

THE UNITED STATES DEPOSITION — TIME FOR ADOPTION IN AUSTRALIAN CIVIL PROCEDURE?

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[The deposition is the most important discovery method in the United States legal system. The deposition promotes the efficient attainment of justice by providing better information than may be obtained through reliance upon document discovery alone, facilitating settlement and narrowing the issues for trial. However, the deposition can also be costly and subject to abuse. This article outlines the US court rules governing the deposition and explains the advantages and disadvantages of the deposition. The article then considers whether the US-style deposition should be adopted in Australia and the potential ramifications of adoption. Particular consideration is given to how to obtain the forensic advantages of the deposition while containing costs, and the impact of adoption on Australian civil procedure and legal culture more generally.]

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I INTRODUCTION

The United States-style deposition has been raised, or at least alluded to, by the Australian Law Reform Commission ('ALRC'), the Victorian Law Reform Commission, the Law Council of Australia and the litigation funder IMF (Australia) Ltd as a key feature of the US legal system that could be adopted in Australia.¹ The idea of importing litigation techniques from the US may surprise

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¹ ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.102]; Victorian Law Reform Commission, *Civil Justice Review: Consultation Paper* (2006) [17]; Federal Court Liaison Committee, Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006) [106]–[152]; John Walker, 'Enforcing Share-

those that associate excessive litigiousness with the US legal system and wish to avoid that outcome in Australia.² However, the study of comparative civil procedure offers an opportunity for law reform to improve the operation of the home legal system.³ As the deposition is the most important discovery device in the US legal system, as well as a central part of settlement considerations and trial tactics,⁴ an examination of its merits is clearly warranted. This is especially so because Australian law only relies on specialised varieties of deposition in areas such as regulatory investigations.

This article examines the use of the deposition in the US legal system from the perspective of promoting efficiency in the Australian legal system, as the administration of justice in the 21st century is judged not just by the quality of decisions, but also by how efficiently justice is provided.⁵ This article provides an overview of how the deposition operates in the US, considers the advantages and disadvantages of the deposition by reference to both US and Australian experiences, and then considers how those advantages and disadvantages affect the case for the adoption of the deposition in Australian civil procedure.

holder Rights' (Paper presented at the Shareholder Litigation Seminar, Centre for Corporate Law and Securities Regulation, Sydney, 13 June 2006); Matthew Drummond, 'Cashman Puts Victorian Civil Litigation in the Dock', *Australian Financial Review* (Sydney), 13 October 2006, 53.

² See, eg, ALRC, above n 1, [7.89] (citations omitted), noting that '[r]epresentative proceedings legislation was received with trepidation by some potential respondents, concerned at "legal entrepreneurialism", "US style litigation" and "sensational" claims'; *Williams v FAI Home Security Pty Ltd [No 3]* [2000] FCA 1438 (Unreported, Goldberg J, 13 October 2000) [15], where the applicants sought an order for the correction of a notice because 'the incorrect statement as to the solicitors using the American contingency fee basis is calculated to evoke the repugnancy to American contingency fee litigation which is widespread in Australia'. For a contradiction of the position that the US is overly litigious: see Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society' (1983) 31 *UCLA Law Review* 4; Marc Galanter, 'Oil Strike in Hell: Contemporary Legends about the Civil Justice System' (1998) 40 *Arizona Law Review* 717.

³ The use of comparative study for civil procedure law reform is well-established: see, eg, Eric Stein, 'Uses, Misuses and Non-Uses of Comparative Law' (1977) 72 *Northwestern University Law Review* 198, 210; Andreas F Lowenfeld, 'Introduction: The Elements of Procedure: Are They Separately Portable?' (1997) 45 *American Journal of Comparative Law* 649, 652; Adrian A S Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Adrian A S Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999) 3, 11. For an account of how alternative dispute resolution originated in the US and was then introduced into Australia: see Sir Lawrence Street, 'Evolution of Commercial ADR in Australia' (2005) 79 *Australian Law Journal* 765.

⁴ Charles Alan Wright, *Law of Federal Courts* (5th ed, 1994) 610. See also Alexander Holtzoff, 'Instruments of Discovery under Federal Rules of Civil Procedure' (1942) 41 *Michigan Law Review* 205, 206; Edson R Sunderland, 'Discovery Before Trial under the New Federal Rules' (1939) 15 *Tennessee Law Review* 737, 747.

⁵ Zuckerman, above n 3, 3–12, explains that justice is measured by three dimensions: rectitude of the decision (that is, achieving the correct decision); timeliness of the decision; and the cost of securing a decision. See also ALRC, *Costs Shifting: Who Pays for Litigation*, Report No 75 (1995) [2.2], which states that '[c]ost is a critical element in access to justice'; ALRC, *Review of the Adversarial System of Litigation*, Issues Paper No 20 (1997) [13.2]–[13.4], reporting on delay in the provision of justice causing direct and indirect financial costs, loss of remedies, stress and frustration for litigants, lawyers, judges and court administrators, and decreased confidence in the administration of justice.

II AN OVERVIEW OF DEPOSITION RULES IN THE UNITED STATES

The rules governing the deposition at the federal level in the US are set out in the *Federal Rules of Civil Procedure 2005* (US) ('*FRCP*').⁶

A *Who May Be Examined*

In general, a party may take the testimony of any person, including a party, by oral deposition without leave of the court.⁷ Consequently, the range of persons who may be deposed is wide and includes any witnesses, such as expert witnesses and employees of a party (for example, document custodians).⁸ The attendance of witnesses may be compelled by subpoena.⁹ There are some exceptions to the general rule where leave of the court or the stipulation of the parties is required.¹⁰ They include when a proposed deposition would result in more than 10 depositions being taken by a particular party or where the person to be examined has already been deposed in the case.¹¹

It is also possible to depose a corporation, partnership, association or government agency.¹² If a party wishes to take such a deposition they must describe with reasonable particularity the matters on which examination is requested.¹³ The organisation named must then designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.¹⁴ The persons designated must testify as to matters known or reasonably available to the organisation.¹⁵ This type of deposition is most appropriate when the actions of a corporation involved many individuals, the relevant people are no longer with the corporation, or in cases with voluminous discovery that is difficult to comprehend.¹⁶

Determining who to examine is significantly aided by *FRCP* requirements of mandatory disclosure of the name and contact details of each individual likely to have discoverable information that the disclosing party may use to support its

⁶ For simplicity, this article refers only to the rules governing the deposition at the federal level in the US. However, each US state also has its own deposition rules. Within the Australian system, the main comparison is with the Federal Court system.

⁷ *FRCP* r 30(a)(1). See also Charles Alan Wright and Arthur R Miller, *Federal Practice and Procedure* § 2102 (3rd ed, 2004).

⁸ David M Malone and Peter T Hoffman, *The Effective Deposition* (2nd ed, 2001) 4.

⁹ *FRCP* r 30(a)(1).

¹⁰ *FRCP* r 30(a)(2).

¹¹ *FRCP* r 30(a)(2)(A)–(B).

¹² *FRCP* r 30(b)(6).

¹³ *FRCP* r 30(b)(6).

¹⁴ *FRCP* r 30(b)(6).

¹⁵ *FRCP* r 30(b)(6). See also Wright and Miller, above n 7, § 2103; *Gucci America Inc v Exclusive Imports International*, No 99 Civ 11490 RCC FM, 8 (Casey J) (SD NY, 13 August 2002), explaining that giving evidence of matters known or reasonably available to the organisation does not require that the deponent have personal knowledge, but they must be able to convey the sum of all knowledge known to a corporation and its affiliates.

¹⁶ Sidney I Schenkier, 'Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)' (2003) 29(2) *Litigation* 20, 21–2.

claims or defences, and by case management procedures for scheduling of discovery.¹⁷

B *Procedural Requirements*

To take the deposition of any person a party must:

- ‘give reasonable notice in writing to every other party to the action’;¹⁸
- ‘state the time and place for taking the deposition and the name and address of each person to be examined, if known, or, if the name is not known, a general description sufficient to identify the person’;¹⁹
- state the method by which the testimony shall be recorded, such as sound, sound-and-visual, or stenographic means (any party may designate another method to record the testimony of the deponent in addition to the method specified by the person taking the deposition);²⁰
- conduct a deposition before a person agreed upon by the parties, authorised to administer oaths, or appointed by the court;²¹ and
- unless otherwise authorised by the court or stipulated by the parties, limit the deposition to one day of seven hours (‘the court must allow additional time ... if needed for a fair examination of the deponent, or if the deponent or another person, or other circumstance, impedes or delays the examination’).²²

The notice to a party deponent may be accompanied by a request for the production of documents and tangible things at the taking of the deposition.²³ Documents held by a third party may be obtained for a deposition through use of a subpoena.²⁴

¹⁷ *FRCP* rr 26(a)(1)(A), 16. See also Stephen B Burbank and Linda J Silberman, ‘Civil Procedure Reform in Comparative Context: The United States of America’ (1997) 45 *American Journal of Comparative Law* 675, 681–2.

