether any benefit was obtained as a result of the conduct and, if so, the value of that benefit. There are significant challenges in identifying the impact of the conduct and excluding the impact of other circumstances such as broader economic impacts and specific decisions taken by the company concerned. The attempt to quantify the benefit is the necessary starting point because it is only if that cannot be done that the turnover period figure becomes relevant and, if it can be calculated, a determination needs to be made if it is greater than $10,000,000.

14.19 Perhaps surprisingly, there has not yet been much detailed consideration as to how matters relating to the benefit are to be pleaded and the evidence to be adduced for these purposes. In large part this is because it was, until very recently, common practice in competition matters for there to be agreement as to penalty either as part of a full resolution of the proceedings or following a finding of liability. In these circumstances, the focus has been on the factors to be considered in determining the relevant penalty and whether the amount proposed by the parties is within the reasonable range of penalties. However, there is now a live question as to whether the practice of agreed civil penalty submissions will continue.[333]

14.20 The issue arose for consideration in *Australian Competition and Consumer Commission v Flight Centre Limited (No 3)*. Logan J held that the combined effect of r 16.02(1)(c), (d), (e) and (f) and r 16.03(1)(b) was that the ACCC was required to plead the material facts which it alleged gave rise to the imposition of a penalty calculated on the basis of a benefit having been derived by the respondent.[334]

14.21 Reliance on the alternative methods of determining the maximum penalty is likely to have an impact on evidentiary issues at any hearing on liability and on the balancing of the arguments for and against any separation of liability and penalty.

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332 *ACCC v Liquorland (Australia) Pty Limited* [2007] FCA 1339.

333 See Section E regarding the permissibility of agreed penalties.

334 [2014] FCA 292. The decisions on liability and penalty are both subject to appeal.

C THE ROLE OF MARKET DEFINITION

14.22 A number of provisions of the CCA require the Court to make findings as to the markets in which conduct is alleged to have occurred. Most often this arises in matters arising under Part IV of the CCA and involves the provisions which deal with substantial lessening of competition in a market (ss 45, 47, 50) or the possession and use of power in particular markets (s 46).

14.23 The object of the CCA is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[335] The endeavours to promote competition arise in a number of ways.

14.24 The first is by prohibiting arrangements which are assumed to be necessarily harmful to the competitive process.[336] This includes agreeing with one's competitors not to compete in certain areas, fixing prices, rigging bids, allocating customers, agreeing not to supply customers in certain circumstances or locations, or setting prices for on-sellers.[337] These cases do not require considerations of market, other than on the jurisdictional question of whether the relevant market is one in Australia.

14.25 The second is by prohibiting arrangements where the conduct in question is intended to, or does, or is likely to have the effect of substantially lessening competition[338] in a market. The effect of conduct upon competition is assessed in the context, or market, in which the goods or services in question are supplied or acquired.

14.26 The third is by imposing certain constraints on those who have substantial power in a particular market to prevent taking advantage of that power to harm the competitive process in that or any other market.

14.27 The consequence, or potential consequence, of any conduct will be more substantial if the market in question is very small, and the converse applies if that market is very large.[339] Similarly, participants in very small markets will appear to have more power to act without constraint than they would if a larger market were found. Thus identifying the appropriate market within which power and conduct are to be assessed is a critical framework for the enquiry.

Defining the market

14.28 The legislative framework for market definition is provided by s 4E of the CCA which states that:

> *For the purposes of this Act, unless the contrary intention appears 'market' means a market in Australia and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.*

14.29 The High Court held in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[340] that the CCA is an economic statute seeking to attain economic purposes and must be interpreted accordingly. The CCA has also been held to be remedial legislation and thus must be interpreted accordingly.[341] This outcome, of interpreting the CCA to achieve its economic objectives, is consistent with s 15AA of the *Acts Interpretation Act 1901* (Cth).

14.30 Five cases encapsulate the concept, purpose and process of defining markets. The clearest and most widely used economic definition of a market for the purposes of the CCA appears in *Re Queensland Co-operative Milling Association Ltd: Re Defiance Holdings Ltd* ('QCMA'):

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335 Section 2 of the CCA.

336 See Div 1 of the Part IV of the CCA, ss 45(2)(a)(i), 45(2)(b)(i), 47(6) and (7), 48 of the CCA.

337 Some types of conduct may be the subject of authorisation under Part VII of the CCA because additional circumstances disclose a net public benefit, such as countering market power elsewhere in a supply chain. There are also some defences specific to certain arrangements such as joint ventures.

338 See, for example, ss 45, 47 and 50 of the CCA.

339 See, for example, the observations of Mason CJ and Wilson J in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 [20] ('Queensland Wire').

340 (2001) 205 CLR 1.

341 *Webb Distributors (Australia) Pty Ltd v Victoria* (1993) 179 CLR 15.

> *We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.*[342]

14.31 This explanation of the concept has been universally adopted and accepted by all Australian courts.[343] Two subsequent decisions, also universally approved, amplify QCMA.

14.32 In *Trade Practices Commission v Australia Meat Holdings Pty Ltd* ('AMH') Wilcox J held:

> *A market is the field of activity in which buyers and sellers interact and the identification of market boundaries requires consideration of both the demand and supply side. The ideal definition of a market must take into account substitution possibilities in both consumption and production. The existence of price differentials between different products, reflecting differences in quality or other characteristics of the products, does not by itself place the products in different markets. The test of whether or not there are different markets is based upon what happens or (would happen) on either the demand or the supply side in response to a change in relative price.*[344]

14.33 The reference to relative price is intended to include a change in the quality of the good or service provided, for example where the price of a service is static but a part of the service, such as the availability of home delivery or restricted trading hours, is introduced.

14.34 A third seminal decision on the identification of markets is that of French J (as he then was) in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd*:

> *In competition law [market] has a descriptive and a purposive role. It involves fact finding together with evaluative and purposive selection. In any given application it describes a range of economic activities defined by reference to particular economic functions (e.g. manufacturing, wholesale or retail sales), the class or classes of products, be they goods or services, which are the subject of those activities and the geographic area within which those activities occur. In its statutory setting the market designation imposes on the activities which it encompasses limits set by the law for the protection of competition. It involves a choice of the relevant range of activity by reference to economic and commercial realities and the policy of the statute. To the extent that it must serve statutory policy, the identification will be evaluative and purposive as well as descriptive.*[345]

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342 (1976) 8 ALR 481, 517.

343 See, for example, Queensland Wire above n 339; *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* (2003) 215 CLR 374, *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90.

344 (1989) ATPR 40-932 [47].

345 (1991) 33 FCR 158.

14.35 The Trade Practices Tribunal described as follows the process of delineating the relevant market in *Re Tooth & Co Ltd; Re Tooheys Ltd*:

> *It is first necessary to identify close competition relevant to the matter in consideration. The market should comprehend the maximum range of business activities and the widest geographic area within which, given a sufficient economic incentive, buyers can switch from one supply source to another and sellers from one production flow to another.*[346]

14.36 The Trade Tribunal also noted that the long run substitution possibilities are of importance rather than the short term transitory ones. Within the bounds of the market, substitution possibilities may be more or less intense and more or less immediate. The field of substitution is not necessarily homogeneous, but may contain within it sub-markets. Their competitive relationship can have a wider effect upon the functioning of the market as a whole.

14.37 The market is a multi-dimensional concept; with dimensions of product, functional level, space and time.

14.38 Lastly, there is *ACCC v Liquorland (Australia) Pty Ltd* per Allsop J:[347]

> *Market definition is not an exact physical exercise to identify a physical feature of the world; nor is it the enquiry after the nature of some form of essential existence. Rather, it is the recognition and use of an economic tool or instrumental concept related to market power, constraints on power and the competitive process which is best adapted to analyse the asserted anti-competitive conduct...*[348]
>
> *Thus, once one appreciates the integrated legal and economic notions involved in the concept of a market and its purposive role (to which I will come) one is unlikely to find utility in a debate about the precise physical metes and bounds of a market...*[349]
>
> *It is also to be recalled that "all competition or substitution does not cease at the outer boundaries of the market; the economy as a whole is a network of substitution possibilities in consumption and production; competition is a matter of degree": Re Tooth & Co Ltd; Re Tooheys Ltd (1979) 39 FLR 1 at 39. The fact that minds might differ in the placement of the boundary of a local market in a judgmental process of assessing the relevant closeness of substitution for the analytical tool of market definition in a competition enquiry does not deny or rule out a conclusion as to the local nature of the market.*[350]
>
> *... Market definition is to be approached by beginning with the problem at hand and asking what market identification best assists the assessment of the conduct and its asserted anti-competitive attributes...*[351]
>
> *This is not the abrogation of principled analysis in favour of the impugned conduct determining the market. Rather, it is to recognise the consequence of market definition being a tool for analysis and not a physical thing, or essence, which can be identified in a manner divorced from the relevant context. An analysis of market power in Australia in relation to the liquor industry for the purposes of merger evaluation under s 50 of the Act may not turn upon individual analyses of the degree of competition in suburban or regional areas as small as Arncliffe, Campbelltown or Tweed Heads. However, the assessment of the purposes of Woolworths (through Messrs Smith and Meagher) in the placement of the relevant clauses into deeds with prospective local shopkeepers in order to prevent competitive sales from new licences detracting from the sales and hence profitability of their own local suburban liquor shops provides another framework of analysis entirely. The facts and perspectives of analysis in the two circumstances*

346 (1979) 39 FLR 1.

