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*Federal Litigation and
Dispute Resolution Section*



FEDERAL COURT
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Case Management Handbook

Chapter 8 – Discovery of Documents

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Editor's Note

The introduction of the Federal Court's National Court Framework reforms, including the extensive revision of the Court's Practice Notes, has effected a fundamental reform of the Court and the way that it operates. The Case Management Handbook is currently under revision to seek to ensure that it reflects these changes. It is envisaged that the structure of the revised Handbook will be closely aligned with the organisation of the Court's new Practice Notes and be responsive to the content and practices reflected in them. Among other things, this will necessitate the re-writing of existing chapters and the writing of extensive new content.

Chapter 8 (Discovery of Documents) has now been revised and this version should be utilised to the exclusion of the equivalent chapter (chapter 7) in the current version of the Handbook.

Simon Daley PSM
Editorial Committee

A. Purpose of discovery

- 8.1 As Practice Note [CPN-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 use discovery procedures that are tailored for commercial disputes in the manner best suited to the character and needs of each case: see Practice Notes [CPN-1](#) (Part 10), [GPN-TECH](#), and [C&C-1](#) (paras 8.1-8.7). These practice notes were introduced in October 2016 and confirm the Court's emphasis on parties' use of cooperative, innovative and targeted procedures to maximise the efficiency and minimise the burden of the discovery process.
- 8.2 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.
- 8.3 Like other interlocutory procedures, discovery may also serve the important secondary purpose of permitting the parties to assess properly the strengths and weaknesses of their respective cases prior to trial with a view to early settlement of claims.
- 8.4 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 can impose significant burdens upon the parties and the Court and 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 cost, time and possible oppression to the producing party against the importance and likely benefit to the opposing party of such discovery.¹

B. Should discovery be sought?

Identifying the issues in dispute

- 8.5 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 or concise statements in the absence of 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

¹ See *United Salvage Pty Limited v Louis Dreyfus Armateurs SNC* [2006] FCA 116, [3]; *Kyocera Mita Australia Pty Ltd v Mitronics Corp Pty Ltd* [2005] FCA 242; *Re Group Pty Ltd v Adam Kazal (No 2)* [2017] FCA 698, [5].

matter extends beyond a mere identification of matters in dispute. Proper case preparation and Practice Note [CPN-1](#) 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 opponent's documents at all and, if so, for what purpose?
- Can that purpose be achieved by a less expensive means?
- Will the discovery order effectively facilitate a mediation or other ADR process?
- 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? In other words, would the request be sufficiently limited and targeted, and are the documents sought significantly probative in nature?
- 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?

8.6 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

8.7 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 [CPN-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](#); [CPN-1](#) (Part 10); [GPN-TECH](#); [C&C-1](#) (paras 8.1-8.7). 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 Notes.

Discovery must be for the just resolution of the proceeding

8.8 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

8.9 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 refine pleadings further 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?

- 8.10 While the FCRs and Practice Notes do not expressly require the parties to conduct a pre-discovery conference to develop a discovery plan addressing the issues identified above prior to seeking discovery orders, [CPN-1](#) and [GPN-TECH](#) both indicate that the Court will expect the parties to have discussed discovery issues, including potential discovery protocols, before approaching the Court with a discovery request.² Indeed, in many instances, practitioners and the Court will not be able to address the matters identified in Practice Note [CPN-1](#) (part 10) 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 before the discovery process is embarked upon. Significant cost can be incurred if disputes subsequently arise regarding the adequacy of the discovery (which disputes could have been avoided by prior information exchange and planning), if supplementary discovery orders are made requiring a party to repeat the discovery process in substantial respects, or if the interlocutory timetable is otherwise disrupted as a consequence of delays or difficulties relating to discovery.
- 8.11 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 define more clearly the matters in dispute and the scope of required discovery;
 - the parties to file affidavits, participate in oral depositions, attend for examination or to 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 party's 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 that inadequately particularised allegations in the pleadings be struck out.
- 8.12 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.