¹⁸ *FRCP* r 30(b)(1). See also Wright and Miller, above n 7, § 2106.

¹⁹ *FRCP* r 30(b)(1). See also Wright and Miller, above n 7, §§ 2109, 2112.

²⁰ *FRCP* r 30(b)(2)–(3).

²¹ *FRCP* r 30(b)(4). *FRCP* r 28(a) provides that depositions shall be taken before an officer authorised to administer oaths by the laws of the US or the place where the examination is held, or before a person appointed by the court in which the action is pending. *FRCP* r 29 substantially extends the classes of person before whom a deposition may be taken, by allowing the parties by written stipulation to provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions. See also Wright and Miller, above n 7, §§ 2082, 2091.

²² *FRCP* r 30(d)(2).

²³ *FRCP* rr 30(b)(5), 34.

²⁴ *FRCP* r 45. See also Wright and Miller, above n 7, § 2108.

C Examination and Objections

The procedure at a deposition is usually that the lawyer acting for the party noticing the deposition examines the deponent, and then the lawyer for the deponent may conduct an examination.

The *FRCP* set out the requirements for when an objection is required as follows:

- (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.
- (B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.²⁵

This means that no objection is necessary unless the objectionable question could have been cured through a prompt objection. A matter will usually be capable of being cured if it is a matter as to form; that is, the form of the question is objectionable but could be corrected so as to become unobjectionable. For example, questions that are ambiguous, compound, argumentative, calling for speculation or misstating prior testimony could be objected to and corrected.²⁶

The *FRCP* make it clear that:

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.²⁷

Further, '[a]ny objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner.'²⁸ In short, objections do not prevent a witness from answering a question. If the objection is valid then it is preserved should an opponent wish to use the deposition at a later point. In addition, lawyers are prohibited from using objections to try to affect the testimony of a witness.²⁹

²⁵ *FRCP* r 32(d)(3). See also Wright and Miller, above n 7, § 2156.

²⁶ For further examples: see Malone and Hoffman, above n 8, 191–4.

²⁷ *FRCP* r 30(c). See also *Ralston Purina Co v McFarland*, 550 F 2d 967, 973–4 (Field J) (4th Cir, 1977); *Shapiro v Freeman*, 38 FRD 308 (SD NY, 1965).

²⁸ *FRCP* r 30(d)(1).

²⁹ See Advisory Committee Notes, *FRCP* for the 1993 Amendments, which state that *FRCP* r 30(d)(1) was adopted to prohibit 'speaking objections' that were aimed at coaching a witness during a deposition. See also *Odone v Croda International plc*, 170 FRD 66, 68 fn 3 (Attridge J) (D DC, 1997), where it was stated that an attorney 'may not object to questions in such way as to "coach" the witness or suggest an answer'; Jean M Cary, 'Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions' (2006) 19 *Georgetown Journal of Legal Ethics* 367, 371–2.

In contrast to an objection where the deponent is required to answer, there are a limited number of circumstances where the lawyer may instruct the deponent not to answer. Those circumstances arise when it is necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the deponent or party.³⁰

The effect of this approach to objections is that the party taking the deposition must ensure its questions are in admissible form if they want to be able to rely on the testimony in court.

III ADVANTAGES OF THE DEPOSITION

The deposition is one of the most flexible devices in US civil procedure and may be used for three main purposes: discovery, preserving testimony, and case development and assessment.

A Discovery

In the discovery mode questions are asked with the aim of finding out information. The much cited US decision of *Hall v Clifton Precision* held that one of the purposes of the deposition 'is to elicit the facts of a case before trial. Another purpose is to even the playing field somewhat by allowing all parties access to the same information, thereby tending to prevent trial by surprise.'³¹ A witness will be deposed to ascertain what they do and do not know, and to identify other sources of information. For example, an executive involved in a business transaction the subject of a dispute, may be asked what their role in the transaction was, who else was involved in the transaction, and how documents related to the transaction were dealt with, such as circulation, filing and storage. Equally, a plaintiff in a product liability matter may be asked about their medical history, use of the particular product, knowledge of labels and the harm they allege suffering. The witness is asked open-ended questions aimed at exhausting their recollection. The requirement that a witness answer despite an objection also facilitates the disclosure of information or leads for new information.

In Australia, the usefulness of the deposition for discovery is evidenced by its use by regulatory agencies in conducting investigations. Both the Australian Securities and Investments Commission ('ASIC') and the Australian Competition and Consumer Commission ('ACCC') have been given the statutory power

³⁰ *FRCP* r 30(d)(1), (4). *Eggleston v Chicago Journeyman Plumbers' Local Union No 130*, 657 F 2d 890, 903 (Wood J) (7th Cir, 1981), states that while the general rule is that questions of doubtful relevance must be answered, although objected to, other questions may be so irrelevant that refusing to answer may be justified.

³¹ *Hall v Clifton Precision, A Division of Litton Systems Inc*, 150 FRD 525, 528 (Gawthrop J) (ED Pa, 1993). See also *Hickman v Taylor*, 329 US 495, 507–8 (Murphy J) (1947), where the US Supreme Court dealt with the role of the US discovery rules generally by observing that

[m]utual knowledge of all of the relevant facts gathered by both parties is essential to proper litigation. ... The deposition–discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

to conduct examinations similar to depositions when seeking to obtain information.³² Indeed, in relation to the ACCC, the High Court has opined that the purpose of s 155 of the *Trade Practices Act 1975* (Cth):

is to aid the Commission in the discharge of its functions under the Act. These functions include the investigation of alleged breaches, the acquisition of information and the obtaining of evidence for submission to the Court in proceedings in respect of contravention.³³

The courts have upheld the use of the power of the ACCC to conduct examinations to provide the Commission with admissible evidence intended to be tendered in anticipated proceedings.³⁴

Similar advantages have been credited to examinations conducted pursuant to the *Corporations Act 2001* (Cth) ss 596A–B. In *Hamilton v Oades*, Mason CJ (in discussing a predecessor to s 596B) explained that the provision was designed to elicit information and evidence to determine if there had been some form of misconduct.³⁵ His Honour further explained that ‘[t]he very purpose of the section is to create a system of discovery, which may cause defences to be disclosed, for the purpose of bringing charges.’³⁶

The use of an examination by a regulator or an ‘eligible applicant’ under the *Corporations Act 2001* (Cth) is not identical to the US deposition but it clearly demonstrates the value of a deposition for obtaining information. The US experience has been that those advantages cannot be obtained from document discovery. The deposition offers something more than can be gleaned from the bare text of a document. This is discussed further below in relation to case development and assessment.³⁷

For completeness it should be noted that the Northern Territory and Victorian Supreme Court rules contain a discovery procedure which enables interrogation by oral examination.³⁸ While it has been recognised that the procedure may encourage more spontaneous answers so as to give a better understanding of the evidence given by a party, its use is currently limited because a party must consent to the use of the procedure, and probing follow-up questions do not seem possible under the interrogatory format that is required.³⁹ However, in the NT, a

³² *Australian Securities and Investments Commission Act 2001* (Cth) s 19; *Trade Practices Act 1974* (Cth) s 155. These sections provide for a person to give evidence orally and under oath or affirmation before ASIC and the ACCC respectively. For a description of the conduct of an oral examination pursuant to the *Trade Practices Act 1974* (Cth) s 155: see ACCC, *Section 155 of the Trade Practices Act — Information-Gathering Powers of the Australian Competition and Consumer Commission in Relation to Its Enforcement Function* (October 2000).

³³ *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460, 472 (Mason J).

³⁴ *Kotan Holdings Pty Ltd v Trade Practices Commission* (1991) 30 FCR 511.

³⁵ (1989) 166 CLR 486, 496–7, discussing s 541 of the *Companies (NSW) Code 1981* (NSW). See also *Evans v Wainter Pty Ltd* (2005) 145 FCR 176, 216–17 (Lander J); *Re Normans Wines Ltd (receivers and managers apptd) (in liq)*; *Harvey v Burfield* (2004) 88 SASR 541.

³⁶ *Hamilton v Oades* (1989) 166 CLR 486, 497 (Mason CJ).

³⁷ See below Part III(C).

³⁸ *Supreme Court Rules 1987* (NT) O 31; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 31; Bernard Cairns, *Australian Civil Procedure* (2005) 328–9.

³⁹ *Supreme Court Rules 1987* (NT) O 31.02(2); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 31.02(2). See LexisNexis, *Discovery and Interrogatories* (1997) vol 1 (at 0)

court may order an oral examination where it will be less costly to the parties than written interrogatories, or there is some other advantage to the parties.⁴⁰ Thus, the limitation of consent may be overcome but the procedure appears not to have been used,⁴¹ possibly because of its novelty or because parties may be wary of invoking the procedure as they may then be subject to it as well.