347 [2006] FCA 826.

348 Ibid [429].

349 Ibid [430].

350 Ibid [434].

351 Ibid [437].

are different. It is the market that best enables evaluation of Woolworths' conduct that is relevant.[352]

At least two elements of this passage are to be steadily borne in mind in identifying the markets here. First, it is the area of close competition. The relative and evaluative judgment as to the degree of closeness of competition relevant to the assessment of the conduct is important. Here, the question is the assessment of the purpose of Woolworths and Liquorland in undertaking conduct directed at local competitors. The degree of closeness of competition in the local area may be seen to be different from, or more important than, the degree of closeness of competition from a broader geographic perspective. In other words, merely because there is what can be said to be close competition on price across the Sydney conurbation for retail liquor, does not gainsay a local market, being a field or area of even closer competition between sellers in suburban areas. Secondly, the notion of giving less and charging more and thus constraint on activity is central to the analysis. This, as with the notion of close competition, can occur at different levels of commercial behaviour and organisation.[353]

Thus, the identification of the market as the correct analytical tool or instrumental concept to assess the conduct in question will be assisted by the recognition of the close competition and factors dealing with constraints that may be seen to be affected or advanced by the conduct in question.[354]

A distillation of the case law

14.39 From these decisions a series of propositions that both apply as a matter of law and are consistent with economic principles can be derived:

(a) the expression market definition is itself perhaps misleading in that the actual task is market selection, that is the process is both evaluative and purposive and involves a choice by the arbiter of fact that meets the purposes of the CCA in identifying and preventing harm to competition;

(b) a market is not a physical place, or a feature of the physical world: it is an intellectual construct created to analyse competition and competitive effects or, to use the words of the Full Court in Universal Music Australia v Australian Competition and Consumer Commission,[355] it is but a metaphor;

(c) markets do not have crisp or precise boundaries.

(d) the concept of substitution is central;

(e) the concept of close substitution (and only close substitutes are in the market) measures the level of constraint and thus involves questions of degree and judgment;

(f) markets must be defined (or selected) by examining both supply and demand side substitutes;

(g) in assessing substitutes and the degree of constraint, one looks at the long run and thus allows time for substitution to occur;

(h) the finding on a market is a question of fact informed by the evidence, commercial realities and, perhaps, expert economic opinion;

(i) the relevant activities and constraints that constitute the process of competition take place within the market and thus the selected market must be large enough to comprehend those activities and constraints;

(j) conduct by the same person may fall to be analysed, and held to have occurred, in different markets according to the purpose of the analysis;

(k) the process of market selection always proceeds from the identification of the conduct in question and works outwards, not vice versa; and

352 Ibid [438].

353 Ibid [441].

354 Ibid [442].

355 (2003) 131 FCR 529.

(l) a market has dimensions, incorporated into its definition, of product (or service), geographical extent and the functional levels in the supply chain that are relevant in considering the conduct in question.

Substitution

14.40 The central process in understanding and defining a market is *substitution* between actual or potential suppliers and acquirers in response to a change in either the price or quality of one supplier's product. If in response to a supplier changing price or reducing quality one can simply purchase another thing to meet that demand, or get it from another source, then the supplier will be constrained to be efficient in its price and output decisions. The degree of constraint is critical, because it is constraint that is being measured, hence the requirement that the putative substitute be a close substitute to the good or service in question.

14.41 The process used to identify and delineate close substitutes is defined in QCMA:

> *It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a simple but fundamental question: if the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: from which products and which activities could we expect a relatively high demand or supply response to a price change, i.e. a relatively high cross-elasticity of demand or cross-elasticity of supply?*[356]

14.42 In practice the test used to examine and identify the closeness of substitutes is the SSNIP test: if a person supplying the product or service in question wished to introduce a small but significant non-transitory increase in price (SSNOP) in the order of 5–10%, to what alternative products would customers turn or to what alternative sources of supply. Proposed market boundaries are expanded until there are no identified alternatives that would prevent the business in question successfully imposing the SSNIP. The smallest area in which a hypothetical profit maximising monopolist could successfully introduce a SSNIP identifies the boundaries of the relevant market.

14.43 A difficulty with empirically applying the SSNIP test is that often the test is applied to gauge conduct that has not yet occurred: the assessment is thus qualitative and hypothetical.

Dimensions

14.44 Markets are usually defined and pleaded with reference to three dimensions, product, geographic and functional. The product and geographic aspects each deal with substitution possibilities, with the further consideration of the timeframe over which those possibilities might be realised. The product dimension defines the relevant service or good, together with the services or goods that customers might turn to if there were a small but significant increase in the price (or reduction in the quality) of the initial good or service. The geography dimension identifies the area in which suppliers of substitutable goods or services supply potential customers as well as suppliers of other things who can readily and significantly switch to supply of the initial service or good in response to a price incentive. The functional dimension describes the level (e.g. manufacturing, wholesale, retail) or combination of levels most relevant to the inquiry.

The pleading and proving of markets

14.45 Accepting the notion from QCMA that market is "basically a very simple idea", one may well then wonder at the armada of material and expertise which parties often seek to deploy before the Court to address this issue.

14.46 The difficulty often lies in the importance of the market definition to the outcome of the case. In many cases a very narrow market may have fewer substitutes and constraints on a party's conduct and thus apparently heighten the power of participants and the significance of their conduct; and the converse may apply for very broadly defined markets. Further, once a market is defined, the prospect of new entry into that market arises. This is usually described and pleaded as barriers to entry. If new entry can be timely and effective it may constrain the market power of incumbents. Market definition thus offers parties a tempting forensic opportunity which is not easily or often resisted.

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356 QCMA (1976) 8 ALR 481, 517.

14.47 A market case, by its nature, may not readily be pleaded with the specificity or particularity of a feature of the real world; it is an intellectual construct. Often buyers or sellers can only (and need only for the purposes of the exercise) be identified by a class defined by the good or service in issue e.g. buyers of toothpaste or suppliers of legal services. Similarly the geographical area of the supply to relevant customers often will not, and need not, be precise (e.g. South East Queensland or metropolitan Adelaide). Many relevant issues, such as the identification of alternative suppliers or the likelihood of new entry, can only be matters of opinion.

14.48 Given the modern requirement for pleadings to identify specifically the true areas of dispute upon the informed instructions of the client, then (excluding penalty cases involving natural persons), the respectively contended markets and their formulation should be apparent by the first directions hearing. If not, the parties should be encouraged to bring this about before the matter proceeds. A bare denial of the applicants contended market is no longer acceptable.

14.49 It is also likely that requiring lead counsel for the parties to appear and have them explain the respective positions on factual disputes (at length if necessary) will do much to circumscribe the nature and scope of the evidence to be called and in particular what discovery (if any) is appropriate. To the extent that the principles of market definition (as opposed to their application) are said to be in dispute (a fairly rare occurrence) this also can be delineated.

14.50 There are a number of tools in the Court's armoury, apart from the more traditional ones, to deal with the areas of true dispute that emerge, and sort them from those that are merely putting an opponent to proof of evidentially difficult, but actually uncontroversial, facts. These are discussed below.

14.51 It is not only the Court and the parties who shoulder the burden of dealing with market and competition disputes. These disputes often drag in competitors, customers and suppliers to the parties which are not themselves parties to the litigation. Much of their time and much Court time will be taken up protecting their commercial secrets from the litigants.

14.52 Initiatives which reduce the matters in dispute will serve to limit the demands that must be placed on non-parties. Whether the non-party is involved by reason of compulsory process (such as following a s 155 CCA notice) or acting in its civic duty, they ought neither be unnecessarily injured nor discouraged by reason of their involvement. Such initiatives may include:

(a) **Section 190 of the Evidence Act 1995:** this section makes provision for waiver of the rules of evidence and offers a useful and perhaps underutilised tool. Market issues usually require significant reliance on the evidence of market participants. Often it will include matters broadly understood to be true, but difficult to prove, e.g. most persons travelling by air for business would not regard travel to anywhere other than where their business is to be conducted as a close substitute.

