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THE UNCERTAIN FUTURE OF DISCOVERY IN THE NSW SUPREME COURT EQUITY DIVISION

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On 22 March 2012, the NSW Supreme Court issued Practice Note SC Eq 11 (**the Practice Note**) on disclosure of documents (**disclosure**) in the Equity Division. The Practice Note is likely to have a significant impact on the Commercial, Construction and Technology and Admiralty Lists which are managed by the Equity Division and will therefore affect the majority of major litigation in NSW. The Practice Note was effective from 26 March 2012 and applies to all new and existing proceedings[1].

While the Practice Note does not confirm the position, it seems likely that the term "*disclosure*" is intended to have the same meaning as the frequently used term "*discovery*". This is the process by which parties to a proceeding disclose their relevant and privileged documents with a view to identifying and narrowing the issues in the dispute.

The Practice Note provides that disclosure orders will not be made (even if the parties have mutually consented) until:

+ after the parties have served their evidence[2] (unless there are "*exceptional circumstances necessitating disclosure*"); and
+ only if "*it is necessary for the resolution of the real issues in dispute in the proceedings.*"

Once evidence has been exchanged, if the parties still consider disclosure is necessary they must file and serve an affidavit explaining:

+ why disclosure is required "*for the resolution of the real issues in dispute*";
+ the classes of documents of which disclosure is requested; and
+ the estimated cost of the disclosure process.

The Court will then decide if an order for disclosure is warranted and may impose a limit on the amount of recoverable costs for disclosure.

Commentary

The Practice Note seeks to put into practice the Supreme Court's recent endeavours to reduce the

1 Other than proceedings in the Commercial Arbitration List.
2 "*Evidence*" means all statements submitted by the parties to support their case and includes affidavits, witness statements and expert reports.

complexity, time and cost of litigation. It aims to achieve "*the just, quick and cheap resolution of the real issues in dispute in the proceedings*." It is in part based on the findings of ***ALRC Report 115: Managing Discovery: Discovery of Documents in Federal Courts*** tabled on 25 May 2011, although notably the Supreme Court Practice Note takes a somewhat different approach to that adopted by the Federal Court.

With the advent of emails and other electronic documents, the parties' discovery obligations have become prohibitively expensive, sometimes to the extent of being crippling, particularly in examples of so called "mega-litigation" such as ***Seven Network Limited v News Limited*** **[2007] FCA 1062**. By removing the discovery process as an automatic step, the Court is seeking to reduce the time and costs of litigation and is attempting to focus the parties' minds on the real issues in dispute from the outset. It is an approach that bears some similarity to the US process of pre-trial oral examination where "depositions" are taken before discovery in an attempt to set out the factual background to the litigation, except here the Court is insisting on affidavit evidence that will be relied upon throughout the proceedings. While that US process is now generally considered to be a little cumbersome given the lengthy cross-examination that occurs during a deposition, the differences between the systems (namely the English/Australian tradition of evidence in chief in written form versus the US oral tradition) is likely to mean that the approach adopted by the Supreme Court sidesteps some of the problems faced in the US. It is hoped that this will lead to a swifter and cheaper resolution of proceedings and decrease the Court's involvement.

Some concerns which have been raised about the Practice Note include:

+ there is no guidance in the Practice Note about the meaning of "*exceptional circumstances*". There is a wide body of law dealing with exceptional circumstances in relation to certain procedural requirements for production of evidence (specifically in relation to liability cases in the District Court) but it is unclear whether the Supreme Court intends those cases to apply;
+ the usual order of steps in the litigation process will change considerably with parties having to consider their evidence almost from the outset and without reference to their opponent's documents; and
+ disputes involving large numbers of documents needed to corroborate facts may suffer if the Court takes a less than understanding approach to the "*exceptional circumstances*" provision[3].

As directions hearings take place over the course of the coming months we will start to get a feel for the impact which this Practice Note will have on how all of us run litigation. Whilst time will tell, the feeling is that this could be quite significant.

3 Although parties should be able to refer to and exhibit key documents to their evidence so this last concern may be avoided.

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