B Preservation of Testimony

The US deposition may be used as a substitute for, rather than an adjunct to, the trial when a witness is unavailable to attend the hearing. The *FRCP* allow a deposition to be used as a replacement for live testimony when a witness is unavailable due to death, age, illness, infirmity, imprisonment or being outside the jurisdiction of the court.⁴² This is often referred to as a *de bene esse* examination, literally meaning ‘as well done’, because the examination is a replacement for live testimony at trial.⁴³ In short, the deposition allows the testimony to be preserved so as to protect against unavailability of the witness.

In Australia, O 24 of the *Federal Court Rules 1979* (Cth)⁴⁴ provides for the examination of a person in similar circumstances, namely: (a) where a witness is in Australia, but is unable because of age, health or imminent departure from Australia to attend the trial; or (b) where a witness is outside Australia and they are unwilling or unable to attend the trial and their appearance cannot be compelled. Order 24 also allows for each party and any legal practitioner representing the party to attend the examination and for examination, cross-examination and re-examination.⁴⁵

However, O 24 differs from the US-style deposition in that ordering an examination is discretionary,⁴⁶ the examination must take place before a judge or an examiner that the court appoints,⁴⁷ and the examiner can put questions to the person being examined.⁴⁸ In addition, objections are dealt with very differently compared with the US where only questions that could have been cured through a prompt objection need to be made. Under the *Federal Court Rules 1979* (Cth),

[21 245], observing that ‘[i]t is also suggested that the procedure will enable the strength and weaknesses of a party as a witness to be assessed, and assist in determining how weak or strong the party’s case is.’

⁴⁰ *Supreme Court Rules 1987* (NT) O 31.03(9).

⁴¹ No case law exists on the procedure and enquiries with NT barristers and the Chambers of the Supreme Court Master indicate that the procedure has not been invoked.

⁴² *FRCP* r 32(a)(3). See also Wright and Miller, above n 7, § 2146, noting that the deposition is not to be treated as second class evidence.

⁴³ Malone and Hoffman, above n 8, 24.

⁴⁴ All Australian states have similar court rules: *Uniform Civil Procedure Rules 2005* (NSW) pt 24; *Uniform Civil Procedure Rules 1999* (Qld) ch 11 pt 2; *Supreme Court Civil Rules 2006* (SA) pt 10 div 5; *Supreme Court Rules 2000* (Tas) pt 19 div 2; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 41; *Supreme Court Rules 1971* (WA) OO 38, 38A.

⁴⁵ *Federal Court Rules 1979* (Cth) O 24 r 5.

⁴⁶ *Federal Court Rules 1979* (Cth) O 24 r 1. See *Willis v Trequair* (1906) 3 CLR 912; *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 139 CLR 521; *Idoport Pty Ltd v National Australia Bank Ltd [No 37]* [2001] NSWSC 838 (Unreported, Einstein J, 5 October 2001) [35]–[40].

⁴⁷ *Federal Court Rules 1979* (Cth) O 24 r 1(1)(a).

⁴⁸ *Federal Court Rules 1979* (Cth) O 24 r 5(5).

the person being examined must object to questions as though they were in court and the normal rules of evidence applied.⁴⁹ The rules also require the examiner to state to the parties the opinion of the examiner regarding the validity of the ground for the objection without deciding whether the objection should be sustained.⁵⁰ Like the US system, it is the court that decides the validity of the ground for the objection.⁵¹

The examination of witnesses who are abroad is governed by the *Foreign Evidence Act 1994* (Cth),⁵² which gives a court a broad discretion as to whether to allow an examination of a person abroad and the manner of taking that evidence. The *Foreign Evidence Act 1994* (Cth) not only allows for the issue of a commission for an examination, being the procedure under O 24 discussed above,⁵³ but also for the issue of a letter of request to the foreign country and for the trial judge to be able to receive the evidence from the witness by travelling to the foreign location or by video link.⁵⁴ The unavailability of witnesses, whether within or outside Australia, may also be alleviated by the Federal Court procedure that allows for testimony to be given by ‘video link, audio link or other appropriate means.’⁵⁵

The extensive Australian procedures for dealing with an unavailable witness mean that the adoption of the US deposition is unnecessary in this context. However, the Australian procedures are only adopted when it is known that a witness will be unavailable.⁵⁶ The general use of the deposition in the US means that the unforeseen unavailability of a witness through death or an unknown illness is protected against because a transcript or videotape created during discovery will be available.

C Case Development and Assessment

The deposition plays a major role in case development in the US legal system. Questions are asked with the goal of encouraging the witness to make admissions (hopefully to damaging facts), adopt a particular position so that it cannot be changed without drawing adverse inferences, and to test how they respond to

⁴⁹ *Federal Court Rules 1979* (Cth) O 24 rr 5(2), 7.

⁵⁰ *Federal Court Rules 1979* (Cth) O 24 r 7(a). Rule 7(b) also requires that the opinion of the examiner and the following information be set out in the deposition or in an attachment: (i) the question; (ii) the ground for the objection; (iii) the opinion of the examiner; and (iv) the answer (if any).

⁵¹ *Federal Court Rules 1979* (Cth) O 24 r 7(c).

⁵² The Australian states have similar legislation: *Evidence on Commission Act 1995* (NSW); *Evidence on Commission Act 1977* (Qld); *Evidence Act 1929* (SA) s 59E; *Evidence on Commission Act 2001* (Tas); *Evidence Act 1958* (Vic) ss 9B–C; *Evidence Act 1906* (WA) ss 110–11.

⁵³ See above nn 44–6 and accompanying text.

⁵⁴ *Foreign Evidence Act 1994* (Cth) s 7(1); *Bell Group Ltd (in liq) v Westpac Banking Corporation* (2004) 189 FLR 360, 372–4 (Owen J), which held that the legislation allowed for the taking of evidence abroad by video link.

⁵⁵ *Federal Court of Australia Act 1976* (Cth) s 47A.

⁵⁶ *Federal Court Rules 1979* (Cth) O 24 r 1; LexisNexis, *Practice and Procedure — High Court and Federal Court of Australia* (1991) (at 153) [42 920.5].

the version of events given by the opposing party.⁵⁷ Once the key witnesses from both sides have been deposed, a case may be evaluated from an educated position. A party will be in a position where they can move for summary judgment if the evidence gathered does not support the case pleaded, look to achieve a settlement, or attempt to remedy deficiencies in the case, although that may be difficult after witnesses have adopted particular positions. These courses of action follow from the ability to use deposition testimony to impeach a witness who changes their story at trial, as the deposition testimony will constitute a prior inconsistent statement.⁵⁸

Intrinsic to the evaluation of the prospects of a claim is the advocate's unfiltered access to the witness.⁵⁹ This means that the lawyer can evaluate the witness on subjective factors such as honesty and believability because of the spontaneous nature of the examination.⁶⁰ The deposition may be a practice run for the trial so that the examiner can see how a witness reacts to particular questions. The lawyer can also probe answers, especially those that are evasive or vague, and follow up on new leads.⁶¹ Accordingly, the story of the opposing party is presented in their own words rather than through those of the opposing lawyer as set out in pleadings, interrogatories or an affidavit.⁶²

The strong belief in the US judicial system in the need for unfiltered access to a witness to discover the truth has seen decisions denying the use of written questions and restricting the ability of a lawyer to confer with witnesses during a deposition. In relation to the former it has been observed that:

the interrogatory format does not permit the probing follow-up questions necessary in all but the simplest litigation. Second, without oral deposition, counsel are unable to observe the demeanor of the witness and evaluate his credibility in anticipation of trial. ... Finally, written questions provide an opportunity for counsel to assist the witness in providing answers ...⁶³

⁵⁷ Mark McCurdy, 'Obtaining Admissions in Depositions' (2001) 74 *Temple Law Review* 139, 139–40; David Greenwald, Joanne Caruso and Michael Turrill, 'Taking Effective Video-Taped Depositions and Using Them at Trial' (Paper presented at the American Bar Association Annual Meeting, Section of Litigation, San Francisco, 7–10 August 2003) 2.

⁵⁸ *FRCP* r 32(a)(1). See also Wright and Miller, above n 7, § 2144; Jeffrey Kroll, 'Effective Use of Depositions at Trial' (2003) 30(1) *Litigation* 47, 48. If the deposition is videotaped then the witness and judge will be able to watch the prior inconsistent statement in colour and with sound. See *United States v Tunnell*, 667 F 2d 1182, 1188 (Politz J) (5th Cir, 1982), where it was observed, in relation to a videotape, that 'the trial judge was able to note [the witness's] attitude reflected by his motions, facial expressions, demeanor and voice inflections'; *DPP (NSW) v Alexander* (1993) 33 NSWLR 482, 498 (Hunt CJ).

⁵⁹ Geoffrey C Hazard Jr, Colin C Tait and William A Fletcher, *Cases and Materials on Pleadings and Procedure* (7th ed, 1994) 929; A Darby Dickerson, 'The Law and Ethics of Civil Depositions' (1998) 57 *Maryland Law Review* 273, 278.

⁶⁰ Greenwald, Caruso and Turrill, above n 57, 2, referring to 'the wealth of information that may be gleaned from body language, verbal cues and opposing counsel's reaction to the deponent's testimony'.

