

**MIDDLETONS CONTINUING LEGAL EDUCATION**

**DISCOVERY AND INTERROGATORIES**

**22 MAY 2008: 1.00 – 2.00pm**

**OVERVIEW**

This paper is prepared as an outline for a seminar to examine the fundamentals of discovery and interrogatories in litigation. Necessarily the content and detail on the paper is constrained by the nature of the seminar and the time available. It is not as a definitive statement on the topic.

Legal practitioners are reminded to rely on their own research and enquiries in advising clients. A Legal practitioner will also be mindful of the evolving nature of the law, together with the importance of the relevant facts to determine outcomes in an individual matter.

**Table of Contents**

**A. Are you feeling lucky? ..... 2**

**B. What is litigation? ..... 2**

**C. Planning and strategy in litigation..... 2**

**D. What is discovery?..... 3**

**E. When is discovery available? ..... 3**

**F. The two limbs to discovery of documents..... 4**

**G. Overview of Part 21 Discovery, inspection and notice to produce documents ..... 4**

**H. Part 21 Division 1 Discovery and inspection..... 5**

**I. Definitions of the word “document” ..... 6**

**J. The test: “relevant to a fact in issue” ..... 6**

**K. A key concept: “documents ... in the possession of (a) party” ..... 8**

**L. Objections..... 8**

**M. Practice Note provisions ..... 11**

**N. Part 21 Division 2 Notice to produce before hearing..... 11**

**O. Interrogatories ..... 13**

**P. Overview of Part 22 Interrogatories..... 14**

**Q. Conclusion..... 15**

**A. Are you feeling lucky?**

***“If a process is available which will cause your opponent to increase your prospects of resolving the dispute successfully, is there any good reason not to use it?”***

**B. What is litigation?**

1. Litigation is a means to an end, and not an end in itself. It is a component of the judicial system, its purpose has been described as:

***“The ‘unique and essential’ function of the judicial branch is the quelling of controversy by the ascertainment of the facts and the application of the law.”<sup>1</sup>***

2. At all times in litigation the party with the better grasp of the facts has a potential advantage over the opponent, by enjoying the opportunity to identify those facts which are relevant, the operation of the law upon those facts and to determine/implement strategy first.

**C. Planning and strategy in litigation**

3. The role of discovery including interrogatories is akin to early warning or intelligence of the strengths and weaknesses of your own and also your opponent's, case to allow an informed approach to decision making in litigation.
4. Also, Judges tend to welcome and to utilise contemporaneous evidence such as documents, and their content, as probative and relevant to facts in issue. They serve the purpose of useful reference points to navigate.

***“... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.”<sup>2</sup>***

5. Conceptually, litigation is best conducted with a settled strategy derived from the client's desired outcome, thus allowing the necessary tactical plans to reach that outcome. The counsel of “prepare backwards, present forwards”<sup>3</sup>, is a preferred and effective approach of many skilled litigators to define, and to ensure, success.

---

<sup>1</sup> *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [43]

<sup>2</sup> *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 LI L Rep 140 per Atkin LJ at 152].

<sup>3</sup> Thanks to Geoff Lindsay SC who introduced this concept to me.

6. Yet litigation remains a dynamic process of change. The parameters of a matter rarely remain static. Informed planning and ongoing re-appraisal remain the most reliable means to achieve the client's desired outcome and to avoid unwelcome surprises for the client.

#### D. What is discovery?

##### Macquarie Dictionary:

**discover** *v.t.* **1.** to get knowledge of, learn of, or find out; gain sight or knowledge of (something previously unseen or unknown).

**discovery** *n.* **3.** *Law.* compulsory disclosure, as of facts or documents.

7. Discovery refers to a class of inquisitive processes which allow a party to obtain from an opponent:
  - (a) the production and inspection of documents relevant to a fact in issue in the proceedings;
  - (b) admissions as to her, his or its knowledge, information and belief of the of facts relating to a matter in issue;
  - (c) facilitation of proof.
8. The aim of the process of discovery is to reduce surprise and to ensure that each party is aware of the other party's relevant documents and as a consequence the **overriding purpose** (see CPA s56) is achieved. In this regard Part 6 of the CPA will be a most relevant consideration to interlocutory disputes as to contests in regard to discovery.
9. In 2008 trial by ambush is actively discouraged.

