STREAMLINING PLEADINGS AND DISCOVERY

Memorial Procedures and Redfern Schedules in Commercial and Corporations Practice

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1. It is widely accepted that the most common – and enduring – complaints about litigation concern time and cost. This part of today's presentation focuses on what are often the two most time-consuming and costly steps in any litigation – pleadings and discovery – and looks at some ideas that have been, and might be, borrowed from the world of arbitration (and international arbitrations in particular).

2. The focus here is on the **Commercial and Corporations Practice Note (C&C-1),** which is of application to Commercial and Corporations NPA. To recap, that is the National Practice Area that covers the following sub-areas:
    - Commercial Contracts, Banking, Finance and Insurance
    - Corporations and Corporate Insolvency
    - General and Personal Insolvency
    - Economic Regulator, Competition and Access
    - Regulator and Consumer Protection
    - International Commercial Arbitration

3. Clause 8 of C&C-1 is headed **Discovery, Redfern and Memorial Procedures** – the meaning of which would not be immediately clear to those familiar with traditional practice in any of our courts. The clause goes on to record that discovery is generally guided by the **Central Practice Note (CPN-1)**, but that it is the responsibility of the parties, their lawyers and the Court to control discovery, including through techniques such as Redfern Discovery and the memorial procedure.

4. To illustrate the need for the development of a better system of discovery: a fortnight ago I was one of 5 counsel appearing in an interlocutory application in the Federal Court. The application took half a day, and the Court book prepared for the occasion ran to over 1000 pages. The sole issue was whether the privileged documents discovered by the respondents had been adequately described by them. An order that the parties give standard discovery had been made by the Court in September 2016 – before the new practice notes came into effect - but a year later discovery had not yet been completed. The practice note then in force, **CM 5**, contained provisions requiring practitioners to seek to eliminate or reduce the burden of discovery and warned that orders for discovery would not be made as a matter of course, but despite those provisions many matters become bogged-down in seemingly intractable and limitless discovery quagmires.

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5. While this is not typical of every case in the Federal Court, it is also by no means unique. Discovery is time consuming and hugely expensive, and although Rule 20.11 of the Federal Court Rules (and now CPN-1 cl 10.2) state that a discovery order should not be made unless it will facilitate *"the just resolution of the proceeding as quickly, inexpensively and efficiently as possible"*, the reality is that discovery orders often have precisely the opposite effect.

6. Rule 20.2 currently provides that two forms of discovery are available – standard discovery or non-standard – the latter, typically, being discovery by criteria or categories.

7. CPN-1 cl 10.3 encourages the parties to co-operate to reduce the burden of discovery, and makes reference to informal exchanges of documents and to the Redfern Discovery Procedure, which it describes as an *"innovative discovery technique*".

8. The remainder of the provisions of CPN-1 cl 10 concern the circumstances in which a discovery order will be made. They place on the party seeking discovery a significant responsibility to persuade the Court that discovery is needed - at all, and in particular at the time that it is being sought; that what is being sought is no broader or burdensome than necessary; and that the parties have made reasonable efforts to agree on the appropriate discovery scope and protocol in the circumstances.

Redfern Discovery

9. The general observations in C&C-1 cl 8 referred to earlier are followed by specific provisions for Redfern Discovery – named not after the inner-city suburb, as we may have first thought, but instead after the UK barrister and arbitration guru, Alan Redfern, who is credited with developing the technique. The use of the word *technique* is important here – this is the how, not the if or the why.

10. Redfern Discovery doesn't fit neatly with the Federal Court Rules. It is certainly not standard discovery, but neither is it traditional discovery by categories or criteria. It is possibly best understood a hybrid of a Notice to Produce Documents and conventional discovery. It incorporates the requirement that the documents sought need to be specifically identified but unlike Rule 20.31 it is not confined to a request for documents that have been specifically referred to in the pleadings and affidavits.

11. The process involves each party compiling a schedule of the specific documents – or narrow and precise categories of documents – that they require to be discovered. Included in the schedule must be an explanation as to why the document is material and relevant – by specific reference to the pleadings and evidence. The opposing party is then required, in the same schedule, to respond: by consenting or objecting to each request and by giving reasons for any objection.