⁶¹ Holtzhoff, above n 4, 209.

⁶² Wright, above n 4, 610, notes that the oral deposition 'is the only discovery device that permits examination and cross-examination of a live witness by counsel, where there is no opportunity to reflect and carefully shape the information given'.

⁶³ *Mill-Run Tours Inc v Khashoggi*, 124 FRD 547, 549 (Magistrate Francis) (SD NY, 1989). See also *P H International Trading Co v Christia Confezioni SpA*, No 04 C 903 (ND Ill, 24 September 2004); *National Life Insurance Co v Hartford Accident & Indemnity Co*, 615 F 2d 595,

In regard to the latter:

The underlying purpose of a deposition is to find out what a witness saw, heard, or did — what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy,⁶⁴ with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness — not the lawyer — who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts.⁶⁵

In Australia, the opportunity to see a witness tell their story was associated with evidence-in-chief being given orally, albeit at a much later stage in the litigation — the trial. However, modern case management has led to greater reliance on affidavits or witness statements being exchanged prior to trial and frequently replacing evidence-in-chief.⁶⁶ It has been recognised that as a result, the evidence given is the lawyer's understanding of the witness's evidence.⁶⁷ A dishonest witness is afforded an advantage because their statement is admitted as evidence before the judge in written form and must be challenged through cross-examination.⁶⁸ The witness is relieved of the need to recall their evidence and simply needs to adhere to their written statement. The judge is also unable to assess the credibility of a witness during friendly examination.⁶⁹ In addition, the process of preparing the affidavit or witness statement and requiring the witness to commit to a written recitation can affect recollection intentionally and unintentionally.⁷⁰ This is not to say that witness preparation or 'coaching' is not possible prior to a deposition.⁷¹ However, the opportunity to take the deposition

599–600 fn 5 (Rosenn J) (3rd Cir, 1980); *Haymes v Smith*, 73 FRD 572, 575 (Curtin CJ) (WD NY, 1976); Edson R Sunderland, 'Scope and Method of Discovery Before Trial' (1933) 42 *Yale Law Journal* 863, 875.

⁶⁴ Charlie McCarthy was the name of the dummy used by the popular ventriloquist Edgar Bergen in the 1930–50s in the US.

⁶⁵ *Hall v Clifton Precision, A Division of Litton Systems Inc*, 150 FRD 525, 528 (Gawthrop J) (citations omitted) (ED Pa, 1993). See also *Re Amezaga*, 195 BR 221, 225–6 (Lamoutte CJ) (Bankr PR, 1996); *Armstrong v Hussmann Corporation*, 163 FRD 299 (ED Mo, 1995).

⁶⁶ Justice Arthur R Emmett, 'Towards the Civil Law? The Loss of "Orality" in Civil Litigation in Australia' (2003) 26 *University of New South Wales Law Journal* 447, 458–61; Zuckerman, above n 3, 19, 47.

⁶⁷ Emmett, above n 66, 461.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Michael Legg, 'Preparing Witnesses Effectively and Ethically' (2003) 41(11) *Law Society of New South Wales Journal* 60.

⁷¹ See W K Olson, *The Rule of Lawyers* (2003) 199–202; Roger C Cramton, 'Lawyer Ethics on the Lunar Landscape of Asbestos Litigation' (2003) 31 *Pepperdine Law Review* 175, 185–8, which detail the use of a memorandum by the lawyers for the plaintiff in the US to prepare clients for their depositions in asbestos litigation. Some of the topics covered by the memorandum included instructing clients that it was important that they never saw any warning labels on asbestos products, that they should name with certainty specific brands of asbestos-containing products

closer to the disputed events, and without the crafting of a written statement or affidavit, provides an opportunity to access testimony before it is overly reconstructed.

In Australia, this advantage of the deposition can still be found in relation to examinations conducted pursuant to ss 596A–B of the *Corporations Act 2001* (Cth). In *Evans v Wainter Pty Ltd*, it was observed that an examination could be used to determine whether the corporation would be likely to succeed in litigation against its officers, auditors or third parties, and, while the procedure cannot be used as a dress rehearsal for the cross-examination of a person in a pending or subsequent action, it is not improper to examine a person against whom litigation is pending.⁷² Equally, in *Re Robert Sterling Pty Ltd (in liq) and the Companies Act [No 3]*, Needham J commented on the advantage of not being able to prepare answers to questions given in advance in relation to an examination under s 249 of the *Companies Act 1961* (NSW):

It would, of course, be very convenient for a witness if, when the question was asked of him, he either had the right to have it put in writing or the right to discuss it with his solicitor or counsel. It is likely, in such a procedure, that frankness would be at a premium. The liquidator, where an order has been made for the examination of a witness ... is entitled, in my opinion, subject to the normal rights of a witness to object to answer questions the answers to which might incriminate him, to have the witness' immediate answer to a question.

Everybody who has practised the law knows that in cross-examination truth will out on some occasions when it would not if the questions were, in effect, dribbled to the witness either orally or in writing.⁷³

However, in relation to oral interrogatories under the Victorian and NT Supreme Court rules, the spontaneity of the examination has been raised as a concern because parties may make admissions or fail to qualify answers which could have been achieved through a written interrogatory.⁷⁴

that they worked with, and reference should be to products they installed rather than removed, as it was almost impossible to prove the brand of a product being removed.

⁷² (2005) 145 FCR 176, 216–17 (Lander J). See also *Re Southern Equities Corporation Ltd (in liq)*; *Bond v England* (1997) 25 ACSR 394, 432 (Lander J): 'it will not be an abuse if the examination will give rise to a forensic advantage, for example by way of securing admissions or obtaining material or evidence not otherwise available to the liquidator.'

⁷³ [1979] 2 NSWLR 728, 731–2. This decision was followed in *Re Stolar; Australian Securities and Investments Commission v Karl Suleman Enterprises Pty Ltd* (2003) 44 ACSR 694, 699 (Austin J). See also *Re Qintex Group Management Services Pty Ltd (in liq)* [1997] 2 Qd R 91, 95 (McPherson and Pincus JJA, Derrington J).

⁷⁴ LexisNexis, above n 39, (at 0) [21 255]:

There is an obvious danger that a party examined on oral examination will not have sufficient opportunity to consider the answers being made and may therefore run the risk of making admissions or giving information which if given in written form could be prepared on a more limited or qualified basis.

IV DISADVANTAGES OF THE DEPOSITION

A *Cost and Discovery Abuse*

The prime disadvantage of the deposition is cost.⁷⁵ In the US, a witness will be deposed rather than have an affidavit or witness statement prepared for them. As a result, instead of a party incurring the cost of having their lawyers prepare affidavits for witnesses, they incur the cost of having their lawyer defend a deposition for each of their witnesses and take the deposition of each of the opposing party's witnesses. The amount of lawyer time required to prepare a case may increase significantly, thus increasing costs.⁷⁶

The costs of the deposition in the US may be further increased due to other aspects of the US legal system such as the approach to discovery, pleading requirements, the rule on costs and legal culture.

The rules governing discovery in the US have been subject to a number of amendments. The federal discovery rules were adopted in 1938. From 1946 to 2000, the *FRCP* effectively provided for parties to obtain discovery, including the taking of depositions, in regard to any matter that was not privileged and was relevant to 'the subject matter involved in the pending action', but the information sought need not be admissible at the trial if the discovery appeared reasonably calculated to lead to the discovery of admissible evidence.⁷⁷ This formulation was interpreted as authorising a colloquial 'fishing expedition' during discovery.⁷⁸ The liberal approach to discovery was adopted to prevent surprise at trial, to even the playing field between litigants by requiring the disclosure of relevant information, and to improve the accuracy of decision-making by ensuring that all relevant information could be considered.⁷⁹ However, the liberal discovery rules also led to allegations of discovery abuse.⁸⁰ 'Discovery abuse' is an ill-defined

⁷⁵ Federal Judicial Center, *Manual for Complex Litigation* (4th ed, 2004) [11.45]; Hazard Jr, Tait and Fletcher, above n 59, 929.

⁷⁶ Thomas E Willging et al, 'An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments' (1998) 39 *Boston College Law Review* 525, 540, finding that depositions account for the greatest amount of lawyer-related discovery expenses.

⁷⁷ As originally drafted, *FRCP* r 26(b)(1) applied only to the deposition, but was extended to all discovery in 1946. See generally Jeffrey W Stempel and David F Herr, 'Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery' (2001) 199 *Federal Rules Decisions* 396, 400–4; Amelia F Burroughs, 'Mythed It Again: The Myth of Discovery Abuse and *Federal Rules of Civil Procedure* 26(b)(1)' (2001) 33 *McGeorge Law Review* 75, 77–83, dealing with the history of the *FRCP* in relation to discovery. See also Stephen N Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 *Federal Discovery Rules*' (1998) 39 *Boston College Law Review* 691, 734–9, discussing the 1946 amendments.