(b) **Notices to admit:** these are useful for shifting the cost consequences for recalcitrant parties (although are very difficult to apply to many broad issues and concepts involving markets and competition). It may be appropriate in some cases to seek orders foreshadowing that the costs consequences of particular non-admissions of a matter raised in a pleading, or of particularly unlikely markets, will be separately determined. It may also be appropriate to require an affidavit from a party's solicitor to elicit the factual foundation of a party's position where it appears it may be strategic rather than principled, particularly given the certification to the Court that such foundation exists.

(c) **Interrogatories:** these are increasingly used as a practical substitute to some discovery (e.g. to identify suppliers, or specify the total sales to certain persons in certain periods, rather than an order to produce the documents from which this might be gleaned). What may greatly aid their utility is if they are crafted with the aid or approval of the Court in the course of a directions hearing. Practical experience indicates that interrogatories specifically approved by a Judge have much enhanced prospects of being understood and drawing a meaningful response.

(d) **Discovery:** Where discovery is thought necessary, consideration might be given to requiring the parties to file affidavits from persons who are available and are actually familiar with the facts regarding the nature, volume and type of records that are maintained, the search facilities that are available and the form in which information can be provided, so that the utility and burden of discovery can be assessed and taken into account before categories are proposed. Solicitors'

affidavits often fail to fulfil this function and are usually provided to resist rather than facilitate discovery. If the matter is to proceed electronically, consideration might also be given at this stage, to whether a database which is already extant, such as a regulator's investigation database, should inform the way in which electronic documents are to be identified and exchanged.

(e) **Other initiatives:** other initiatives that might forestall or alleviate pleading disputes may be to have orders at an early stage as to the consequences of adopting certain styles of pleading that do not serve to crystallise issues. If the logical chain of connection between the conduct and the market alleged in a defence or reply is not expressly pleaded, must it be? Is a simple expedient to order that the party may not later put on evidence of matters that could have been pleaded? If there are bare denials of facts pleaded, are the parties required to plead the ground for denial, and should they be limited in putting a positive case that is not pleaded (whether as a matter of surprise or case management)?

D EXPERT ECONOMIC EVIDENCE

14.53 In *Re QCMA and Defiance Holdings*,[357] the Australian Competition Tribunal (Woodward J, President Shipton and Brunt) observed that: "*in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources*."

14.54 Similarly, in *Outboard Marine Australia v Hecar*[358] Bowen CJ and Fisher J said: "'*competition' for the purposes of s 47(1) must be read as referring to a process or state of affairs in the market. In considering the state of competition a detailed evaluation of the market structure seems to be required*".[359]

14.55 Notions such as market structure pose two distinct issues for litigating parties and the Court. First, they are notions derived from a non-legal discipline; secondly, they frequently involve evaluative terms of indeterminate reference. As the majority of the High Court (McHugh ACJ, Gummow, Callinan and Heydon JJ) observed in *NT Power Generation Pty Ltd v Power and Water Authority*:[360]

> *The Act is seeking to advance the broad goal of promoting competition. Certain provisions of the Act, particularly in Pt IV, necessarily turn to a significant degree on expressions which are not precise or formally exact. One example is "market": there can be overlapping markets with blurred limits and disagreements between bona fide and reasonable experts about their definition, as in this case. Other examples are "substantial", "competition", "arrangement", "understanding", "purpose" and "reason" (which need only be a "substantial" purpose or reason: s 4F).*

14.56 Against this background, the role of the expert economist in competition and regulatory disputes before the Federal Court and the Australian Competition Tribunal is to assist the Court in connecting economic principles to concrete legal problems.[361]

14.57 This section addresses the following issues:

- expert evidence and the character of economic expertise;

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357 (1976) 25 FLR 169,187–189.

358 (1982) ATPR 43,980, 43,983.

359 When introducing the substantive suite of 1977 amendments to the *Trade Practices Act 1974* (Cth), including the definition of "market" in s 4E, the Minister for Business and Consumer Affairs, Mr Howard, described the Act as "this extremely technical legislation," Australian Parliament, House of Representatives Hansard, Trade Practices Amendment Bill 1977: Second Reading Speech, 3 May 1977, 1476.

360 (2004) 219 CLR 90 [68].

361 See by analogy, RA Posner, *Economic Analysis of Law* (7th edition) (Austin: Wolters Kluwer: 2007), 3.

- the nature and uses of expert economic evidence;
- substantive and procedural rules governing the giving of expert evidence; and
- the receipt of expert economic evidence and the role of the hot tub.

14.58 These issues complement, and should be read alongside, the treatment of expert evidence in Chapter 12 of this Handbook, and the other matters relating to competition law in this chapter.

Expert evidence and the character of economic expertise

14.59 The earliest use of party-instructed experts occurred in the Ecclesiastical Courts where, by the 1570s, use was being made of artificers in dilapidation suits, to provide estimates of the extent of repair needed to restore damaged property.[362] The 1685 *Practice of the Spiritual or Ecclesiastical Courts* stated that there should be two witnesses of each craft in order to make a sufficient proof for the civilian court. The notion was that there should be sufficient – as opposed to competing – expert evidence.

14.60 During the incipience of the use of expert evidence in English Courts, judges were alarmed, one observing, that the experts were "drawn up, not on one side, and for the maintenance of the same truths, but, as it were, in martial and hostile array against each other".[363] These concerns grew. In *The Matter of Dyce Sombre Lord Cottenham L.C. observed that*:

> *I have seen enough of professional opinions to be aware that in matters of doubt upon which the best constructed and best informed minds may differ, there is no difficulty in procuring professional opinions on either side.*[364,]

14.61 Expert evidence involves the giving of an opinion based on assumed or established facts.[365]

14.62 Expert evidence may also, to some extent, involve the giving of opinions based upon inferences and evaluative judgments; such as the exercise of judgment involved in selecting relevant facts, from amongst a body of evidence, upon which to predicate an opinion. Such activity is not strictly scientific, since the conclusions reached are not amenable to verification. Indeed this aspect of opinion evidence was one ground for the Courts' initial refusal to admit that in the absence of testability, "the witness cannot be prosecuted for perjury".[366]

14.63 As Deirdre Dwyer has observed:

> *Expert evidence does not allow itself to be classified neatly within the fact/opinion distinction. The problem is that, while part of an expert's evidence consists of opinions that she has drawn from the facts, and another part consists of constituent facts that may have been provided by a non-expert, an expert may also identify and work with facts that are [readily] observable because of her expertise, or recognized as significant because of her expertise.*[367]

14.64 Complexity of this kind arises in respect of expert economic evidence.

14.65 Economics is the science of rational choice in circumstances of scare resources, and involves analysing how these resources are or can be allocated. As Alfred Marshall observed in *Principles of Economics* (Ch. II, §1):

> *Economics…concerns itself chiefly with those desires, aspirations and other affections of human nature, the outward manifestations of which appear as incentives to action in such a form that the force or quantity of the incentives can be estimate and measured with some approach to accuracy; and which therefore are in some degree amenable to treatment by scientific machinery.*

362 D Dwyer, *Judicial Assessment of Expert Evidence* (Cambridge: Cambridge University Press, 2008) Ch 5.

363 *Seven v Imperial Insurance Co*., The Times 14 April 1820.

364 (1849) 1 Mac & G 1207.

365 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 (Heydon J).

366 *Adams v Canon* (1621) Dyer 53b (Coke CJ).

367 Dwyer, above n 362, 90.

14.66 Economic analysis has various aspects. Macroeconomics analyses how aggregates, such as output, employment and the general price level are determined. Microeconomics examines how production and consumption are organized, what is produced and who benefits. Econometrics applies statistical methods to economic issues; by modelling, in mathematical terms, some aspect of the economy.

14.67 The character of this expertise has a direct bearing upon the admissible forms of evidence. Chief Justice French has noted, extra-judicially:

> *The accommodation of expert testimony within the rubric of specialised knowledge is not quite so easy with the social sciences such as economics and anthropology. In so saying it is important to recognise that these designations cover a variety of sub-disciplines. They do not describe a single methodology. There are things that economists do involving quantitative analysis and factual inferences that resemble the techniques of the hard sciences. There are other things they do which are evaluative or taxonomical including the organisation and labelling of facts.*[368]

14.68 In *Liquorland*, Allsop J (as his Honour then was) said this:

> *The recognition of the place of expert economic assistance in the manner described by Professor Brunt means that often the point of the expert opinion is to give a form or construct to the facts. It may appear to be an argument put by the witness. So it is. The discourse is not connected with the ascertainment of an identifiable truth in which task the Court is to be helped by the views of the expert in a specialised field. It is not, for example, the process of ascertaining the nature of a chemical reaction or the existence of conditions suitable for combustion. The view or argument as to the proper way to analyse facts in the world from the perspective of a social science is essentially argumentative. That does not mean intellectual rigour, honesty and a willingness to engage in discourse are not required. But it does mean that it may be an empty or meaningless statement to say that an expert should be criticised in this field for "putting an argument" as opposed to "giving an opinion". In this respect, regard should be had to the comments of French J in Sampi v State of Western Australia [2005] FCA 777 at [792]–[793].*[369]

14.69 While one might expect two scientists, retained to analyse the chemical composition of a patented drug, or two pathologists opining on a cause of death, to converge to some degree in their responses, there is little surprising in the prospect of two economists, deploying social scientific notions in contested circumstances, reaching different conclusions.