#### E. When is discovery available?

10. Discovery is only available in regard to issues raised by pleadings between parties. Thus discovery is not available between co-defendants in the absence of any cross claim between them.
11. There is a limited right to obtain discovery of documents against a non-party or even prior to the commencement of proceedings by the process known as preliminary discovery (see UCPR Part 5), ie against prospective defendants, see also *Anton Piller* orders (UCPR r25.19).

12. The Rules do not provide a code. The inherent power is expressly preserved, see: UCPR r1.4 *These rules do not affect the right of any person to commence proceedings for discovery.*
13. It is important to note that there is a residual power in the Supreme Court to grant discovery in equity as a component of its inherent powers and the auxiliary jurisdiction. A litigator will be conscious of the origins of the processes from the Ecclesiastical Courts and Chancery, as a means of doing justice between parties. This origin often underpins discretionary decision-making in the process even in 2008.
14. The proliferation of documents in many forms has caused the Courts to preserve the integrity of their interlocutory procedures and processes by limiting the scope of discovery to define topics or classes of documents. There are strict controls on the processes.
15. Rarely will a Court make an order for general discovery but rather jealously guard the extent of discovery. Costs, and particularly CPA s60, will be a significant consideration.

#### **F. The two limbs to discovery of documents**

16. The first limb is an obligation on a party to disclose the existence of all relevant documents in her, his or its possession, custody or power including those which the opposite party is not entitled to inspect. Thus discovery lists will separate documents into categories including those over which a claim of privilege is claimed.
17. The second limb is an obligation to give inspection to all documents to which the obligation to give discovery extends except those which are privileged from production.

#### **G. Overview of Part 21 Discovery, inspection and notice to produce documents**

18. UCPR Part 21 provides for discovery of documents in the Supreme, District and Local Courts.

#### **Division 1 Discovery and inspection**

##### **21.1 Definitions**

##### **21.2 Order for discovery**

- 21.3 List of documents to be prepared
- 21.4 Affidavit and certificate supporting list of documents
- 21.5 Documents to be made available
- 21.6 Subsequently found documents to be made available
- 21.7 Discovered documents not to be disclosed
- 21.8 Personal injury claims

#### Division 2 Notice to produce before hearing

- 21.9 Definitions
- 21.10 Notice to produce for inspection by parties
- 21.11 Production under notice to produce
- 21.12 Personal injury claims
- 21.13 Costs and expenses of compliance

### H. Part 21 Division 1 Discovery and inspection

#### *r21.1 Definitions*

- (1) *In this Division: **excluded document**, in relation to proceedings the subject of an order for discovery, means any of the following documents:*
- (a) *any document filed in the proceedings,*
  - (b) *any document served on party A after the commencement of the proceedings,*
  - (c) *any document that wholly came into existence after the commencement of the proceedings,*
  - (d) *any additional copy of a document included in the list of documents, being a document that contains no mark, deletion or other matter, relevant to a fact in question, not present in the document so included,*
  - (e) *any document comprising an original written communication sent by party B prior to the date of commencement of the proceedings of which a copy is included in the list of documents,*

*but does not include any document that the court declares not to be an excluded document for the purposes of those proceedings.*

***list of documents** means a list of documents referred to in rule 21.3.*

***order for discovery** means an order referred to in rule 21.2.*

***party A** means a party to whom another party is giving discovery, or being ordered to give discovery, of documents.*

***party B** means a party who is giving discovery, or being ordered to give discovery, of documents.*

***party B's affidavit** means an affidavit prepared in relation to the list of documents under rule 21.4.*

***Note:** See the Dictionary for further definitions including, in particular, a definition of "possession".*

- (2) *For the purposes of this Division, a document or matter is to be taken to be relevant to a fact in issue if it could, or contains material that could, rationally affect the*

assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.