⁷⁸ *Hickman v Taylor*, 329 US 495, 507 (Murphy J) (citations omitted) (1947), stated that '[n]o longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case.'

⁷⁹ *Ibid.* See also Subrin, 'Fishing Expeditions Allowed', above n 77, 716, citing Edson R Sunderland, 'Improving the Administration of Civil Justice' (1933) 167 *Annals of the American Academy of Political and Social Science* 60–83; John Beckerman, 'Confronting Civil Discovery's Fatal Flaws' (2000) 84 *Minnesota Law Review* 505, 513–14.

⁸⁰ Discovery abuse appears to have been most prominently denounced in the 1970s and 1980s. See *Herbert v Lando*, 441 US 153, 179 (Powell J) (1979): discovery has 'not [been] infrequently exploited to the disadvantage of justice'; Wayne D Brazil, 'The Adversary Character of Civil Discovery: A Critique and Proposals for Change' (1978) 31 *Vanderbilt Law Review* 1295, 1304; Charles B Renfrew, 'Discovery Sanctions: A Judicial Perspective' (1979) 67 *California Law*

term but includes situations where discovery procedures are invoked to deliberately impose costs on an opponent rather than to obtain relevant information, where a party seeks unnecessary discovery due to a misapprehension of the claim or out of an abundance of caution, or where a party withholds discoverable information.⁸¹ Discovery abuse therefore increases the cost of litigation.

The scope of discovery and its associated costs in the US have also been linked to the *FRCP* requiring only simplified notice pleading so that the issues in dispute are not well-defined, leading to a range of subjects for which discovery must be undertaken.⁸² Excessive discovery is also possible because of the US rule on costs, which requires each party to bear their own costs regardless of the outcome of the litigation.⁸³ Consequently, an opponent can be made to bear additional discovery costs in the knowledge that those costs will not be revisited upon an unsuccessful litigant, as they may be in Australia where costs follow the event.⁸⁴ Further, US legal culture, which both reflects and contributes to the above factors, has been argued to be excessively adversarial and legalistic.⁸⁵ It is argued that lawyers will take every opportunity to advance the likelihood of success for their client and harm the chances of their opponent through both legal tactics, such as novel theories or numerous claims, and by affecting the economics of the dispute, such as through imposing costs that make a settlement payment less than the costs of defending the suit.⁸⁶

Review 264, 264; Judge Milton Pollack, 'Discovery — Its Abuse and Correction' (1978) 80 *Federal Rules Decisions* 219, 221–2, citing the Chief Justice of the US Supreme Court and the US Attorney-General. Allegations of discovery abuse have arisen again recently due to discovery requests for electronically-stored information. The *FRCP* were amended on 1 December 2006 to adopt specific procedures for electronically-stored information: see Louis R Pepe and Jared Cohane, 'Document Retention, Electronic Discovery, E-Discovery Cost Allocation and Spoliation of Evidence: The Four Horsemen of the Apocalypse in Litigation Today' (2006) 80 *Connecticut Bar Journal* 331; Michael Legg and Jennifer Thomas, 'New Discovery Rules in the US for Electronically Stored Information' (2006) 44(7) *Law Society of New South Wales Journal* 79.

⁸¹ John K Setear, 'The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence and Discovery Abuse' (1989) 69 *Boston University Law Review* 569, 581–3; Jack B Weinstein, 'What Discovery Abuse? A Comment on John Setear's "The Barrister and the Bomb"' (1989) 69 *Boston University Law Review* 649, 654–5; Beckerman, above n 79, 507.

⁸² *FRCP* r 8; Frank H Easterbrook, 'Discovery as Abuse' (1989) 69 *Boston University Law Review* 635, 644–5; Geoffrey C Hazard Jr, 'From Whom No Secrets Are Hid' (1998) 76 *Texas Law Review* 1665, 1677–8.

⁸³ See *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240, 247 (White J) (1975): 'In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.'

⁸⁴ Easterbrook, above n 82, 645; Note, 'Discovery Abuse Under the Federal Rules: Causes and Cures' (1982) 92 *Yale Law Journal* 352, 353–4.

⁸⁵ See Brazil, above n 80, 1303–4, who argues that the advent of discovery resulted in the adversarial approach to trial being extended into the pre-trial area; Robert A Kagan, *Adversarial Legalism: The American Way of Law* (2001) 9, contending that the US has a distinctive approach to law where

disputants readily invoke legal rights, duties, and procedural requirements ... [and] a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers ...

See also Beckerman, above n 79, 517, stating that representing a client loyally and effectively, especially as a litigator, requires adversariness and aggressiveness.

⁸⁶ Kagan, above n 85, 108: 'discovery is sometimes used as a club against the other party ... solely to increase the adversary's expenses', and 'the more a disputing party has to spend in defending

Discovery abuse extends to depositions, as they may be scheduled for people with peripheral involvement in the dispute, or the topics examined in a deposition may go beyond what is in issue in the dispute.⁸⁷ The deposition can be particularly costly for large organisations such as corporations or governments because the number of possible deponents is great as compared with an individual or small entity.⁸⁸ The aim of both lawyers taking and defending a deposition to cause only helpful facts to be adduced may give rise to tactics in the framing of questions and answers that consume time and create costs as they battle for an informational advantage.⁸⁹ For example, a lawyer may only ask leading questions to get answers to specific issues that support their case, or the deponent may have been instructed not to elaborate on answers even when they only give part of the story. In addition, the US has in the past been troubled by lawyers adopting obstructive behaviour in depositions, such as preventing a witness from answering, coaching a witness, threats of physical violence, insults and discriminatory language.⁹⁰

Before looking at the US response to discovery abuse, it should be noted that the allegations of discovery abuse are not uncontested and that many of the allegations have been criticised as being based on anecdote rather than empirical studies.⁹¹ The empirical studies that have taken place have generally found that discovery abuse is not a problem in the majority of cases but can be a major problem in a minority of cases, and the likelihood of discovery abuse tends to be linked to case complexity which may be measured by multiple parties, the number of claims, the amount at stake or the type of case.⁹²

The allegations of discovery abuse led to a number of efforts to revise the *FRCP*. In 1993, the *FRCP* gave judges extensive power to limit discovery where it was duplicative or burdensome.⁹³ The advent of case management allowed for the number and scope of depositions to be abridged and costs reduced. The US courts recognised that:

discovery is not boundless, and a court may place limits on discovery demands that are ‘unreasonably cumulative or duplicative,’ or in cases where ‘the burden or expense of the proposed discovery outweighs its likely benefit, taking into

or asserting a just position, the greater her incentive to compromise her legal claims or defenses’: at 119.

⁸⁷ Pollack, above n 80, 222.

⁸⁸ Easterbrook, above n 82, 643.

⁸⁹ Brazil, above n 80, 1330–1.

⁹⁰ Jean M Cary, ‘Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation’ (1996) 25 *Hofstra Law Review* 561.

⁹¹ Linda S Mullenix, ‘Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking’ (1994) 46 *Stanford Law Review* 1393, which discusses the difficulties in determining the existence and extent of discovery abuse by highlighting the questionable social science used to champion reform in the US.

⁹² See generally Judith A McKenna and Elizabeth C Wiggins, ‘Empirical Research on Civil Discovery’ (1998) 39 *Boston College Law Review* 785; James S Kakalik et al, ‘Discovery Management: Further Analysis of the *Civil Justice Reform Act* Evaluation Data’ (1998) 39 *Boston College Law Review* 613; Willging et al, above n 76.

⁹³ *FRCP* r 26(b)(2); Advisory Committee Notes, *FRCP* for the 1993 Amendments. See also *Crawford-El v Britton*, 523 US 574, 598 (Stevens J) (1998), where the Supreme Court observed that ‘Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly’.

account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues'.⁹⁴

In 2000, the *FRCP* were amended to provide that '[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party'.⁹⁵ The change in the criterion for relevance from 'the subject matter involved in the pending action' to 'the claim or defense of any party' was undertaken to rein in the scope of discovery.⁹⁶

Discovery abuse has also been dealt with through sanctions such as awarding attorneys' fees, preventing certain evidence or facts being challenged, or striking out claims, defences or testimony when there is unwarranted discovery.⁹⁷ Economic penalties have been found to be effective only when they are of a quantum that impacts the stakes of the case.⁹⁸ Sanctions precluding evidence or striking out pleadings are rarely used because they prevent the determination of the matter on its merits.⁹⁹

Discovery abuse in depositions has been addressed through judicial supervision and the court rules prescribing the number of depositions, the length of a deposition and the requirements for objections.¹⁰⁰ The aforementioned rules were introduced in 1993 and 2000.¹⁰¹ Judicial control of the deposition is maintained in the US by judges frequently being available by telephone to rule on issues,¹⁰² or through procedures for the filing of a motion to remedy the dispute.¹⁰³ In addition, obstructionist tactics can be noted on the record (transcript or video) for later reference, including making reference to actions that violate the court rules.¹⁰⁴ A study of depositions after the 1993 amendments

⁹⁴ *Six West Retail Acquisition v Sony Theatre Management Corporation*, 203 FRD 98, 102 (Magistrate Francis) (SD NY, 2001), citing *FRCP* r 26(b)(2). See also *Eggleston v Chicago Journeyman Plumbers' Local Union No 130*, 657 F 2d 890, 904 (Wood Jr J) (7th Cir, 1981), where the Court suggested limitations being imposed on depositions to deal with whether a class action should be certified, that is, allowed to proceed because it met the requirements of r 23 of the *FRCP*.