14.70 A clear distinction must, however, be drawn between expert evidence and expert assistance. As Allsop J observed in *Evans Deakin Pty Ltd v Sebel Furniture*:

> *[an expert's] views…no doubt [assist] in analysing and preparing the case and in marshalling and formulating arguments. That is the legitimate, accepted and well known role of expert assistance for a party preparing and running a case. Expert evidence in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing.*[370]

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368 RS French, "Expert Testimony, Opinion Argument and the Rules of Evidence" [2008] FedJ Schol 3. See also *Gumana v Northern Territory* (2005) 141 FCR 457 [155]–[156] (Selway J).

369 [2006] FCA 826 [842].

370 [2003] FCA 171 [676].

The nature and uses of economic evidence

14.71 Some decades ago, in her article "The Use of Economic Evidence in Antitrust Litigation: Australia" (1986) 14 *Australian Business Law Review 261*, Professor Maureen Brunt identified a range of potential uses for economic evidence:

> *the identification of markets, their structure, the processes of competition within them, and the results to which they give rise…evidence relating to relevant technical economic concepts, such as marginal cost.*

14.72 While the categories of available and admissible economic evidence may not be closed, the following are the principal types commonly encountered in practice.

14.73 First, an exposition of the meaning and nature of economic concepts and regulatory concepts, for example concepts of productive, allocative and dynamic efficiency, or concepts arising in respect of essential infrastructure, such as efficient component pricing, sunk and stranded costs and so on.[371] And so, in *Re Michael*,[372] Parker J (with whom Malcolm CJ and Anderson J agreed), observed:

> *While the evidence does not establish that particular terms in issue had uniform, accepted and certain meanings, it does establish that some words or phrases used in the Act and the Code are in common use in that field of economics which is concerned with competition policy, or more particularly with the regulation of essential infrastructure. In this context the words or phrases convey a meaning to those familiar with this field of economics which differs from that which the words themselves suggest in ordinary everyday usage. As the subject matter is by nature conceptual there is no uniform, accepted and certain meaning, but there is a principle or theory, the essential tenets of which are widely understood, though there need not be uniform acceptance of them. In my view, expert evidence may relevantly and usefully inform the Court as to this specialised usage, of which the Court would otherwise be unaware, so that the Court can determine whether the Act and Code is using particular words or phrases in their ordinary everyday usage, or in the specialised usage among those versed in this field of economics. Further, the expert evidence provides an appreciation of the nature and objectives of competition policy in the field of economics, and, in particular, of the regulation of essential infrastructure, so that the policy and objectives of the Act can be discerned with a greater and more reliable appreciation of the possibilities. In addition, the potential relevance of some concepts and provisions in the Act and Code can be more readily understood.*[373]

14.74 Similarly, in *Woodside Energy Ltd v Commissioner of Taxation*,[374] consideration was given to the admissibility of evidence concerning the term "assessable petroleum receipts".

> *There is a distinction in this respect between admissible evidence, which furnishes an economic opinion concerning what factors can or should be taken into consideration in construing a legislative provision, and inadmissible evidence as to the application of the legislative provision.*[375]

14.75 In *ACCC v Metcash Trading Limited and Another*, Emmett J said:

> *Both Dr Pleatsikas and Professor Hay are clearly well qualified to express opinions as to economic principles. In substance, as might be expected, there was little difference between the contents of their respective reports as to the relevant economic principles. However, I did not find helpful the application by the witnesses of those principles to the specific circumstances of the present case. Accordingly, I rejected those parts of their reports in which they purported to express opinions about the application of*

371 See generally, JG Sidka and DF Spulber, *Deregulatory Takings and the Regulatory Contract* (Cambridge: Cambridge University Press, 1997).

372 (2002) 25 WAR 511 [107].

373 See further: *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 [665] (Tamberlin J).

374 [2006] FCA 1303.

375 *Allstate Life Insurance Co v Australia And new Zealand v Banking Group Ltd* (No 33) (1996) 64 FCR 79.

> *the relevant principles to those circumstances. Nevertheless, I admitted that material as submissions from the parties tendering the respective reports. I have attempted below to distil from the reports the economic principles relevant to the three issues to be determined in the proceeding, which, as I have said, are the issues involving market definition, the counterfactuals, and the substantial lessening of competition.*[376]

14.76 Secondly, substantive analysis of matters such as market definition and substantial lessening of competition.[377] The identification of markets is the necessary first step in assessing the competitive effects of impugned conduct.[378] It is a purposive exercise, which seeks to situate the alleged contravening conduct within an area of competitive activity by reference to four dimensions, being, product, geography, functional level and time.[379] In undertaking this exercise, the Court must select what emerges as the clearest picture of relevant competitive processes in the light of commercial reality and the purposes of the CCA.[380] Section 4E of the CCA guides this exercise.[381]

14.77 The importance of this exercise cannot be understated. If the Court is not satisfied of the existence of an alleged market, any claim predicated upon that market must fail, as Sackville J observed in *Seven Network Ltd v News Ltd*[382] (Seven Network).

14.78 Sackville J expressed certain limits on such use of expert economic evidence in Seven Network:

> *Conclusions on market definition cannot simply be reached by choosing between the expert opinions. The task requires the application of the statutory criteria, informed (as the authorities require) by economic principles. Ultimately, the conclusions must rest on an assessment of the evidence as a whole including, where they are helpful, the opinions and reasoning of the experts. But the fact that ss 45 and 46 of the TP Act incorporate economic principles and concepts does not mean that the application of those principles to the facts is, in effect, to be delegated to the economists who are called to give their expert opinions.*[383]

14.79 This is a modern rendering of a long expressed concern that the Court is required to engage in a rational assessment and critique of expert evidence, including because: "the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert".[384]

14.80 A separate species of such evidence was discussed in *Re Brand Name Prescription Drugs Anti-Trust*.[385] Retail pharmacies brought proceedings against manufacturers and wholesalers of brand name prescription drugs alleging a price fixing conspiracy and the denial of discounts. Chief Judge Posner in the 7th Circuit Court of Appeals observed that there were two ways in which the plaintiffs might have been able to prove collusive conduct by the manufacturers. They could have presented direct evidence by way of admissions or eyewitness accounts that the manufacturers had agreed to collude. Alternatively they could have presented:

> *… circumstantial evidence, economic in character, that their behaviour could better be explained on the hypothesis of collusion than on the hypothesis that each was embarked*

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376 (2009) 282 ALR 464 [149].

377 *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 350–35 (Lockhart, Wilcox and Gummow JJ).

378 *Re BHP/Koppers Pty Ltd Purchasing Agreement* (1981) ATPR 42,807, 42,828. On the non-mechanistic character of market definition, see: *ACCC v Liquorland (Australia) Pty Limited* [2006] FCA 826 (per Allsop J, as the Chief Justice then was). See, to similar effect Professor S Breyer, "Five Questions About Australian Anti-Trust Law" (1977) 51 *ALJ 28*, 34 cited with approval by French J in *Taprobane Tours* (1991) 33 FCR 158, 175.

379 *Taprobane Tours* (1991) 33 FCR 158, 174 (French J).

380 Ibid 178 per French J.

381 *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* (2003) 215 CLR 374, 454 [247] (McHugh J).

382 [2007] FC 1062 [1856], [1966].

383 Ibid [1794] upheld in the joint judgment of Dowsett and Lander JJ in *Seven Network Ltd and Another v News Limited and Others* (2009) 182 FCR 160 [363]–[364]

384 *Davie v Edinburgh Magistrates* (1953) SC 34, Lord President Cooper. This concern led to the introduction of the ultimate issue rule (now abrogated by s 80 of the Evidence Act 1995) once expert evidence was deemed admissible.

385 185 F 3d 781 (7th Cir 1999).

> *on an individual rather than a concerted course of action – that each, in other words, was merely exploiting the market power it had, rather than seeking to create or amplify such power through an agreement with competitors not to compete.*[386]

14.81 Thirdly, economic evidence may be led in cases arising under other statutory or constitutional principles that invoke economic concepts. Expert economic evidence was recently deployed in several proceedings brought by online wagering operators, seeking to impugn state legislation as incompatible with the protection conferred by s 92 of the Commonwealth Constitution. A live issue in that litigation, in the High Court and otherwise, was the extent to which economic principles (and evidence) directly inform the proper construction of s 92.