12. A combined schedule – with all parties' requests and responses – is then prepared for the Court, which will determine each disputed request. The criteria applied by the Court are not new – the Court will look at relevance and materiality, burden and proportionality, and any applicable protections - such as privilege. The reference in cl 8.7 of C&C-1 to the process being "*flexibly informed by Article 9 of the International Bar Association Rules (as amended)"* refers to the principles of admissibility and assessment of evidence in those Rules, which are substantively consistent with the principles traditionally applied by our courts.

13. Redfern and his co-authors have said of the Redfern Schedule that it is *"[a]n increasingly common formatting tool for organising and presenting [the] process of document request, objection and decision"*[2]. They go on to say that:

> *"When a party issues a 'request to produce' to the other, an exchange of views takes place between the parties' lawyers, usually by correspondence, but sometimes at a meeting. During this exchange, the parties' positions become clearer: for example, the 'requested party may say 'we are prepared to produce documents covering this period of time, but not longer, because it would be oppressive', or 'we don't have the management committee minutes but we are prepared to disclose the relevant board minutes'. In this way, the nature of the requests and objections may change as the discussion proceeds."*

14. It is in this context that the references to collaboration, co-operation and informal exchanges between lawyers in the CPN-1 and C&C-1 should be read. The Redfern Schedule has the potential to provide a useful mechanism to give effect to these imperatives.

Memorial Procedures

15. A further procedure that has been borrowed – this time expressly – from international commercial arbitrations is what is known as a **memorial procedure**, for which provision is made in cl 8.8 - 8.11 of C&C-1.

16. This is a form of pleading – using that term loosely – that is common in arbitrations and also in court proceedings in civil law jurisdictions. It is a bit of a strange beast for those schooled in UCPR-style pleading, and there is work that will need to be done if it is to be embraced.

17. The idea behind the concept is the presentation of a party's case in one combined document rather than through the more familiar sequentially-staged process of pleadings,

[2] Redfern and Hunter on International Arbitration, 6th Ed, p 383-4

evidence and documents and finally, submissions. Pleadings traditionally provide the framework of a party's case, but a memorial is designed to be a comprehensive narrative incorporating references to the supporting evidence and describing the findings and conclusions that are said to be supported by that narrative. The document is often (but not always) accompanied by the party's witness statements, expert reports and documentary evidence.

18. Memorial procedures take a number of forms, and are shaped by the tribunal and parties with due regard to the nature of the dispute. Although the practice note refers to international commercial arbitrations as the source of the procedure, there are only a few instances of international arbitration rules making express provision for this process. The Rules of the International Centre for the Settlement of Investment Dispute (ICSID) is one example, the Singapore International Arbitration Centre (SAIC) is another – although in the latter case the new Investment Arbitration Rules, which provide for this procedure, were introduced only in January 2017.

19. The principal advantage of the memorial procedure is considered to be that it offers a more streamlined process which allows the parties and the court an earlier opportunity to assess the true areas of dispute and the relative strengths of the opposing contentions, allowing space for early resolution - or at least a narrowing of the dispute. Using this procedure also avoids a range of time-consuming interlocutory processes such as strike-out applications, requests for further and better particulars, and the amendment of formal pleadings. Some of these advantages are given express recognition in cl 8.11 of C&C-1 which provides that:

> *"The memorial procedure may assist in identifying the real issues quickly and in promoting early and realistic case evaluations. This in turn may facilitate the early settlement of disputes, particularly for substantial commercial disputes that may otherwise be lengthy and expensive. However, the procedure also involves bringing forward some of the steps (and therefore the costs) which often occur later in a proceeding and may not be suitable for every commercial dispute."*

20. Abandoning pleadings-driven litigation will not come easily to many lawyers, and when and how this will be achieved in practice will need to be developed over time. The practice note is not overly prescriptive in this regard – but there is an overarching responsibility on lawyers and the courts to work toward finding the procedure most suitable to each particular case. Clause 7.3 of the CPN-1 states that:

> *"This co-operation requires (and the Court expects) that the parties and their lawyers think about the best way to run their cases conformably with the overarching purpose. The parties and their lawyers can expect that the Court will engage with them in a dialogue to achieve the overarching purpose. The Court Rules should never be viewed as inflexible. The overarching purpose includes the elimination of unnecessary "process-driven" costs. The Court expects parties and their lawyers to have in mind at all times the cost of each step in the proceeding, and whether it is necessary."*