## I. Definitions of the word “document”

19. It is useful to consider the meaning and definitions of the word **document**.

(a) **UCPR Dictionary:**

*“document” includes any part of a document and any copy of a document or part of a document.*

(b) **Interpretation Act 1987 s21** meanings of commonly used words and expressions:

(1) *In any Act or instrument:*

**document** means any record of information, and includes:

- (a) *anything on which there is writing, or*
- (b) *anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or*
- (c) *anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or*
- (d) *a map, plan, drawing or photograph.*

(c) **Evidence Act 1995** Dictionary which provides the following definition:

**document** means any record of information, and includes:

- (a) *anything on which there is writing, or*
- (b) *anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or*
- (c) *anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or*
- (d) *a map, plan, drawing or photograph.*

### **Dictionary clause 8 References to documents**

*A reference in this Act to a document includes a reference to:*

- (a) *any part of the document, or*
- (b) *any copy, reproduction or duplicate of the document or of any part of the document, or*
- (c) *any part of such a copy, reproduction or duplicate.*

## J. The test: “relevant to a fact in issue”

20. The key phrase is **relevant to a fact in issue**, which has resonance with the *Evidence Act* s55(1). In discovery the focus is the document’s content (or lack

thereof), as to whether it may rationally effect the assessment of the probability of the existence of a fact. Admissibility is not a consideration.

### **r21.2 Order for discovery**

- (1) The court may order that party B must give discovery to party A of:
    - (a) documents within a class or classes specified in the order, or
    - (b) one or more samples (selected in such manner as the court may specify) of documents within such a class.
  - (2) A class of documents must not be specified in more general terms than the court considers to be justified in the circumstances.
  - (3) Subject to sub rule (2), a class of documents may be specified:
    - (a) by relevance to one or more facts in issue, or
    - (b) by description of the nature of the documents and the period within which they were brought into existence, or
    - (c) in such other manner as the court considers appropriate in the circumstances.
  - (4) An order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue.
21. A litigator must not be misled by the older tests of long standing derived by Brett LJ in the *Peruvian Guano Company*<sup>4</sup> case which put the test that a document may be discoverable "if it is relevant to a train of enquiry which may directly or indirectly enable the party to require in the affidavit either to advance its own case or damage the case of its adversary".
22. Clearly, a refined and considered understanding of the real issues in dispute will promote a more effective approach to drafting the classes of documents for which an application for discovery is made. Note, in particular, sub clause (3) and the emphasis by repetition of the concept relevance to a fact in issue.
23. As opposed to notices to produce or subpoenas, orders for discovery will not be granted for documents or matters going solely to credit.

### **r21.3 List of documents to be prepared**

- (1) Party B must comply with an order for discovery by serving on party A, a list of documents that deals with all of the documents (other than excluded documents) referred to in the order.
- (2) The list of documents:
  - (a) must be divided into two parts:

---

<sup>4</sup> *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 52 LJQB 181

- (i) *Part 1 relating to documents in the possession of party B, and*
  - (ii) *Part 2 relating to documents that are not, but that within the last 6 months prior to the commencement of the proceedings have been, in the possession of party B, and*
  - (b) *must include a brief description (by reference to nature and date or period) of each document or group of documents and, in the case of a group, the number of documents in that group, and*
  - (c) *must specify, against the description of each document or group in Part 2 of the list of documents, the person (if any) who party B believes to be in possession of the document or group of documents, and*
  - (d) *must identify any document that is claimed to be a privileged document, and specify the circumstances under which the privilege is claimed to arise.*
  - (3) Party B must comply with the requirements of sub rule (1):
    - (a) within 28 days after an order for discovery is made, or
    - (b) within such other period (whether more or less than 28 days) as the order may specify.
24. This rule provides for the mechanics of all documents relevant to the orders for discovery. See UCPR Form 11 “List of documents”. Note that it includes time limits and two parts with Part 2, and that “*the last six months prior to the commencement of the proceedings*”, is not the date that the orders for discovery have been made. Proper professional practice requires appropriate description of documents in each category rather than vague, elliptical or unhelpful descriptions. As is evident, discovery cannot be granted until after the joinder of issues.