14.82 In *Betfair Pty Ltd v Racing New South Wales*, Heydon J sounded this caution:

> *Proceedings in the Federal Court of Australia frequently involve inquiries into the question whether there is a substantial effect on competition in a market. Those proceedings have developed certain unattractive drawbacks. They are ponderous. They are slow. In them the parties tender, often successfully, copious quantities of inadmissible or marginally admissible "expert" evidence, selected with extreme discrimination, assembled at enormous expense and given with considerable impertinence in more than one sense of that word. Those drawbacks also exist in certain proceedings for review of certain types of administrative action in the Australian Competition Tribunal. In those proceedings the rules of evidence do not apply, but the drawbacks described are equally undesirable. These are not drawbacks lightly to be imported into cases on s 92 of the Constitution.*[387]

14.83 In *Sportsbet Pty Limited v Harness Racing Victoria and Another (No 6)*, Mansfield J said this:

> *I proceed with some caution in utilising the evidence provided by each expert with regard to "price discrimination" in addressing the existence or otherwise of discrimination within the s 92 or s 109 enquiry. The presence or absence of price discrimination is not determinative of that question. Price discrimination in a market place is capable of correcting market deficiencies, as well as being a source of them.*[388]

14.84 In *Sportsbet Pty Limited and Another v State of Victoria and Another*, Gordon J said this:

> *The evidence given by the economists was received without objection. I express no view about its admissibility. However, the utility of the evidence of each depended wholly upon what each economist meant by the expression "protectionist" and how each understood the relevant provisions bear upon the question to which his opinion was directed. Both the meaning to be given to the term "protectionist" and the legal and practical operation of the impugned provisions are ultimately questions for the court. Neither is a question for expert economic opinion. That conclusion is reinforced by consideration of the opinions which each expressed.*[389]

14.85 The majority in the Full Court (Kenny and Middleton JJ), reversing Gordon J, adopted a different approach:

> *There was evidence that a different funding model in the United Kingdom has not proved as successful so far as the UK racing industry is concerned. Racing in the United Kingdom is funded by a levy scheme, pursuant to which the industry and wagering operators negotiate annually on the level of a levy for the following year or, absent agreement, a levy is determined by the Secretary for Culture. Most betting in the United Kingdom takes places with off-course corporate bookmakers, operating "high street" betting shops. Under this scheme, wagering funding to the racing industry has varied greatly over the past decade and is apparently in decline, with adverse effect on the industry, including available prize money.*

386 Ibid [6].

387 (2012) 249 CLR 217 [65].

388 (2012) 206 FCR 50 [130].

389 (2011) 282 ALR 423.

> *The two economists — whose evidence was discussed by the primary judge in Sportsbet v Victoria at 450–451 [118]–[123] — were both unable to proffer a funding alternative for the racing industry that did not contain significant difficulties and inefficiencies…*
>
> *There was evidence that, if the current funding arrangements were replaced by a uniform fee paid by all bookmakers, at present turnover levels, that fee needed to be set at a level that most bookmakers would be unable to pay because the fee would exceed a bookmaker's typical profit margin. There was also evidence that a uniform revenue fee would be no less uncommercial. That is, if a uniform revenue fee were introduced, the evidence indicated that operators would need to pay around 41% of their revenue to achieve the level of funding attracted on the existing model in the 2009/2010 financial year. Further, this funding option would be less stable than the current one. Thus, the economists' evidence indicated that there was no alternative equally efficient and viable funding model to that which already operated.*[390]

Substantive and procedural rules governing expert evidence

14.86 The admissibility of expert economic evidence is governed by legislation, rules of court and practice notes. Those rules in summary require that:

(a) the opinion is relevant (including that the field of knowledge is one in which expert opinion can properly be called);

(b) the person put forward as an expert possesses specialised knowledge in that field;

(c) the specialised knowledge is based on the person's training, study or experience; and

(d) the particular opinion tendered is based on the specialised knowledge.

14.87 Matters of relevance are anterior to matters of admissibility.39162Whether evidence is relevant is a matter of judgment for the Court, but does not call for an exercise of discretion.39263Evidence is either relevant or irrelevant.

14.88 Section 76 of the Evidence Act provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion is expressed.

14.89 Section 79 of the Evidence Act provides an exception to this exclusionary rule, in stating that, if a person has specialised knowledge based on the person's training, study or expertise, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

14.90 In *HG v R*, Gleeson CJ pointed out that the provisions of s 79 of the Evidence Act:

> *will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.*[393]

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390 (2012) 207 FCR 8 [186]–[188].

391 Evidence Act 1995 ss 55(1) and 56.

392 *Smith v R (2001) 206 CLR 650*, 653–654.

393 (1999) 197 CLR 414 [39].

14.91 His Honour also observed that:

> *in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s 79, to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture "opinions" (sometimes merely their own inference of fact), outside their field of specified knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted*[394]

14.92 Similarly, in *Ocean Marine Mutual Insurance Assn (Europe) OV v Jetopay Pty Ltd*, the Full Court observed that the:

> further requirement [in s 79] that an opinion be based on specialised knowledge would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge.' (Emphasis in original.)[395]

14.93 The High Court has recently provided substantive guidance as to the application of these principles in *Dasreef Pty Limited v Hawchar*, as follows:

> *in order for an expert to proffer an admissible opinion, it is necessary to demonstrate that she has specialized knowledge based on her training, study or experience which permitted her to conduct the exercise undertaken, and that the opinion expressed was wholly or substantially based on that knowledge;*
>
> *at common law, the expression of an opinion by an expert is inadmissible if the facts and assumptions upon which the opinion is based are not identified. In addition, at common law, the expression of an opinion by an expert is inadmissible if the facts and assumptions upon which the opinion is based are not proven;*
>
> *at common law, the expression of an opinion by an expert is inadmissible unless the expert states the reasoning by which he or she arrived at the conclusion based on the proven facts or assumptions; and*
>
> *these common law requirements continue to operate under s 79 of the Evidence Act.*[396]

14.94 Rules of court also affect the basis upon which material may be admitted.

14.95 If evidence is excluded as inadmissible, it can be treated as a submission, pursuant to FCR r 5.04, item 19.[397] That rule permits the making of a direction that an expert's opinion be received by way of submission, and the manner and form of that submission, whether or not the opinion would be admissible as evidence.[398]

14.96 While such treatment necessarily changes the character and treatment of the material, evidence becomes argument. However, it does not demote the evidence to the level of a submission made by counsel. As Chief Justice French observed extra-judicially of the predecessor rule:

> *This rule is expressed in general terms because the problem of argumentative evidence occurs not only with economists, but other kinds of expert witness, particularly in intellectual property litigation. Although some commentators saw this rule as a downgrading of economic testimony that was a misconceived reaction. Where argument from an economist can offer to the court models for the characterisation and evaluation of primary factual evidence that argument can play a very significant role in the outcome of litigation. A well constructed economic argument can be as beneficial*

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394 Ibid [44].

395 (2000) 120 FCR 146. In *Seven Network Limited v News Limited (No 14)* [2006] FCA 500, Sackville J, [24]–[25], relied upon these authorities, and the absence of the necessary reasoning process, to exclude expert evidence concerning the value of the loss of the opportunity alleged in that proceeding.

396 (2011) 243 CLR 588.

397 Introduced following *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313.

398 *Noza Holdings Pty Ltd v Cmr of Taxation* (2010) 273 ALR 621; *Randwick City Council v Minister for Environment* [1998] FCA 1376.

> *to the court as a well constructed legal submission. If economists have an ability to put argument directly to the court as part of the trial process rather than filtering it second-hand through counsel, their role in the adjudication process is enhanced rather than downgraded… Notwithstanding the flexibility offered by the rule it is of course important to maintain the distinction between argument and evidence. Where argument depends for its validity upon the finding of primary facts it will play no part in the course consideration if those primary facts cannot be found on the evidence.* [399]

14.97 Practice Note CM 7, *Expert witnesses in proceedings in the Federal Court of Australia*, issued on June 2013 (CM 7), is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. CM7 is also intended to pre-empt, by directing attention to the expert's primary duty to the Court, and the proper form of the expert's report, the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity.

14.98 Rule 23.12 of the FCR requires a party to give a copy of CM 7 to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding.

14.99 Against this background, and having regard to the character of economic expertise and evidence, one prudent approach to the presentation of affidavit economic evidence to the Court is separately to deal with:

(a) the factual assumptions upon which the opinions are expressed;

(b) any primary factual evidence the expert is purporting to give;

(c) the principles applicable to the questions under consideration – for example, the economic principles applicable to market definition (supply and demand-side substitutability);

(d) the methodologies by which the expert proposes to apply the principles to the factual matters under consideration, that is, the reasoning process. This may include, where relevant, identifying any subset of facts the expert considers bear particular economic significance in the factual matrix; and

(e) the application of those principles and methodologies to the facts assumed.