² See, for example, *Agius v South Australia (No 4)* [\[2017\] FCA 361](#), [186].

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

8.13 When addressing the matters identified by the FCRs and Practice Note [CPN-1](#), 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) or concise statements in the absence of pleadings. 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 parties' 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 a less extensive discovery burden. By maintaining the non-admitted allegation the applicant may 'unnecessarily' expose itself to 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 costs 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 formulate jointly a statement of agreed facts as a foundation for the Court to determine 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 facts may prove to be an inadequate or incomplete basis for the Court to determine the dispute.

- **interrogatories:** the subject of 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

- 8.14 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.
- 8.15 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.
- 8.16 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.
- 8.17 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 respondent, and the Court has commonly not made orders for discovery by members of the represented class (as to individual 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: CPN-1

- 8.18 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.³ Particular issues relating to the discovery of electronic material and the application of the Practice Note [GPN-TECH](#) are addressed below.
- 8.19 Practice Note [CPN-1](#) requires practitioners and the Court to consider whether a discovery request is proportionate to the nature of the case, appropriate at the particular stage of the proceedings, and appropriately limited and targeted in its scope.
- 8.20 In addition to Practice Note [CPN-1](#), Practice Note [C&C-1](#) sets out two procedures generally employed in the context of international commercial arbitration as potentially useful approaches in commercial cases: the Redfern Discovery Procedure, under which the parties collaboratively prepare a schedule containing document requests and responses under the court's supervision; and the Memorial Procedure, in which the parties file pleading-related material along with key documents and evidence in a single process early in the proceedings (see Practice Note [C&C-1](#) paras 8.1-8.11).
- 8.21 Practitioners and the Court should consider the following matters in their approach to requests for these various forms of discovery:
- Do the pleadings (if they have been ordered) 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?⁴
 - 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

³ See generally *Sogelease Australia Ltd v Griffin* [2003] NSWSC 178.

⁴ 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.

be deferred? On the other hand, could this increase costs in the longer term and/or create an obstacle to settlement?

- 8.22 As stated in s 8.10 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.
- 8.23 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.
- 8.24 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.

D. Categories of documents – ‘limited and targeted’ requests

- 8.25 In light of Practice Note [CPN-1](#) (Part 10) and [C&C-1](#), it is likely that an order for standard discovery (pursuant to 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 limit discovery further by use of targeted requests for specific categories of documents 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.
- 8.26 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.
- 8.27 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 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.
- 8.28 Categories are also useful because they effectively translate the issues arising on the pleadings (or in a concise statement) 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.

8.29 It should be noted, however, that r [20.17](#) does not require that a list of documents produced in response to an order for discovery specify the category to which each document relates.⁵ If a list did not do so, it would be open to a party to apply to the Court under r [20.17\(3\)](#) for an order that a more detailed list be provided and that each document in a category be separately described.

8.30 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].

8.31 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 similar range of primary document sources as would be required to give general discovery.

8.32 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.

8.33 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].

⁵ *Cantor v Audi Australia Pty Limited (No 3)* [\[2017\] FCA 1079](#), [40]-[41], [48].

E. The peril of categories

8.34 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.

8.35 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.

8.36 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.⁶ The pre-planning and disclosure process described in sections **Error! Reference source not found.** and 8.10 above is vital in this regard.

8.37 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.

8.38 The provisions of Practice Note [GPN-TECH](#) recommend that parties attempt to agree discovery plans and protocols for the exchange and management of electronic documents and provide an appropriate opportunity for parties to volunteer information about:

- internal management structure, including delineation of functions and responsibilities between departments or business units;
- organisational reporting lines and management structures;
- accounting and accounting record keeping practices;
- series of regular reports prepared and kept by the organisation;

⁶ 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].

- methods by which files and records are maintained (e.g. hard copy or electronic);
- all relevant documents that are available without the need to resort to backup tapes (see further discussion of backup tapes below).