**K. A key concept: “documents ... in the possession of (a) party”**

25. It is helpful to recall that the word **possession** is defined in the dictionary in the *Civil Procedure Act 2005* s3 definitions as:

**possession**, otherwise than of land, includes custody and power.

26. This Delphic phrase has been subject to considerable litigation including where a party has custody of a document but not sole legal possession, see, for example, as an agent.

**L. Objections**

27. Consideration of legal professional privilege, or client legal privilege is beyond the scope of this seminar, and other categories of privilege including privileges founded upon prevention of self-incrimination, protected confidences, public interest immunity, and settlement privilege.

**r21.4 Affidavit and certificate supporting list of documents**

- (1) *The list of documents must be accompanied by:*
- (a) *a supporting affidavit, and*
  - (b) *if party B has a solicitor, by a solicitor's certificate of advice.*

*Note: See rule 35.3 as to who may make such an affidavit.*

- (2) *The affidavit referred to in sub rule (1) (a) must state that the deponent:*
- (a) *has made reasonable inquiries as to the documents referred to in the order, and*
  - (b) *believes that there are no documents (other than excluded documents) falling within any of the classes specified in the order that are, or that within the last 6 months before the commencement of the proceedings have been, in the possession of party B (other than those referred to in Part 1 or 2 of the list of documents), and*
  - (c) *believes that the documents in Part 1 of the list of documents are within the possession of party B, and*
  - (d) *believes that the documents in Part 2 of the list of documents are within the possession of the persons (if any) respectively specified in that Part, and*
  - (e) *as to any document in Part 2 of the list of documents in respect of which no such person is specified, has no belief as to whose possession the document is in,*

*and must state, in respect of any document that is claimed to be a privileged document, the facts relied on as establishing the existence of the privilege.*

- (3) *The solicitor's certificate of advice referred to in sub rule (1) (b) must state that the solicitor:*
- (a) *has advised party B as to the obligations arising under an order for discovery (and if party B is a corporation, which officers of party B have been so advised), and*
  - (b) *is not aware of any documents within any of the classes specified in the order (other than excluded documents) that are, or that within the last 6 months before the commencement of the proceedings have been, in the possession of party B (other than those referred to in Part 1 or 2 of the list of documents).*

**r21.5 Documents to be made available**

- (1) *Subject to the requirements of any Act or law, Party B must ensure that the documents described in Part 1 of the list of documents (other than privileged documents):*
- (a) *are physically kept and arranged in a way that makes the documents readily accessible and capable of convenient inspection by party A, and*
  - (b) *are identified in a way that enables particular documents to be readily retrieved,*

*from the time the list of documents is served on party A until the time the trial of the proceedings is completed.*

- (2) *Within 21 days after service of the list of documents, or within such other period or at such other times as the court may specify, party B must, on request by party A:*
- (a) *produce for party A's inspection the documents described in Part 1 of the list of documents (other than privileged documents), and*

- (b) *make available to party A a person who is able to, and does on party A's request, explain the way the documents are arranged and assist in locating and identifying particular documents or classes of documents, and*
- (c) *provide facilities for the inspection and copying of such of the documents (other than privileged documents) as are not capable of being photocopied, and*
- (d) *provide photocopies of, or facilities for the photocopying of, such of the documents as are capable of being photocopied, subject to:*
  - (i) *party A's solicitor undertaking to pay the reasonable costs of providing those photocopies or facilities, or*
  - (ii) *if party A has no solicitor, party A providing to party B an amount not less than a reasonable estimate of the reasonable costs of providing those photocopies or facilities.*

**r21.6 Subsequently found documents to be made available**

- (a) *that any document within the class or classes specified in the relevant order for discovery (not being an excluded document) but not included in Part 1 of the list of documents is within, or has come into, party B's possession, or*
- (b) *that any document included in Part 1 of the list of documents which was claimed to be a privileged document was not, or has ceased to be, a privileged document,*

*party B must forthwith give written notice to party A of that fact, and comply with rule 21.5 in respect of the document, as if the document had been included in Part 1 of the list of documents and the list had been served on the date of the giving of the notice.*

28. The use of documents obtained on discovery is confined to the proceedings and not for any ulterior or collateral purpose.