14.100 The quarantining of each of these matters into discrete sections promotes clarity in accordance with the Act, the Rules and CM 7. It also lends itself to severable rulings on separate material, in a manner that may avoid an entire report being excluded, should part of it be either irrelevant or inadmissible.

14.101 The legal professional has an important, if delicate role, in this process of securing admissibility. The independence of the expert and her primary duty to the Court cannot be rendered vulnerable or undermined by substantive suggestions from solicitors or counsel. However, as Lindgren J observed in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7*):

> *Lawyers **should** be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in subs 82(1) of the NT Act, the requirements of s 79 (and of s 56 as to relevance) of the Evidence Act are determinative in relation to the admissibility of expert opinion evidence.*[400] *(emphasis in original)*

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399 O 10 r 1(2)(j): RS French, "The Role of the Court in Competition Law" [2005] *FedJ Schol* 4.

400 [2003] FCA 893 [19].

The receipt of expert evidence and the role of the hot tub

14.102 Chapter 12 in this Handbook identifies in broad terms the manner in which traditional cross-examination and concurrent evidence are conducted. Paragraph 12.40 describes particular concerns that have arisen with the traditional cross-examination of experts.

14.103 As described in paragraph 12.41, one technique that has been adopted is for the experts to give evidence serially. Under this model, expert evidence is deferred to be heard in one segment of the case, usually after the parties lay evidence is closed, when the experts are examined and cross-examined one after the other.

14.104 However, this model does not resolve the concern that adversarial techniques may obscure rather than reveal the real positions of the expert. As such, there has been rapid growth of the concurrent or "hot tub" technique of eliciting expert evidence. Within the context of competition law proceedings in the Federal Court and applications in the Australian Competition tribunal, different judges adopt different practices in conducting concurrent evidence.

14.105 Paragraphs 12.45–12.58 contain a detailed outline of a typical "hot tub" process, taken from Justice Rares' paper referred to in paragraph 12.39.

14.106 Potential variations to the "hot tub" process include:

- conducting cross-examination on a single witness basis in the absence of the other experts; and
- having questions for the economists drafted in advance and used to guide the conduct of the hot tub. These may be drawn up *inter partes*, or with the assistance of the judge. Under this model, the questions form the armature of the evidence within the hot tub, with counsel taking turns at leading the discussion around that framework. (In addition, the hot tub procedure is capable of being optimally efficient in a competition law case if, before the joint report, or at least before the concurrent evidence, the experts are given common assumptions of fact.) The judge may interject throughout the questioning, to draw out matters of particular interest or concern. Equally, the experts may question each other during the discussion. Each of the questions is dealt with, at which point conventional cross-examination is permitted, of each witness, alone, the other experts leaving the hot tub.

14.107 Paragraph 12.43 acknowledges the concerns that can arise with regards to concurrent evidence, but suggests that, in practice, evidence tends to come out in a more focussed way than is usual when traditional techniques are used, and the necessity for aggressive cross-examination (whilst still available) diminishes, as "position taking" seems to reduce. Expanding on this point, the traditional antagonistic confrontation between two different professions – here, a lawyer schooled in economics and an economist experienced in giving evidence – is replaced by a session conducted amongst members of the same community of practice or profession. This imposes quite different norms of interaction. One striking aspect of the dynamic of concurrent evidence is that, surrounded by peers and the discipline that imposes, witnesses will tend to make more reasonable concessions than under cross-examination.

14.108 Other benefits of the hot-tub (however conducted), include that:

- the hot tub will often commence with each witness being allowed to give an oral précis of her evidence. This allows the Judge to view the witness in chief, providing an exposition of her views and conclusions, as opposed to immediately experiencing the witness as an expert under attack during cross-examination. Given that the role of the expert is primarily to assist the Court, there is much to be said for a highly trained specialist being permitted to propound a thesis in chief before being interrogated by a skilled cross-examiner; and
- depending upon the manner in which the hot tub is conducted, the experts will often be permitted to question each other. As a function of shared subject-matter expertise, this may elicit evidence that would not otherwise have been elicited by counsel.

14.109 The benefits of complementing the hot tub with some form of conventional cross-examination are equally plain. Once the experts have been subjected to peer discipline through the concurrent evidence, counsel for each party can perform a role no expert properly should: namely, by testing evidence by reference to a particular

theory of the case, and with a directly adversarial approach. As observed in *Fox v Percy*,[401] an expert witness should never assume the role of an advocate and argumentative evidence should be rejected.

14.110 This process, taken alongside concurrent evidence is useful for the Court. Genuinely contradictory evidence allows (at least) two versions of events to emerge, which is both apt to an adversarial common law system, and apt to assist the Court in elaborating and testing alternatives.

E RESOLUTION OF PROCEEDINGS

14.111 Where matters of liability are not in issue, the common practice in competition law proceedings commenced by the ACCC has been for the ACCC and one or all respondents to seek to resolve the matter by putting before the Court a common position on the facts and the relief which the parties consider appropriate in the circumstances, including the amount or range of any pecuniary penalty to be ordered.

14.112 This approach has generally been considered as supporting the efficient administration of justice and reducing complex, time-consuming and costly litigation, whilst the Court continues to bear the ultimate responsibility to determine a penalty that is appropriate in all of the circumstances of the case.[402]

14.113 Some significant recent cases have cast doubt on the scope for putting pecuniary penalties negotiated with regulators before the Courts. In 2014, a majority of the High Court in *Barbaro v The Queen; Zirilli v The Queen* held that:

- courts should have no regard to the agreed figures in fixing the amounts of the penalties to be imposed, other than to the extent that the agreement demonstrates a degree of remorse and/or cooperation on the part of each respondent, and
- the prosecution is neither permitted nor required to provide the Court with its view of an appropriate sentence or sentencing range that may be imposed on an offender.[403]

14.114 Barbaro arose in context of criminal sentencing and its broader legal implications were initially uncertain. A number of first instance decisions suggested the case could be distinguished in the context of civil penalty proceedings.[404] However, in May 2015, the Full Court of the Federal Court delivered its decision in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (CFMEU).[405] The Court held that the considerations that were applied to the submission of agreed penalties in the criminal context (as considered in Barbaro) likewise applied to submissions regarding pecuniary penalties under the *Building and Construction Industry Improvement Act 2005* (Cth). The Court further held that any other approach would limit the Court's discretion in applying the appropriate sentence, which was not expressly allowed by the Act.

14.115 The CFMEU decision has significant implications for all parties involved in matters with an Australian statutory regulator with the power to seek pecuniary penalties.[406] Special leave has been granted in that case and the High Court was expected to hear the Commonwealth's appeal from the CFMEU decision in late 2015. In the meantime caution will be required in the approach to submitting agreed penalties.

14.116 Until the High Court provides clear guidance on the role of parties agreeing penalties, facts may continue to be the subject of agreement (that is, Agreed Statements of Facts), and submissions may continue to be made on the relative seriousness of the misconduct, comparable decisions and the relevant sentencing principles or proper approach to fixing a penalty. However it may be prudent for parties to avoid submissions that suggest either a range of pecuniary penalties or an agreed figure.

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401 (2003) 214 CLR 118 [151].

402 *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 [21].

403 [2014] HCA 2.

404 See, for example, *Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2015] FCA 274; Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464.

405 [2015] FCAFC 59.

406 P Renehan and P Stevenson, 'Purity but at what price: the application of Barbaro principles to pecuniary penalty proceedings', Paper presented at the 2015 Competition Law Conference, Sydney, 30 May 2015. Regulators potentially affected by the CFMEU decision include the ACCC, ATO, ASIC and the Fair Work Ombudsman.

F CONFIDENTIALITY

14.117 Competition law matters will almost inevitably involve the disclosure of and reliance upon commercially sensitive information; usually between persons in a commercial relationship, whether current or potential rivals or customers and suppliers. Accordingly, this can give rise to a tension between the Court's commitment to the principle of open justice, enshrined in ss 17(1) and 37AE of the FCA, and the need to prevent disclosure of commercially sensitive information where such disclosure would, for example, deter a party from seeking to enforce its rights in the Court.

Critical assessment of confidentiality claims

14.118 There is a useful discussion of confidentiality regimes in the context of discovery in chapter 7 of this Handbook (paragraphs 7.76–7.84). As that discussion points out, the negotiation and management of confidentiality claims can be an extremely expensive process, the costs of which are frequently underestimated or overlooked by parties.

14.119 Such costs could be minimised by parties (and practitioners) critically assessing whether to make confidentiality claims from the outset, particularly if the information in question is no longer current or has been otherwise disclosed. Further, parties ought to review whether or not to maintain their claims at each potential point of disclosure (for example, when giving discovery, when tendering documents or when determining whether to seek non-publication or suppression orders over parts of the judgment).