⁹⁵ *FRCP* r 26(b)(1); Advisory Committee Notes, *FRCP* for the 2000 Amendments.

⁹⁶ Stempel and Herr, above n 77, 398, 404.

⁹⁷ *FRCP* rr 11, 37; Renfrew, above n 80, 267–71.

⁹⁸ Beckerman, above n 79, 551–2.

⁹⁹ *Ibid* 556–7.

¹⁰⁰ Richard L Marcus, 'Malaise of the Litigation Superpower' in Adrian A S Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999) 71, 99.

¹⁰¹ *FRCP* r 30; Advisory Committee Notes, *FRCP* for the 1993 Amendments; Advisory Committee Notes, *FRCP* for the 2000 Amendments.

¹⁰² William Schwarzer and Alan Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* (2006) 10–11. For an example of the parties being required to contact a judge by telephone due to a dispute during a deposition: see *Local Rules for the United States District Courts for the Southern and Eastern Districts of New York* (effective 15 April 1997, incorporating amendments to 15 April 2005) r 37.3(b); *Flynn v Goldman, Sachs & Co*, No 91 Civ 0035 (KMW), 20–1 (Magistrate Lee) (SD NY, 1 November 1991).

¹⁰³ *FRCP* r 37 provides for a motion to be filed to compel an answer and allows for orders as to expenses and sanctions in the event of non-compliance. However, the motion must be accompanied by a certification that the movant has acted in good faith to resolve the issue with the other party or person without court action. See also *Ralston Purina Co v McFarland*, 550 F 2d 967, 973–4 (Field J) (4th Cir, 1977); Wright and Miller, above n 7, § 2286.

¹⁰⁴ Malone and Hoffman, above n 8, 137–9; Cary, above n 90, 599.

found that seven or fewer people were deposed in 75 per cent of cases, few lawyers reported that too many depositions were taken in a case, and the most frequent complaint by lawyers was that a deposition took more time than they thought was necessary.¹⁰⁵

In summary, the extent of discovery abuse is difficult to measure but many examples of discovery abuse are available. The deposition is not immune from discovery abuse. The US has repeatedly attempted to curb discovery abuse through the combination of judicial management, rule changes to limit the scope of discovery and sanctions. However, it is difficult to tell how effective those techniques are when discovery abuse appears to be consistently linked to a minority of cases.¹⁰⁶

The adoption of the deposition in Australia would necessarily mean that parties would incur the cost of having their lawyer take and defend depositions. However, the extent of those costs will not necessarily reflect the US experience but rather will be a function of the Australian litigation environment, including its approach to discovery, pleading and legal costs.¹⁰⁷

B *Privatisation of Dispute Resolution*

The deposition takes key parts of the trial, such as examination and cross-examination, and moves them to an earlier stage in the litigation process where they take place without a judge.

The lack of a judicial presence may be a cause for concern due to plaintiffs with weak cases fishing for a cause of action, corporate defendants trying to exhaust the resources of their opponents, or the self-interest of lawyers in trying to increase their own incomes.¹⁰⁸ In short, discovery abuse, as explained above, may take place. However, all of these concerns apply equally to discovery as it currently stands and are also ameliorated by practices such as case management and discovery by categories¹⁰⁹ which could apply to the deposition. The physical presence of a judge who can make binding determinations is likely to prevent a deposition from getting out of hand. However, the reality is that there are insufficient judicial resources to have a judge present at every deposition. Instead, it is the spectre of the judge and the corrective orders they are empowered to make that is relied on to ensure control.

More generally, the privatisation of parts of the trial that usually take place before a judge may be of concern in a similar way to which there were concerns about the use of alternative dispute resolution. It may be argued that disputes

¹⁰⁵ Willging et al, above n 76, 538, 570–3. The 2000 amendments limiting depositions to one day of seven hours may have corrected the complaint about the length of depositions.

¹⁰⁶ Willging et al, above n 76, 572; Beckerman, above n 79, 506–7.

¹⁰⁷ Stephen N Subrin, 'Discovery in Global Perspective: Are We Nuts?' (2002) 52 *DePaul Law Review* 299, 309–12, discussing aspects of US society and litigation that impact on the US approach to discovery.

¹⁰⁸ Zuckerman, above n 3, 47.

¹⁰⁹ See ALRC, above n 1, [6.68]–[6.69]. The discovery by categories approach is set out in *Federal Court Rules 1979* (Cth) O 15 r 3; Federal Court of Australia, *Practice Note No 14 — Discovery* (3 December 1999) [1].

will be resolved without a public trial and without a judge ensuring compliance with court rules and protecting vulnerable parties.¹¹⁰ Indeed, Australian courts have expressed concern with the use of a video link to take evidence because it runs contrary to the conduct of proceedings in open court which are available to public scrutiny.¹¹¹

While depositions do take place in private and without a judge being present, depositions are part of the court process. This means that proceedings must be commenced, pleadings must disclose a cause of action and deposition conduct is governed by the rules of the court.

V TIME TO ADOPT THE US-STYLE DEPOSITION IN AUSTRALIA?

The drive for efficiency in civil litigation has been explained as a move away from the ‘trial by ambush’ approach to the ‘cards on the table’ approach. The New South Wales Court of Appeal has explained the preference for a ‘cards on the table’ approach as arising because ‘the expense of courts to the public is so great that their use must be made as efficient as is compatible with just conclusions.’¹¹² Similar sentiment has been expressed in the Federal Court system:

In the long run, the only consequence of keeping issues hidden or not clearly identifying them is to disrupt the business of the court leading to the waste of valuable public resources and to lead to the incurring of unnecessary costs by the parties, costs which ultimately have to be borne by someone.¹¹³

The High Court has also endorsed the need to ‘discourage the vestigial relics of ambush trial’.¹¹⁴

The early identification of the issues in dispute and the determination of the likelihood of success of each of those issues is in the interests of the parties and the public so that a case may be resolved expeditiously. The deposition promotes efficiency, despite being an additional upfront cost, by:

¹¹⁰ See generally L Boule, *Mediation: Principles, Process and Practice* (2nd ed, 2005) 146–62.

¹¹¹ *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Unreported, Supreme Court of New South Wales, Giles CJ, 11 March 1997) 6; *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1, 4 (Palmer J). See also Justice Michael Kirby, ‘The Future of Appellate Advocacy’ (2006) 27 *Australian Bar Review* 141, 148, commenting on the effect of technology on courtrooms and, while foreseeing the development of ‘virtual’ courtrooms, noting the important symbolic role of public proceedings for demonstrating a commitment to principles of open justice and the rule of law.

¹¹² *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116, 127 (Heydon JA). See also *Boyes v Collins* [2000] 23 WAR 123; *Glover v Australian Ultra Concrete Floors Pty Ltd* [2003] NSWCA 80 (Unreported, Sheller, Hodgson and Ipp JJA, 24 April 2003).

¹¹³ *White v Overland* [2001] FCA 1333 (Unreported, Allsop J, 20 September 2001) [4]. See also *Autronic Plastics Inc v DRM Trading Pty Ltd* [2006] FCA 764 (Unreported, Allsop J, 16 June 2006) [4]; *Hooker v Gilling* [2007] NSWCA 99 (Unreported, Ipp, McColl and Basten JJA, 1 May 2007) [52]–[53] (McColl JA).

¹¹⁴ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 196 (Kirby J), citing *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116, 131 (Young CJ in Eq).

- adding an extra dimension to discovery so that the facts of a case are better understood;
- providing a mechanism for facilitating discovery and resolving discovery disputes;
- requiring lawyers to thoroughly prepare a case sooner so that they can take and defend depositions;
- allowing for a more accurate assessment of prospects of success, thus facilitating settlement; and
- narrowing the issues in dispute if a trial is required.

The addition of a US-style deposition as a further discovery device provides additional advantages and does not merely duplicate existing discovery methods. The US-style deposition may deal with the same topics as document discovery or written interrogatories, but the examination process is so different that it provides additional information. The story of the witness would be told through an oral deposition rather than a written affidavit. The version of events given by the witness would be challenged and probed through cross-examination. The evidence of a party is not just set out unchallenged in a collection of documents or an affidavit, but can be tested by their opponent. Additionally, the possibility of surprise at trial is minimised further than can be achieved through document discovery and affidavits because the meaning of documents and actions taken by the witness can be explored.