**r21.7 Discovered documents not to be disclosed**

- (1) *No copy of a document, or information from a document, obtained by party A as a result of discovery by party B is to be disclosed or used otherwise than for the purposes of the conduct of the proceedings, except by leave of the court, unless the document has been received into evidence in open court.*
- (2) *Nothing in sub rule (1) affects the power of the court to make an order restricting the disclosure or use of any document, whether or not received into evidence, or the operation of any such order.*

**r21.8 Personal injury claims**

*In any proceedings on a common law claim:*

- (a) *for damages arising out of the death of, or bodily injury to, any person, or*
- (b) *for contribution in respect of damages so arising,*

*an order for discovery may not be made in relation to any document unless the court, for special reasons, orders otherwise.*

## M. Practice Note provisions

29. It is prudent to ensure that the relevant Practice Note for the proceedings is carefully scrutinised. An example of provisions regarding discovery is found in Practice Note SC Eq 3 Commercial List and Technology Construction List, (extract at conclusion of this document), which provides for discovery to be made electronically.

## N. Part 21 Division 2 Notice to produce before hearing

30. The protocol for the notice to produce under Part 21 is the subspecies of the process of discovery. The obvious utility of the content of this division is that the rules confer a right upon a party for the inquisitive process as opposed to Division 1 where the process is available only with the permission of the court.
31. This regime must be distinguished from the notices to produce pursuant to UCPR Part 34, the latter being akin to a subpoena for production. The distinction between the two has been examined by Brereton J in *A v Z*<sup>5</sup>.
32. The critical difference between them is that discovery is limited by the concept by relevance to a fact in issue in the proceedings whereas subpoenas for production are not so limited and may extend to documents relevant to credit.

### **r21.9 Definitions**

(1) *In this Division:*

**notice to produce** means a notice to produce referred to in rule 21.10.

**party A** means a party to whom another party is producing, or being asked to produce, documents or things for inspection.

**party B** means a party who is producing, or being asked to produce, documents or things for inspection.

(2) *For the purposes of this Division, a document or thing is to be taken to be relevant to a fact in issue if it could, or contains material that could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or thing would be admissible in evidence.*

33. Another useful tool in UCPR Part 21 is found in r21.10 in respect of documents referred to in the various *inter partes* pleadings and documents in evidence referred to therein. The limitation is that it must be a specific document and clearly identified as opposed to merely identifiable.

---

<sup>5</sup> [2007] NSWSC 899

**r21.10 Notice to produce for inspection by parties**

- (1) Party A may, by notice served on party B, require party B to produce for inspection by party A:
  - (a) any document or thing that is referred to in any originating process, pleading, affidavit or witness statement filed or served by party B, and
  - (b) any other specific document or thing that is clearly identified in the notice and is relevant to a fact in issue.
- (2) A notice to produce may specify a time for production of all or any of the documents or things required to be produced.

**r21.11 Production under notice to produce**

- (1) Unless the court orders otherwise, party B must, within a reasonable time after being served with a notice to produce:
  - (a) produce for party A's inspection such of the documents or things referred to in the notice (other than privileged documents) as are in party B's possession, and
  - (b) serve on party A, in respect of any document that is not produced, a notice stating:
    - (i) that the document is a privileged document, or
    - (ii) that the document is, to the best of party B's knowledge, information and belief, in the possession of a person identified in the notice, or
    - (iii) that party B has no knowledge, information or belief as to the existence or whereabouts of the document.
- (2) For the purposes of sub rule (1):
  - (a) unless party B establishes to the contrary, 14 days or longer after service of the notice is to be taken to be a reasonable time, and
  - (b) unless party A establishes to the contrary, less than 14 days after service of the notice is to be taken to be less than a reasonable time.