14.120 Once a decision has been made to make a confidentiality claim, the claimant needs to identify with precision the scope of the claim and the harm said to flow from disclosure. This will guide whether or not the usual implied undertaking[407] (which guards against collateral use, which might include disclosure) will be sufficient to ameliorate the perceived harm or whether an express undertaking or order is required.

14.121 This exercise is arguably no more than what is required by the overarching principle set out in s 37M of the FCA and the obligations imposed upon parties and their lawyers under s 37N(1) and (2) of the FCA. A party – and its lawyers – will be at significant risk of judicial criticism if the Court considers that uncritical assertions of confidentiality have caused undue expense, dispute and delay in the course of a proceeding.

Options for protecting confidential information

14.122 Disclosure of confidential information may arise as a result of pre-trial processes such as formal or informal discovery, notices to produce, subpoenas upon third parties and the filing of evidence. It may also arise in the course of the hearing, when material obtained in the pre-trial phases of the proceeding is tendered or otherwise referred to in the course of the hearing.

14.123 However, disclosure may also occur at other stages of a proceeding, which may be less frequently considered by the parties. For example, at the earliest stages of a proceeding, it may be necessary to disclose commercially sensitive information by pleading it as a material fact in a statement of claim or including it in an affidavit accompanying an originating application. In addition, disclosure of confidential information may occur at the conclusion of the proceeding, if referred to in the judgment, in which case the Court may ask the parties to confirm if they wish to make confidentiality claims over parts of the judgment.

14.124 Different strategies for protection of commercially sensitive information will apply depending on the circumstances of the disclosure and the scope for potential harm to arise following disclosure.

Implied or express undertakings

14.125 The implied undertaking or an express confidentiality regime agreed between the parties may be sufficient to protect confidential information disclosed pursuant to an order of the Court (for example, as to the filing of evidence or the giving of discovery) at least until such time as the content of the information is disclosed in open Court.[408] However, if information is to be disclosed other than pursuant to a compulsory process (such as informal discovery), the risk of subsequent disputes may be minimised if the parties confirm whether or not they will treat any information so disclosed as subject to a specific undertaking.

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407 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Hearne v Street* [2008] HCA 36.

408 Rule 20.03 of the FCR.

14.126 If the parties (or a third party confidentiality claimant) do not consider the implied undertaking to be sufficient to protect their interests, an express confidentiality regime will need to be agreed. Provided that the parties – and any third party confidentiality claimants – can reach agreement as to who will be permitted to access the confidential information and any other restrictions upon the disclosure, such undertakings may be a practical stop-gap measure. They put the parties in a position to meet disclosure requirements under a Court-ordered timetable, leaving disputes as to non-publication or suppression orders until such time as the document in question needs to be tendered.

14.127 However, as discussed in chapter 7, when parties agree upon express confidentiality regimes which are complex and onerous, they can give rise to significant disputation, considerable expense in their administration and an increased risk of inadvertent breach. There is therefore a real need for parties (and third party confidentiality claimants) to shape any express confidentiality regimes with a view to ensuring that they only go as far as is necessary to ameliorate the harm identified when determining whether or not to make the confidentiality claim in the first place. Secondly, parties ought to review the terms of confidentiality regimes to satisfy themselves that the cost and difficulty of their administration and compliance is not disproportionate to the value of the information, or its significance in the dispute.

Confidential information in originating documents

14.128 Sometimes it may be necessary to traverse confidential information in a pleading, an originating application or an affidavit accompanying an originating application. This will necessarily involve disclosure of that information between the parties when the originating documents are served pursuant to r 8.06. In any event, pursuant to r 2.32(1)(b), the parties will have the right to inspect any document in the proceeding except, relevantly, a document that the Court has ordered be confidential. In addition, a non-party will have the right to inspect an originating application or pleading pursuant to r 2.32(2), unless the Court has ordered that the document in question be confidential or be forbidden or restricted from publication to that person or a class of persons of which the non-party is a member.[409]

14.129 If there is sufficiently cogent evidence to persuade the Court that it is necessary to do so, it is possible to obtain orders that parts of a pleading (or originating application or accompanying affidavit) be kept confidential and not disclosed to anyone other than the parties, and that only a redacted version of the pleading be made available for inspection by non-parties in the registry.[410]

Non-publication and suppression orders

14.130 Pursuant to r 20.03, an implied or express undertaking, or even an express order, protecting a document from disclosure will cease to have effect once the contents of the document have been disclosed in open Court, in the absence of an order to the contrary. If parties wish to seek such an order, they need to do so at the earliest opportunity.[411]

14.131 The recently enacted Part VAA of the FCA replaces the previous s 50, which provided for the making of non-publication orders. Part VAA provides for both non-publication and suppression orders, and clarifies a number of procedural aspects concerning such orders (for example, that they can be made in respect of information obtained through discovery or under subpoena or lodged with the Court rather than just evidence). However, the principles underlying the making of an order under the previous s 50 continue to apply to orders under the new s 37AF.[412]

14.132 Although s 37AG sets out a number of grounds upon which a non-publication or suppression order can be sought, the ground that will most commonly apply in competition law matters is that the order is necessary to prevent prejudice to the proper administration of justice.[413]

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409 Rule 2.32(3) of the FCR.

410 See for example *Cyclopet Pty Ltd v Australian Nuclear Science and Technology Organisation* [2012] FCA 1326; *Crosse v Negus* [2012] FCA 182.

411 *Alstom Power Limited v Eraring Energy* [2009] FCA 681; *Brown v Forestry Tasmania (No 2)* [2006] FCA 468.

412 *ACCC v Air New Zealand Limited* [2012] FCA 1439.

413 Section 37AG(1)(a). For example, see *Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd* [2010] FCA 1344 [69].

14.133 The party seeking the order will need to put sufficiently detailed evidence before the Court to persuade the judge not only that an order is necessary, but that it goes no further than is necessary to prevent prejudice to the proper administration of justice.[414] Confidentiality claimants will need to be careful to ensure that they are not seeking orders over information that has been previously disclosed either to the public at large (for example, in filings with regulators or on their website) or to particular persons upon whom they now wish to impose restrictions (for example, where confidentiality claims have been dropped in other proceedings involving the same parties).

14.134 It may be useful to ask the Court to note that express orders replace previous undertakings or interim orders. This will be particularly useful in matters involving multiple confidentiality regimes over large numbers of information and documents.

Orders for closure of the Court

14.135 Although hearings will usually take place in open Court,[415] pursuant to s 17(4) an order can be made closing the Court entirely or excluding certain persons from a hearing if the presence of the public or those persons would be contrary to the interests of justice. Such orders are commonly made in the course of evidence being given, and less commonly during opening or closing submissions. The Court will rely upon practitioners, particularly counsel, to keep such closures to a minimum and to alert the Court when confidential information is about to be traversed.

Particular difficulties in proceedings involving regulators

14.136 There can be particular difficulties in enforcement proceedings brought by the ACCC or the Australian Energy Regulator (AER), or private proceedings in which a subpoena for production of documents is addressed to the ACCC or AER, given that many of the confidentiality claims over documents held by the regulator will be made by third parties, rather than by the regulator itself. This will require the regulator to consult with third parties as to the scope of such claims and, if the parties and third party confidentiality claimants cannot reach agreement, may necessitate the third parties appearing to seek orders protecting their information.

14.137 Subject to any particular urgency in a given case, in the event of the Court being asked to resolve disputes over disclosure, parties should endeavour to agree on a timetable which realistically allows for the additional time needed to negotiate with third parties.

The desirability of a common confidentiality regime

14.138 In proceedings where it is necessary to negotiate confidentiality regimes with large numbers of third party confidentiality claimants, including enforcement proceedings brought by the ACCC, there will be considerable efficiency in the parties and third parties agreeing – as far as possible – to a common confidentiality regime. The cost and difficulty of administering confidentiality regimes, and the risk of inadvertent breach, will be significantly higher if different regimes apply to each set of confidential information. One possibility would be for the parties to agree on the terms of a pro forma regime and seek an order early in the proceeding that the regime apply to all confidentiality claims, unless the confidentiality claimant can demonstrate to the Court that a departure from that regime is justified.

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414 See for example *SGS Australia Pty Ltd v Australian Laboratory Services Pty Ltd (No 2)* [2012] FCA 960 and *Cyclopet Pty Ltd v Australian Nuclear Science and Technology Organisation* [2012] FCA 1326.

415 Section 17(1) of the FCA.

Return or destruction clauses

14.139 It is not uncommon for confidentiality regimes to require that certain documents be returned or destroyed at the final determination of the proceeding (which is usually defined to include the conclusion of any appeal period or the determination of any appeal or otherwise related proceeding). Such clauses will require the parties to keep very clear records of the documents that are subject to such requirements, which (as Chapter 7 points out) can be a significant exercise in itself.