The deposition may also be used to facilitate the discovery of documents and resolve discovery disputes. The ALRC has reported that since the introduction of discovery by categories, practitioners have identified problems in agreeing on categories, placing documents in a category, and ensuring that documents are not excluded from discovery due to technical interpretations of a request.¹¹⁵ A deposition similar to the US *FRCP* r 30(b)(6) deposition addressing document retention policies and what categories of document are within the possession, custody or control of a party, could more efficiently identify appropriate categories of document, where potentially relevant documents may be found, and allow for more narrowly crafted discovery requests.¹¹⁶ The efficiency flows from the unfiltered access to the witness, which allows for a more useful dialogue than the exchange of letters.

A discovery deposition may also be used when there is a dispute as to the adequacy of discovery.¹¹⁷ A deponent may be questioned about why certain types of document that were expected to be discovered have not been provided and

¹¹⁵ ALRC, above n 1, [6.70]–[6.71].

¹¹⁶ Schenkier, above n 16, 21. A *FRCP* r 30(b)(6)-type deposition could also be usefully employed in relation to electronically-stored documents.

¹¹⁷ The *Federal Court Rules 1979* (Cth) O 15 r 8, provides for inadequate discovery to be challenged through an order for particular discovery which proceeds by affidavit. Interrogatories may not be used to test the sufficiency of the discovery undertaken by another party: see *Hall v Truman, Hanbury & Co* (1885) 29 Ch D 307, 319–20 (Cotton LJ), 321 (Fry LJ); *Danby v Australian Financial Agency & Guarantee Co Ltd* (1891) 17 VLR 156, 158 (Hodges J); *Pendlebury v O'Neill* (1911) 11 SR (NSW) 188, 192 (Cullen J); *Seven Network Ltd v News Ltd [No 6]* [2005] FCA 599 (Unreported, Sackville J, 13 May 2005) [10].

what type of search was undertaken to find documents. Where a party has not complied with the court rules or directions then the deposition may be used as evidence in a motion to the court. The mere threat of a deposition may be sufficient to prompt agreement on categories of discovery or the provision of detailed explanations as to the whereabouts of a document.

The witness preparation process for a deposition will highlight the strengths and weaknesses of a case. A pending deposition is able to focus the mind of a witness better than an affidavit for the simple reason that it is adversarial. The witness needs to be able to respond to unhelpful facts when questioned about them in the deposition. Those same facts may be omitted from an affidavit or, at least, pushed to the margins. Of course, the deposition may involve tactics to avoid providing testimony helpful to an opponent, but ultimately the witness must answer. Knowledge of the strengths and weaknesses of a case means that the likelihood of success at trial can be evaluated and an appropriate settlement can be discussed.

The actual deposition then takes the assessment of strengths and weaknesses even further. The extraction of information, commitment to a particular story and assessment of demeanour, aid settlement enormously. The performance of a witness during a deposition and the information gleaned will affect the settlement value of a case.¹¹⁸ For a case to be settled the parties need to be able to assess their prospects of success and the risks they face.¹¹⁹ Simply put, the deposition improves the quality of information available. The information from a deposition adds an extra dimension to the decision-making process.

Where the party is also a witness subject to a deposition, the experience itself may be conducive to promoting settlement. This may be because the party has a better appreciation of the time required to pursue litigation and the problems with their own evidence may be highlighted.

Where no settlement is achieved, the deposition still promotes efficiency by narrowing the issues in dispute. The deposition is an opportunity for a party to test its view of the facts with opposing witnesses. Consequently, the opposing witness will be required to say which facts they disagree with and why. In a complex case those points of disagreement may be numerous but there will also be many points of agreement which do not need to be dealt with before the court. The trial can therefore focus on the key issues and be conducted more efficiently.

The extent to which the deposition may save resources depends on its use to facilitate the settlement of the case or at least define the issues in dispute. However, the fact that in some cases no settlement is reached should not detract from the perceived utility of a deposition. This is similar to the use of alternative dispute resolution mechanisms such as mediation where the procedure is adopted

¹¹⁸ Malone and Hoffman, above n 8, 26; Steven Lubet, 'Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense' (2003) 2(2) *Litigation* 38, 38, arguing that lawyers are conditioned to avoid disclosure where possible but that disclosing the strength of a case may help achieve a settlement.

¹¹⁹ ALRC, above n 1, [1.98] (citations omitted), explains that alternative dispute resolution processes and summary determinations 'signal or identify for the parties the points of convergence in their dispute, and the transaction costs — the time, attention, opportunity costs, and uncertainties — which constitute their settlement range.' The deposition does the same thing only more effectively because it adduces and tests evidence.

although it does not resolve every case. There will always be cases, where because of the principles at stake, an independent judiciary is needed to resolve the dispute.¹²⁰

While the above discussion argues that the use of the deposition in Australia would provide tangible benefits, there are significant reasons for concern. First, the ALRC has observed that '[i]n almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control'.¹²¹ Although Australia has a different approach to pleading and legal costs from that of the US, as well as its own legal culture, there already exist allegations of discovery abuse.¹²² The approach to discovery of leaving no stone unturned when applied to the deposition has the propensity to increase costs dramatically, either because the scope of the deposition becomes unnecessarily wide, or the witnesses deposed are not central to the proceedings. The incentive for a legal practitioner to impose costs on an opponent that has been observed in the US may also exist in Australia, when the stakes are high and aggressive representation is expected.¹²³ The ramifications for a party found to have engaged in discovery abuse will usually be a costs order, possibly on an indemnity basis, but in a high stakes case the quantum of the costs will be insignificant compared with an adverse outcome. Further, as it can be difficult to detect abuse *ex ante*, the conduct may go unpunished.¹²⁴ Thus, abusive steps that improve the likelihood of a positive result are economically rational. The deposition would provide another avenue for imposing costs and wearing down an opponent.

Consequently, the introduction of the deposition must be accompanied by court rules prescribing the number of depositions, the length of a deposition, the requirements for objections and lawyer conduct. Most importantly, the parties must be subject to judicial oversight.¹²⁵ Depositions, although conducted without a judge present, are still subject to the requirements of case management. Accordingly, a judge may require a party to specify the scope of a deposition before it is conducted and may disallow certain topics. However, the US experience has been that despite these steps abuse still exists. Equally, it is necessary to

¹²⁰ See Galanter, 'Reading the Landscape of Disputes', above n 2, 28–30, for an extensive list of reasons as to why cases will need to be fully adjudicated rather than being settled, including where a party may want to change the state of the law, the settlement value of a case cannot be determined, or other causes of complexity make it difficult to determine the outcome of a trial.

¹²¹ ALRC, above n 1, [6.67].

¹²² Ross Cranston et al, *Delays and Efficiency in Civil Litigation* (1985) 76, 85; Justice D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation — Part II' (1995) 69 *Australian Law Journal* 790, 793; ALRC, above n 1, [3.10], [6.68]; Matthew Drummond, 'Bid to Cut Mountain of Documents', *Australian Financial Review* (Sydney), 9 February 2007, 58.

¹²³ G L Davies, 'Civil Justice Reform in Australia' in Adrian Zuckerman (ed), *Civil Justice In Crisis: Comparative Perspectives of Civil Procedure* (1999) 174–6; Ysiah Ross, *Ethics in Law* (2005) 517–18.

¹²⁴ Easterbrook, above n 82, 642.

¹²⁵ Federal Judicial Center, above n 75, [11.45], states: 'The judge should manage the litigation so as to avoid unnecessary depositions, limit the number and length of those that are taken, and ensure that the process of taking depositions is as fair and efficient as possible'.

be careful not to overstate the extent of discovery abuse, as otherwise the deposition may be neutered and many of its advantages lost.¹²⁶

It should also be noted that the additional up-front cost of the deposition may not be warranted where the quantum at stake is small relative to the costs of discovery. The deposition may not be warranted at all or only in an abridged manner in small cases.

Secondly, the change to Australian litigation should not be underestimated. The general adoption of the deposition would result in a major transformation of civil procedure in Australia. Most significantly, affidavit evidence would be substantially reduced or replaced by the deposition. Affidavits would only be used to support procedural steps, such as service of a document, or for urgent applications such as an interlocutory injunction. An affidavit would not exist to be used as a replacement for evidence-in-chief, meaning an oral examination would be necessary. It appears likely that 'orality' would be adopted in discovery and reinstated at trial.¹²⁷

Legal practitioners would need to move from drafting affidavits with only the witness present to the adversarial deposition. Practitioners would need to adapt examination and cross-examination skills to the goals of the deposition, such as discovering evidence or committing a witness to their testimony for a future trial. The deposition requires practitioners to have a skill-set that is often split between solicitors (witness preparation) and barristers (witness examination) which will likely need to be reconciled. The amalgamation of skills may undermine an independent Bar as witness examination skills are learnt by solicitors, or it may give rise to a need for more barristers if solicitors continue to perform witness preparation but a barrister is briefed to conduct the examination of witnesses during depositions.¹²⁸ This may impact law school and professional qualification curricula. Indeed, in the US, deposition courses are taught at law school and are offered by a number of continuing legal education providers.¹²⁹

Thirdly, the deposition may impact on the legal culture in Australia. The US preference for the adversarial deposition over the exchange of affidavits may reflect US legal culture, which has been labelled adversarial legalism.¹³⁰ Australian legal culture, while subsisting in an adversarial legal system, is thought to be less adversarial than US legal culture.¹³¹ Consequently, Australian

¹²⁶ Mullenix, above n 91, 1445, opines that the ramifications of unneeded reforms may include the sacrifice of justice to achieve speed and efficiency.