21. Some observations may be made concerning how the memorial procedure may come to be employed by parties.

22. *Firstly*, there is the qualification in cl 8.8 of C&C-1 that the procedure be used in *"appropriate cases"*. The extract from cl 8.11 referred to earlier also recognises that the procedure may not be suitable "*for every commercial dispute"*. There is no indication of which cases might be considered to be appropriate – one assumes that over time the court will develop guidelines as to the circumstances in which the procedure should be adopted. Justice Katzmann, writing when the practice note was still in draft form, suggested that one such circumstance may be where the evidence is readily available early in the litigation[3]. No doubt there will be other considerations and circumstances identified over time.

23. *Secondly*, the practice note allows the use of the procedure either to be requested by a party or to directed by the Court. Justice Jagot would probably be better placed to give us a sense of the degree to which this has occurred to date – it would not be surprising if in these early days at least the parties are going to need some prompting from the Court.

24. *Thirdly*, there are potential disadvantages of the memorial procedure that may cause resistance from litigants or their lawyers. One such disadvantage has been expressly recognised in the practice note: the front-loading of costs that results when a number of steps which would have been spread over time need to be completed up front. A second disadvantage is that the scope of evidence and document production is often circumscribed by pleadings, and similarly, submissions ultimately address only the issues which are still in dispute late in the proceedings. That gradual process of narrowing the scope of the contest has not yet occurred at the time that the parties serve their memorials – whether they do so sequentially or simultaneously (as is the case in some arbitrations). This may lead to the inclusion of material in the memorial – documents and evidence – which may not ultimately be in dispute or relevant.

25. There is a counter-argument to this: pleadings serve the purpose of narrowing the legal issues between the parties at an early stage of the proceedings, and in a similar way the early production of evidence can serve the purpose of narrowing the factual or evidential issues early on, rather than only towards the end of the timetable.

26. *Fourthly*, the practice note envisages that the procedure will be managed within the framework of the Federal Court Act and the Federal Court Rules. This is potentially incongruous – the Rules, in particular, make provision for a step-by-step, pleading-driven procedure and the memorial procedure departs substantially from that approach. Guidelines for how the two systems are to co-exist will also need to be developed over time.

[3] Katzmann, Justice Anna – "Pleadings and case management in civil proceeding in the Federal Court of Australia (FCA) [2015] FedJSchol 23 at [22]

27. Justice Katzmann emphasises that it is the responsibility of all involved in litigation to work towards delivering justice efficiently. In her Honour's view:

> *"For parties and their lawyers, that means focussing on the real issues and doing so at a very early stage, putting fewer issues in dispute, undertaking no greater factual investigation than is genuinely required, and keeping interlocutory skirmishes to a minimum."*[4]

28. Those who are familiar with the memorial procedure would argue that it is ideally suited to achieve these objectives.

29. Turning briefly to the practicalities of how this procedure will be invoked, it will be recalled that C&C-1 provides for a proceeding to be commenced by the filing of an Originating Application, supported either by a Concise Statement or a Statement of Claim or Affidavit.

30. Clause 8.10 of C&C-1 provides that a party wishing to proceed by way of memorial procedure should make the request *"in its concise statement or other pleading document or at any stage prior to the filing of a substantive pleading document"*.

31. It would seem that a party wishing to enliven the memorial procedure would be advised (but apparently not obliged) to elect the option of filing a Originating Application and Concise Statement – since the alternative of a Statement of Claim or Affidavit would probably be considered to be a substantive pleading document – and the request for a memorial procedure should precede the filing of conventional pleadings: both because of the wording of the practice note (above) and because the procedure is seen as an alternative to conventional pleading.

32. Once again, this is an area where one would expect that there will be guidance from the Court and the development over time of acceptable and expected practice.

33. To conclude, both of the processes that I've discussed – the Redfern Schedule and the Memorial Procedure – require something of a paradigm shift for practitioners. The notions of co-operation and of full and early disclosure do not sit comfortably with our adversarial, and - to be frank - often mistrustful instincts. The philosophy of the new Practice Notes challenges us to suborn these instincts in the interests of promoting the overarching purpose. These two processes provide a mechanism to assist us meeting that challenge.

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[4] Katzmann J, supra, at [1]