14.140 A particular difficulty in competition matters is that the proceeding may not be finally determined for many years. The cost of compliance with undertakings could be considerably reduced if confidentiality claimants critically assessed, at the conclusion of the proceeding, whether confidentiality claims should continue to be pressed. Parties (and third party confidentiality claimants) can sometimes compromise by vacating confidentiality orders that would otherwise require the return or destruction of documents, provided that the parties undertake to keep any copies of the material securely and not to use it for any purpose other than the proceeding. Ideally, however, parties should consider whether return or destruction clauses are really warranted when entering into confidentiality regimes or seeking confidentiality orders.

13.155 If a proposed settlement is not in the best interests of all group members, practitioners representing the applicant should consider:

(a) whether those whose interests are best served by the proposed settlement are able to go forward with a settlement; and

(b) whether another group member might be appointed under s 33T to replace the representative applicant so as to represent those left in the class.[326]

13.156 The use of s 33T to substitute an alternative representative will only work where the claims of the remaining group members are not undermined by the settlement of the others and where there is a group member who is willing to perform that role.

13.157 Settlement approval applications should be accompanied by transparent disclosure of any costs and disbursements sought to be payable by any person affected by the settlement. Those seeking approval for the payment of costs should ensure that the settlement approval application is supported by report from an independent costs expert. The need for such an independent expert follows from Gordon J's observations in the GPT shareholder class action settlement:[327]

> The solicitor is acting for itself – it seeks an order that its costs be approved by the court and paid to it. There is no contradictor.

13.158 The report of the independent costs expert should be directed to:[328]

(a) the reasonableness of the terms of the fee and retainer agreements (including the provisions for ancillary services, interest and an uplift factor);

(b) whether the fees and disbursements actually charged by the solicitors have been calculated in accordance with the fee and retainer agreement; and

(c) confirming that, so far as the solicitor or costs consultant can determine, no significant portion of the fees and disbursements charged by the solicitors have been inappropriately or unnecessarily incurred in conducting the proceedings.

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326 See *Crawford v Bank of Western Australia* [2005] FCA 949.

327 *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626, [27] and *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No 2)* [2013] FCA 1163.

328 Criteria listed by Sackville J in *Courtney v Medtel Pty Limited (No 5)* [2004] FCA 1406, 212 ALR 311 and approved by Flick J in *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277 in which his Honour stated at [24]: '*I made it clear that I did not expect the evidence to involve an exhaustive review of the files maintained by the Solicitors. I had in mind an overview that could be undertaken over a period of about two days.*'

13.159 However, it must be recalled that it is the judicial officer (not an independent costs expert) who is required to determine whether the fees and disbursements are reasonable. Further, the information to be provided to that judicial officer must be 'sufficient' to enable that judicial officer to undertake that assessment.[329]

329 *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626, [35].

15. APPENDIX A – EXAMPLE CONFIDENTIALITY REGIME

EXAMPLE CONFIDENTIALITY ORDERS

THE COURT ORDERS THAT:

1. Until further order of the Court, each of the Documents, Affidavits and Exhibits (and parts thereof) identified in annexure 'A' ('Confidential Material') be kept confidential and not be provided or disclosed to any person except as indicated in Order 2.
2. Access to the Confidential Material is granted only to the following persons for the sole purpose of the conduct of these proceedings:
    - 2.1 the solicitors and counsel (including their relevant office staff) engaged by the parties for the purpose of the conduct of the proceeding;
    - 2.2 representatives of the parties who are involved in the conduct of the proceeding; and
    - 2.3 representatives of the Respondent who have access to the information contained in the Documents, Affidavits and Exhibits (and parts thereof) identified in annexure 'A' as part of the usual course of their employment with the Respondent.
3. Prior to receiving Confidential Material the persons identified in Order 2 (a) and (b) above are to sign an undertaking in the form of annexure 'B' which must be served on the [Plaintiff or Defendant] prior to the Confidential Material being provided to that person.
4. Orders 1 and 2 do not restrict access to the Confidential Material to the Court and staff of the Court.
5. The Confidential Material must be endorsed with a prominent stamp or watermark indicating that the documents are subject to a Federal Court confidentiality order and kept in safe custody by the Associate to the Honourable Justice [insert name of Judge] and not made available to any person for inspection other than those persons referred to in Order 2 or other staff of the Court.
6. In the event that either party wishes to show any part of the Confidential Material to any witness during the giving of evidence at the hearing of the proceeding, then that witness must be told of this order and ordered to comply with its terms.

EXAMPLE CONFIDENTIALITY UNDERTAKING

I, ...
of .....
undertake to [Disclosing Party] and the Federal Court, in respect of all documents filed or produced in these proceedings over which a claim for confidentiality is made by [Disclosing Party] and which are marked as confidential (Confidential Documents) and in relation to the information identified as confidential in the Confidential Documents (Confidential Information) (such Confidential Documents and Confidential Information are listed in Schedule 1 to this undertaking) that:

1. Subject to the terms of this undertaking, I will keep the Confidential Documents and the Confidential Information confidential at all times.

2. I will not use the Confidential Documents or the Confidential Information or any part of either of them, for any purpose other than the sole purpose of the conduct of Federal Court proceedings [insert proceedings number], and any proceedings which are joined to, or to be heard with, these proceedings (the Proceedings), except with [Disclosing Party]'s prior written approval.

3. Subject to cl 4 below, the Confidential Documents and the Confidential Information and any part of either of them will not be disclosed by me either directly or indirectly to any person, including other witnesses in the Proceedings unless:

    (a) such disclosure is expressly authorised by the Federal Court or [Disclosing Party];

    (b) such part of the Confidential Documents or Confidential Information is already known to [Party giving undertaking] otherwise than in contravention of this or a similar confidentiality undertaking;

    (c) such part of the Confidential Documents or Confidential Information is already generally and publicly available otherwise than in contravention of this or a similar confidentiality undertaking; or

    (d) such disclosure is required by law (and then only to the extent that, and to the persons, required by law and in accordance with cl 6).

4. The Confidential Documents and the Confidential Information may be disclosed by me to:

    (a) any Judge of the Federal Court of Australia and his or her staff in connection with the Proceedings;

    (b) [Disclosing Party], its staff, consultants and legal advisers; and

    (c) any one or more of the following persons:

        (i) [name solicitors for the party giving the undertaking] providing that they signed an undertaking in terms substantively identical to this undertaking;

        (ii) [name relevant in house counsel of the party giving the undertaking] providing that they signed an undertaking in terms substantively identical to this undertaking;

        (iii) [name counsel of party giving the undertaking] providing that they signed an undertaking in terms substantively identical to this undertaking; and

        (iv) any other person specifically approved by [Disclosing Party] in writing and who has signed an undertaking in terms substantively identical to this undertaking;

        (v) a secretary or legal assistant employed by [solicitors and counsel for the party giving the undertaking] for the sole purpose of providing clerical or administrative assistance to the persons listed in paragraphs (i) to (iv) in relation to the Proceedings.

5 If I disclose the Confidential Documents or the Confidential Information to any of the persons listed in cl 4(c) above, I will use my best endeavours to protect the confidentiality of the Confidential Documents and the Confidential Information and ensure that the confidentiality is maintained.

6 If I am required by law to disclose any Confidential Documents or Confidential Information to a third person, I agree that before doing so I will, to the extent permitted by law:

(a) notify [Disclosing Party];

(b) give [Disclosing Party] a reasonable opportunity to take any steps that it considers necessary to protect the confidentiality of that information; and

(c) notify the third person that the information is confidential information of [Disclosing Party] and must be kept confidential.

7 I will:

(a) promptly notify [Disclosing Party] of, and will take all reasonable steps to prevent or stop, any breach of confidentiality in relation to the Confidential Documents or the Confidential Information; and

(b) provide all assistance which is reasonably requested by [Disclosing Party] in relation to any proceedings which that person may take against any person for unauthorised use of disclosure of the Confidential Documents or Confidential Information.

8 If the Confidential Documents or the Confidential Information, or any part of them, are to be referred to or otherwise used in the Proceedings, I will take all reasonable steps within my power to ensure that such Confidential Documents or Confidential Information are not disclosed openly in Court and are only used or reproduced as part of a confidential submission.

9 Upon the conclusion of the Proceedings, or my ceasing to have any involvement in the Proceedings, I will:

(a) at the election of [Disclosing Party] return to [Disclosing Party] or destroy paper copies of the Confidential Documents;

(b) destroy or remove any references to the Confidential Information in any documents created and held by me;

(c) take whatever reasonable steps are specified by [Disclosing Party] to prevent access to, or recovery or retrieval of:

(i) any electronic copies of the Confidential Documents held by my or under my control; and

(ii) any references to the Confidential Information in any documents created and held by me or under my control.

Schedule 1

[List or otherwise identify confidential documents]

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