8.39 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 [CPN-1](#) and [GPN-TECH](#) 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.

8.40 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

8.41 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

8.42 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?

8.43 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.

8.44 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 a 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.

- 8.45 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’

- 8.46 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. That practice 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

- 8.47 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).

- 8.48 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 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 documents containing those figures were required to be discovered.

F. The Virtual Mire – Electronic Documents

General

- 8.49 Discovery of electronic documents will usually comprise the bulk of the discovery exercise in modern commercial litigation. Practice Note [GPN-TECH](#) provides a framework for the management of electronic discovery. Importantly paragraph 3.3 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. At the time of writing, an updated “Standard Document Management Protocol” is being developed, but the Court’s [Default Document Management Protocols](#) and [Advanced Document Management Protocols](#) released with now revoked Practice Note [CM-6](#) should otherwise continue to guide the electronic discovery process.

- 8.50 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.
- 8.51 [GPN-TECH](#) contains express recognition that the technological requirements in each case will differ, and on that basis, parties are encouraged to tailor the document management protocol to the particular circumstances of the case in order to maximise its efficiency and effectiveness. Indeed, Practice Note [GPN-TECH](#) is less prescriptive than the now revoked Practice Note [CM 6](#) – it may, therefore, offer greater flexibility than its predecessor.
- 8.52 Together with the developments in the Court’s Practice Notes, the Court has consistently encouraged the development of innovative document management processes in discovery.⁷
- 8.53 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.
- 8.54 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.
- 8.55 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 recipient’s ‘inbox’);
 - 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;

⁷ *Kenquist Nominees Pty Limited v Campbell (No 3)* [\[2017\] FCA 1230](#), [15].

- uploading of the relevant documents into a database for legal review;
- legal review to identify claims for legal privilege and/or confidential material;
- creation of meta data files and imaging of the documents for provision to other parties.

8.56 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.

8.57 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.

8.58 The use of ‘predictive coding’ or ‘technology assisted review’ – that is, an electronic program which may be ‘trained’ to categorise and determine the likely relevance of documents and thus facilitate discovery – has been ordered in at least one case,⁸ and agreed by consent in others. At this time, there have been no Federal Court decisions that contain any detailed analysis of its use. But the fact that [GPN-TECH](#) (see 3.8) contemplates predictive coding has led some to suggest that its use is permissible “without express judicial intervention”.⁹ Moreover, the practice has received judicial approval of in other jurisdictions both in Australia and internationally.¹⁰ Its proposed use should be discussed between the parties (in the course of a pre-discovery conference) and drawn to the attention of the Court.

Search terms

8.59 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.

8.60 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 then 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.

8.61 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.

⁸ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 2)* [2017] FCA 1231.

⁹ Legg and Davey (2017) ‘[Predictive Coding – Machine Learning Disrupts Discovery](#)’ 32 *Law Society Journal* 82-84.

¹⁰ See eg. *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No. 1)* [2016] VSC 734; *Pyrrho Investments Limited & Anr v MWB Property Limited and Others* [2016] EWHC 256 (Ch); *Moore v Publicus Groupe* 11 Civ 1279 (S.D.N.Y 2012).

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.

- 8.62 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 [GPN-TECH](#), section 3. There is the prospect that the other party may seek to expand the scope of the search list, but this is perhaps the price 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.
- 8.63 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 any 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 Court's general discretion in relation to discovery orders.
- 8.64 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.
- 8.65 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)'.
- 8.66 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'.
- 8.67 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.

- 8.68 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.
- 8.69 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

- 8.70 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.
- 8.71 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.
- 8.72 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.
- 8.73 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.

- 8.74 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.
- 8.75 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 proactive 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.¹¹ 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

- 8.76 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.
- 8.77 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 document exchange protocols issued with the now revoked [CM 6](#) (an updated Standard Document Management Protocol is currently being developed) provides for how meta-data is to be handled between the parties.

¹¹ See *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65.