**r21.12 Personal injury claims**

- (a) for damages arising out of the death of, or bodily injury to, any person, or
- (b) for contribution in respect of damages so arising,

a party is not required to comply with a notice to produce in relation to a document or thing that has not been referred to in any originating process, pleading, affidavit or witness statement filed or served by that party unless the court, for special reasons, orders otherwise.

**r21.13 Costs and expenses of compliance**

- (1) The court may order party A to pay the amount of any reasonable loss or expense incurred by party B in complying with a notice to produce.
- (2) If an order is made under sub rule (1), the court must fix the amount or direct that it be fixed in accordance with the court's usual procedure in relation to costs.

## O. Interrogatories

34. The process of discovery examined in Part 21 deals with inquisitive procedures relating to documents. Interrogatories are derived from equitable procedures for discovery of facts and the protocol set out in Part 22 allow a party to interrogate with a view to narrowing the issues for trial and promoting settlement by allowing opposing parties to effectively assess the strength and weaknesses of their cases, vis-à-vis the dispute.
35. Interrogatories may be seen as assisting in achieving the **overriding purpose** by taking into account the dictates of justice.
36. The UCPR Form 21 prescribes the relevant document. An example of an interrogatory to establish provenance of document and to compare handwriting:
- Q.1 *Did you write a letter a copy of which is annexed and marked "A"?*
- Q.2 *Did you send or cause to be sent to Angela Landy of 21 Rue de Rivoli Paris a letter, a copy of which is annexed and marked "A"?*
- Q.3 *Did you on or about 1 April 2005 or at some other and if so what date, send or cause to be sent a letter a copy of which is annexed and marked "A".*
- Q.4 *Did you write the letter dated 5 December 2006 referred to in paragraph 1 of the statement of claim?*
37. A party may object to an interrogatory if it "does not relate to any matter in issue between that party and the party seeking the order" (UCPR r22.2(a)). In this respect the interrogatory provisions mimic those relating to discovery. Within this confine interrogatories may be seen as having the following tactical aims:
- (a) to obtain admissions as to facts which will support the case of the interrogating party;
- (b) to obtain admissions which will destroy or damage the case of the party being interrogated.
38. Interrogatories as to credit do not relate to issues in proceedings and accordingly are not permissible.
39. Examples of the utility of interrogatories include:
- (a) information as to the making, delivery, receipt or possession of a document – the document will usually be annexed to the notice to answer interrogatories;

- (b) a document which contains symbols or abbreviations which are unclear to the reader – a transliteration is required;
  - (c) a document which is partially probative, such as correspondence referring to an event eg: that a discussion took place but not to the content of that discussion – seeking the substance of what was said in that conversation.
40. A significant advantage arising from interrogatories compared to cross examination of witnesses for a party at trial, is that they must be answered to the best knowledge, information and belief of the actual party interrogated.
41. Thus in the case of a corporate entity which is the party to the proceedings, it must provide such answers, including from the party's current or former servants and agents as opposed to its witnesses (if called at all) at trial.

## **P. Overview of Part 22 Interrogatories**

### **22.1 Interrogatories**

### **22.2 Objections to specific interrogatories**

### **22.3 Answers to interrogatories**

### **22.4 Insufficient answer**

### **22.5 Default**

### **22.6 Answers to interrogatories as evidence**

#### ***r22.1 Interrogatories***

- (1) *At any stage of the proceedings, the court may order any party to answer specified interrogatories.*
- (2) *An application for such an order must be accompanied by a copy of the proposed interrogatories.*
- (3) *In the case of proceedings on:*
  - (a) *a claim for damages arising out of the death of, or bodily injury to, any person, or*
  - (b) *a claim for contribution in relation to damages so arising,**such an order is not to be made unless the court is satisfied that special reasons exist that justify the making of the order.*
- (4) *In any case, such an order is not to be made unless the court is satisfied that the order is necessary at the time it is made.*
- (5) *.....*

42. Leave of the Court is required to issue interrogatories and the prospect of gaining such leave will be related to the care with which they are crafted.