¹²⁷ 'Orality' refers to the preference for spoken forms of communication in the conduct of litigation: see Emmett, above n 66, 447.

¹²⁸ In the US, the deposition is often used as a training ground for advocates before they take on that role at trial.

¹²⁹ See, eg, National Institute of Trial Advocacy, *Deposition and Pretrial Skills* (2007) National Institute of Trial Advocacy <<http://www.nita.org/page.asp?id=7&catid=51>>; American Law Institute-American Bar Association, *Deposition Techniques and Strategies* (2007) American Law Institute-American Bar Association <<http://www.ali-aba.org/aliaba/CM070SK.HTM>>.

¹³⁰ See generally Kagan, above n 85.

¹³¹ How adversarial Australia and the US are in terms of legal culture is difficult to measure, especially as individual lawyers in both countries will approach their roles in a variety of ways. The argument for Australia being less adversarial may be based on: the existence of an independent bar which has an attenuated link to the client; the need for less 'theatrics' in the court as juries are seldom used; barristers remaining at the bar table during examination; and the smaller

legal culture may not only shape how the deposition would operate in Australia, but the deposition may also shape Australian legal culture. The introduction of the adversarial deposition into discovery may undermine the cooperative approach that is central to effective negotiation of discovery limits or categories.¹³² The deposition may also impact client expectations, as they will be much more closely involved in the work of their lawyer when they are the deponent, and may expect zealous advocacy rather than cooperation. Further, the attempts to move away from the adversarial system to alternative dispute resolution may be undermined by introducing more adversarialness into the pre-trial process. The greater the conflict generated by a dispute, the higher the likelihood of animosity and the more difficult the achievement of a negotiated outcome.

Fourthly, the deposition may also impact other areas of civil procedure. The fact that the deposition allows for evidence to be tested may make summary judgment applications more likely to succeed. This is especially the case in the Federal Court where the standard for summary judgment is that the court is satisfied that a party has no reasonable prospect of successfully prosecuting or defending the proceeding.¹³³ Once a witness has committed to their testimony during a deposition, a court would be entitled to rely on the testimony as setting out the facts for trial and therefore whether there are reasonable prospects of success.

VI CONCLUSION

The US-style deposition presents a number of advantages from which Australian civil procedure could benefit. However, obtaining the forensic advantages of the deposition may also lead to an increase in the cost of litigation and may affect civil procedure and legal culture more generally.

This article has explained how the deposition can provide better information than that gained by relying upon document discovery alone, facilitate settlement and narrow the issues for trial. The main argument for adopting the deposition is that greater expenditure on better information during discovery should reduce costs overall by removing the need for a trial or reducing the extent of any trial. The negative aspect of the deposition is that, like other aspects of discovery, it can be over-utilised, employed when its use is not warranted or subject to obstructive behaviour, thus increasing costs. The deposition is a double-edged

size of the profession so that the reputation of a lawyer can be harmed by unduly aggressive representation. See Ross, above n 123, 481 ('the Australian emphasis on "fearless" advocacy, as compared to "zealous" advocacy in the United States, is more likely to provide less tampering with evidence'); Sharyn Roach Anleu and Wilfrid Prest, 'Litigation: Historical and Contemporary Dimensions' in Wilfrid Prest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (2004) 1, 9–10, opining that few Australian barristers exhibit the flamboyant entrepreneurial style of some US trial lawyers. But see ALRC, above n 1, [3.30]–[3.41], outlining adversarial conduct by Australian lawyers.

¹³² Beckerman, above n 79, 517.

¹³³ *Federal Court of Australia Act 1976* (Cth) s 31A came into effect on 1 December 2005 and replaced the previous standard that a claim or defence must be so clearly untenable that it cannot possibly succeed: see *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. See also *Uniform Civil Procedure Rules 1999* (Qld) rr 292(2), 293(2).

sword in that it may advance the efficiency of the legal system by narrowing issues and testing the prospects of success, but the informational advantage that the deposition provides may invoke adversarial responses that drive up costs. This is best illustrated by complex cases, which could benefit the most from the deposition. This is because the deposition can elucidate the real issues in dispute and allow the prospects of success on those issues to be more accurately determined than other discovery mechanisms, which in turn promotes resolution. Ironically however, discovery abuse, which could increase costs and delay, is most prevalent in complex cases.

In the US, the cost concerns have been responded to through carefully drafted court rules, active case management by the judiciary and sanctions. These avenues would be open to Australian courts as well. But before adopting a new form of discovery it would be helpful to evaluate empirically whether change is necessary.¹³⁴ Do court systems suffer inefficiency due to problems with current forms of discovery? Can that inefficiency be linked to cases with particular characteristics, such as cause of action, jurisdiction, whether the case is simple or complex, whether it involves multiple parties, involves a large or small quantum of claim, or is it a generic complaint? Can the inefficiency be quantified? Have remedies such as case management been used, and to what effect?¹³⁵ Can the problems with discovery be addressed by the advantages that are associated with the deposition? As the main direct detraction for adopting the deposition is cost caused by discovery abuse, another set of empirical questions follow. What is discovery abuse? Does discovery abuse exist in Australia? How extensive is it? Can discovery abuse be linked to particular types of case, classified by cause of action, jurisdiction, complexity, number of parties or quantum of the claim? What are the incentives for engaging in discovery abuse? How do lawyers make discovery decisions? What role do clients play in discovery decisions? What is the effect on costs of discovery abuse? Frequently, civil procedure will be changed because of a perceived problem, but without any empirical support. It is critically important that changes to civil procedure are premised on clear empirical findings. Equally, it is important to ensure that the empirical research is well-formulated.

In addition to the direct ramifications of the deposition on efficiency and cost, there will be a number of indirect impacts that are equally difficult to gauge. The adoption of the deposition in Australian civil procedure would fundamentally change how litigation is conducted. It is difficult to foresee exactly how that change will manifest itself, although it will not simply be a reflection of the US system because many other aspects of the US system do not exist in Australia. It appears likely that 'orality' would become central to both discovery and trial as

¹³⁴ Anleu and Prest, above n 131, 7: 'Yet for all the obvious limitations, quantitative data are preferable to mere anecdote, impression or intuition.' For examples of empirical studies in Australia: see Cranston et al, above n 122; Bernard Cairns, *The Use of Discovery and Interrogatories in Civil Litigation* (1990).

¹³⁵ See David Weisbrot and Ian Davis, 'Litigation and the Federal Civil Justice System' in Wilfrid Prest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (2004) 122, 138, reporting that the introduction of a modified Individual Docket System in 1997 had resulted in a continuing reduction in case duration.

the affidavit would become unavailable for both. Legal practitioners would need to adapt their current skills to the deposition framework. Legal culture in Australia may alter with a shift towards a more adversarial style, particularly in the pre-trial stages.

The deposition does not exist in a vacuum but operates in conjunction with other aspects of the legal system, such as the discovery framework and pleading requirements that have been discussed above.¹³⁶ Australian scholars could usefully undertake further comparative study of US civil procedure to ascertain which features promote, and which ones hamper, efficiency in depositions and discovery generally.¹³⁷ This could include an examination of limitations on the scope of discovery,¹³⁸ initial disclosure requirements,¹³⁹ sanctions,¹⁴⁰ the pre-trial conference¹⁴¹ and the discovery conference/plan.¹⁴² More generally, the study of comparative civil procedure may offer helpful suggestions for reform. Australia has sought uniformity in the state and federal legal systems which reduces the likelihood of novel solutions being tested within one Australian jurisdiction.¹⁴³ As experimentation in the Australian legal laboratory is limited, the examination of international practices is likely to be of considerable assistance.

Despite the deposition offering considerable advantages, its adoption will turn upon the acceptance that its costs can be controlled and that the conduct of civil litigation will change, both in foreseen and unforeseen ways.

¹³⁶ See above Part IV(A).

¹³⁷ Justice Kenneth Hayne, 'Restricting Litigiousness' (Speech delivered at the 13th Commonwealth Law Conference, Melbourne, 14 April 2003): 'If comparisons are to be made with experiences in other jurisdictions it is important to recognise relevant differences. Only then is the comparison useful.'

¹³⁸ *FRCP* r 26(b)(1)–(2).

¹³⁹ *FRCP* r 26(a)(1).

¹⁴⁰ *FRCP* rr 16(f), 37.

¹⁴¹ *FRCP* r 16.

¹⁴² *FRCP* r 26(f).

¹⁴³ See B C Cairns, 'A Review of Some Innovations in Queensland Civil Procedure' (2005) 26 *Australian Bar Review* 158, 159.