G. Redaction

Relevance

- 8.78 The authorities suggest that there is no absolute entitlement for a party to redact irrelevant material in an otherwise relevant document.¹² 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.¹³ The parties commonly may make appropriate provision for this in the discovery plan or protocol.¹⁴ If such an agreement has been reached, the Court may be reluctant to go behind the agreement and order unredacted production if a party subsequently objects to certain redactions.¹⁵
- 8.79 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.¹⁶ Redaction may be costly and spawn collateral disputes.
- 8.80 One possible exception to this general position relates to documents such as the minutes of meetings, which by their nature are divided into discrete parts. It remains undesirable, however, for a party to redact a document on relevance grounds without first consulting with the other parties, and the Court should only be approached if agreement cannot be reached.¹⁷ Provision for the redaction of documents on the ground of relevance may be made in a discovery plan or protocol agreed between the parties.
- 8.81 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

- 8.82 Confidentiality regimes can be a source of particular complexity, cost and collateral disputation in proceedings. This is because if it becomes necessary to prepare confidentiality undertakings and put in place systems to ensure confidentiality is maintained (including redaction), the parties' ability to provide instructions freely will

¹² *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4)* [2010] FCA 863, [94]-[96]; *Sportsbet Pty Ltd v Harness Racing Victoria (No 3)* [2010] FCA 1420, [14]-[18].

¹³ See *Sportsbet Pty Ltd v Harness Racing Victoria (No 3)* [2010] FCA 1420, [17]; *MG Corrosion Consultants Pty Ltd v Gilmour* [2011] FCA 1514, [12].

¹⁴ See, for example, *Oztech Pty Ltd v Public Trustee of Queensland (No 10)* [2016] FCA 970, [47].

¹⁵ *Oztech Pty Ltd v Public Trustee of Queensland (No 10)* [2016] FCA 970, [58].

¹⁶ *MG Corrosion Consultants Pty Ltd v Gilmour* [2011] FCA 1514, [12].

¹⁷ See *MG Corrosion Consultants Pty Ltd v Gilmour* [2011] FCA 1514, [12], [14], [19]; *Oztech Pty Ltd v Public Trustee of Queensland (No 10)* [2016] FCA 970, [60]; cf *In the matter of Felan's Fisheries Pty Limited* [2017] NSWSC 1262, [81].

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.

- 8.83 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.¹⁸ 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 manner. 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.
- 8.84 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.
- 8.85 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.
- 8.86 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 carefully.
- 8.87 The [Default Document Management Protocols](#) issued with the now revoked [CM 6](#) (soon to be replaced with an updated Standard Document Management Protocol) contain provisions relating to redaction of confidential and privileged information.
- 8.88 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).
- 8.89 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 material 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

¹⁸ *Hearne v Street* (2008) 235 CLR 125.

based discoveries it is a matter of physically blacking out the relevant material in the copy produced to the other party.

- 8.90 Examples of precedent confidentiality undertakings and orders that may be of assistance are reproduced in [Appendix A](#).

Privilege

- 8.91 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.
- 8.92 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.
- 8.93 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

- 8.94 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.¹⁹ It should be noted however that any descriptions of documents on such privilege lists are for the purpose of facilitating retrieval of the documents, not for assessing the validity of the claim of privilege itself.²⁰
- 8.95 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.
- 8.96 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.
- 8.97 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

¹⁹ See generally *Gardner v Irvin* (1878) 4 Ex D 49; *Webb v East* (1880) 5 Ex D 108; *City of Baroda* (1926) 134 LT 576; [1926] All ER 653.

²⁰ *Kenquist Nominees Pty Limited v Campbell (no 3)* [2017] FCA 1230, [50].

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.

- 8.98 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 at least puts that party in a position where it will have to conduct its case trying to ignore its knowledge of relevant information which is privileged.

H. Production of documents from non-parties

- 8.99 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

- 8.100 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.
- 8.101 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

- 8.102 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.
- 8.103 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.