***r22.2 Objections to specific interrogatories***

- (a) *the interrogatory does not relate to any matter in issue between that party and the party seeking the order,*  
 (b) *the interrogatory is vexatious or oppressive,*  
 (c) *the answer to the interrogatory could disclose privileged information.*

43. Sanctions for the failure to comply with such an order including an insufficient answer or default are provided for in UCPR rr22.4 and 22.5.

44. Answers to individual interrogatories may be tendered at the trial as admissions. In addition, they may be used in cross examination.

***r22.6 Answers to interrogatories as evidence***

- (1) *A party:*  
 (a) *may tender as evidence one or more answers to interrogatories without tendering the others, and*  
 (b) *may tender as evidence part of an answer to an interrogatory without tendering the whole of the answer.*  
 (2) *.....*

**Q. Conclusion**

45. The overriding purpose of civil procedure in litigation is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. This is a duty upon parties and practitioners arising from the *Civil Procedure Act*.
46. Litigation requires a legal practitioner firstly to strive to ascertain the relevant facts and secondly to apply the law to those facts as a matter evolves. Discovery is a means to assist in achieving the former, and thereby facilitating the latter, thus promoting cost effective, informed decision-making during proceedings. The overriding purpose is achieved, and in addition, for the client the desired outcome may be identified and secured.

**Mark Walsh  
 Seven Wentworth  
 22 May 2008**

**PRACTICE NOTE SC Eq 3**  
**Supreme Court Equity Division**  
**Commercial List and Technology and Construction List**

**Discovery**

27. The Court endorses a flexible rather than prescriptive approach to discovery to facilitate the making of orders to best suit each case.
28. Subject to an order of the Court or unless otherwise agreed between the parties, discovery is to be made electronically.
29. Practitioners must advise their opponents at an early stage of the proceedings of potentially discoverable electronically stored information and meet to agree upon matters including:
  - 29.1 the format of the electronic database for the electronic discovery
  - 29.2 the protocol to be used for the electronic discovery including electronically stored information
  - 29.3 the type and extent of the electronically stored information that is to be discovered and
  - 29.4 whether electronically stored information is to be discovered on an agreed without prejudice basis
    - 29.4.1 without the need to go through the information in detail to categorise it into privileged and non-privileged information and
    - 29.4.2 without prejudice to an entitlement to subsequently claim privilege over any information that has been discovered and is claimed to be privileged under s 118 and/or s119 of the Evidence Act 1995 and/or at common law.
30. At any hearing relating to discovery (including its form and extent), the Court expects practitioners to have:
  - 30.1 ascertained the probable extent of discoverable documents
  - 30.2 conferred with their opponents about any issues concerning the preservation and production of discoverable documents including electronically stored information
  - 30.3 given notice to their opponents of any problems reasonably expected to arise in connection with the discovery of electronically stored information, including difficulty in the recovery of deleted or lost data
  - 30.4 given consideration to and conferred in relation to the particular issues involved in the collection, retention and protection of electronically stored information, including:
    - 30.4.1 whether the burden and cost involved in discovering a particular document or class of documents is justified having regard to the cost of accessing the document or class of documents and the importance or likely importance of the document or class of documents to the proceedings
    - 30.4.2 whether particular software or other supporting resources may be required to access electronically stored information
    - 30.4.3 the manner in which documents are to be electronically formatted so that the integrity of the documents is protected
    - 30.4.4 whether particular documents need to be discovered in hard copy form (such as original documents or documents larger than A3 in size)
    - 30.4.5 how privileged documents should be appropriately protected
  - 30.5 given consideration to preparing and, if agreed, prepared a Joint Memorandum signed by the senior practitioners who attended the discovery meeting (and who are to attend the discovery hearing) identifying:
    - 30.5.1 areas of agreement on proposed discovery
    - 30.5.2 areas of disagreement with a brief statement of the reasons therefore and
    - 30.5.3 respective best estimates of the cost of discovery.
31. The Court will make orders for discovery having regard to the overriding purpose of the just, quick and cheap resolution of the disputes between the parties.
32. For the purposes of ensuring that the most cost efficient method of discovery is adopted by the parties, on the application of any party or of its own motion, the Court may limit the amount of costs of discovery that are able to be recovered by any party.