5. Alternatives to Discovery

Contents

Introduction

5.1 The Terms of Reference direct the ALRC, in conducting its inquiry, to have regard to alternatives to discovery.[1] The ALRC is also to consider issues to limit the overuse of discovery, and ensure key documents relevant to the real issues in dispute are defined as early as possible. This chapter considers pre-action protocols, pre-trial oral examinations and other processes that encourage early settlement, document exchange and the narrowing of the issues in dispute between parties prior to the

1 See the Terms of Reference at the front of this Consultation Paper.

commencement of proceedings. The chapter draws upon recent works by other law reform bodies, as well as practices and procedures in overseas jurisdictions.

What are pre-action protocols?

5.2 An alternative to discovery are pre-action protocols—a series of procedural requirements that are a pre-requisite to commencing litigation—generally aimed at encouraging settlement, and where settlement is not achieved, narrowing the issues in dispute to facilitate a more efficient and cost-effective trial process.[2]

5.3 Pre-action protocols can cover a spectrum of procedural requirements that may include:

- the need to disclose information or documents in relation to the cause of action;
- the need to correspond, and potentially meet, with the person or entity involved in the dispute;
- undertaking, in good faith, some form of alternative dispute resolution (ADR); and
- conducting genuine and reasonable negotiations with a view to settling without recourse to court proceedings.[3]

5.4 Pre-action protocols may be prescribed in legislation or in court practice rules. For example, the *Civil Procedure Rules* (CPR) in the United Kingdom (UK) mandatorily require a prospective claimant in a personal injury proceeding to send a letter to a prospective defendant, containing a clear summary of the facts on which a prospective claim is based, along with a description of the nature of the injuries and the financial loss incurred.[4] The prospective defendant is then required to send a reply within 21 days, and to ensure that a copy of the letter is sent to the insurer (if any is identified).[5] The prospective defendant is then required to formulate a position on his/her/its liability and send a reply to the prospective claimant within three months.[6]

Advantages and disadvantages of pre-action protocols

5.5 In jurisdictions where they have been implemented, pre-action protocols have been met with some criticism. However, their potential to promote access to justice, efficiency, and promote cultural change has also gained currency.[7]

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2 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 103. See also Lord Woolf, *Access to Justice: Final Report* (1996), 110.

3 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 109; M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 39.

4 *Civil Procedure Rules, Pre-action Protocol for Personal Injury Claim* (UK), [2.7].

5 Ibid, [2.6].

6 Ibid, [2.7].

7 See, eg, R Byron, 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (2001) 75 *Tulane Law Review* 1297, 1311.

Advantages of pre-action protocols

5.6 In many instances pre-action protocols place obligations on parties to disclose relevant information and documents with the aim of facilitating settlement. Where no settlement is reached, the procedures aim to narrow the issues in dispute between the parties in a manner that expedites the trial process.[8] In principle, this should aid in reducing the need for, and cost of, any subsequent discovery of documents.

5.7 Moreover, the simplification and standardisation of the claims process may offer consistency for litigants, and help to promote a culture of cooperation and settlement of cases at an earlier stage. Paula Gerber and Bevan Mailman note in relation to pre-action protocols in construction disputes that:

> Pre-action protocols represent a philosophical shift in the way litigation is commenced and conducted ... towards a full consideration of alternative means of resolving differences. Pre-action protocols do this by forcing parties to fully investigate the merits of their claims and defences as a condition precedent to filing a law suit.[9]

5.8 Many pre-action protocols also play an important role in encouraging parties to pursue ADR. Where ADR is successful, it results in cost savings to both individuals, and to the public in terms of reduced burden on the courts. Alternatively, it has been argued that proper pre-action protocols should reduce the need for ADR.[10]

Disadvantages of pre-action protocols

5.9 A major concern with pre-action protocols relates to 'front-loading' of costs by requiring parties to spend more resources at an early stage of the process. For example, in complex cases where the parties are unlikely to reach early settlement, imposing onerous pre-action requirements may do no more than add to delay and costs for both parties in complying with the pre-action protocols.[11]

5.10 Pre-action protocols also raise a number of access to justice issues, especially for individual litigants. For example, individuals may not necessarily have the monetary resources to comply with relevant protocols, or may be pressured into settlement for fear of having adverse cost orders made against them for non-compliance with the protocols.[12]

5.11 Additionally, pre-action protocols may open up a battlefield for 'satellite litigation', by way of interlocutory applications as to whether a party has or has not

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8 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 109.

9 P Gerber and B Mailman, 'Construction Litigation: Can We Do It Better?' (2005) 31 *Monash University Law Review* 237, 238.

10 I Judge, 'The Woolf Reforms after Nine Years: is Civil Litigation in the High Court Quicker and Cheaper?' (Presentation at the Anglo-Australian Lawyers Society), 16 August 2007 <www.vicbar.com.au> at 25 October 2010.

11 See M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 50.

12 See, eg, Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 140–41 where a number of submissions are summarised making this point.

complied with the relevant protocol.[13] This becomes more likely if parties risk adverse cost orders for not complying with the protocol, and has an obvious impact for courts and the judiciary, as well as adding to delay and the cost of litigation.[14]

5.12 Finally, some have argued that pre-action protocols may be challenged on human rights grounds, if their effect is to impede an individual's right of access to the courts.[15]

Pre-action protocols in the United Kingdom

Specific pre-action protocols

5.13 Pre-action protocols were established in the UK in 1999, following Lord Woolf's *Access to Justice* report (the Woolf Report) in 1996, in which he identified a need to enable

> parties to a dispute to embark on meaningful negotiations as soon as the possibility of litigation is identified, and ensure that as early as possible they have the relevant information to define their claims and to make realistic offers to settle.[16]

5.14 The Woolf Report recommended that:

- pre-action protocols should set out codes of sensible practice which parties are expected to follow when faced with the prospect of litigation;
- when a protocol is established for a particular area of litigation, it should be incorporated into a relevant practice guide;
- unreasonable failure by either party to comply with the relevant protocols should be taken into account by the court, for example in the allocation of costs or in considering any application for an extension of the timetable; and
- the operation of protocols should be monitored and their detailed provisions modified as far as is necessary in light of practical experience.[17]

5.15 Subsequently, pre-action protocols relating to specific types of claims were adopted by way of practice directions. There are currently 10 pre-action protocols in the UK covering a wide range of claims,[18] as set out in the following table:

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13 M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 55; National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), 31.

14 See, eg, National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), 31.

15 See Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 109–110. The VLRC Report identified that the implementation of pre-action protocols may be challenged on the basis that such protocols are a barrier to accessing the courts, and therefore incompatible with the right to '... have the charge heard or proceeding decided ... after a fair trial' pursuant to s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, this concern was dismissed on the grounds that pre-action protocols: would not bar the commencement of proceedings; are triggered before the commencement of proceedings; and support the facilitation of a fair hearing.

16 Lord Woolf, *Access to Justice: Final Report* (1996), 107.

17 Ibid, Ch 10 Recommendations.

18 See *Pre-action Protocols* (UK).

Pre-action protocol	Came into force
Personal Injury	26 April 1999
Clinical Disputes	26 April 1999
Construction and Engineering	2 October 2000
Defamation	2 October 2000
Professional Negligence	16 July 2001
Judicial Review	4 March 2002
Disease and Illness	8 December 2003
Housing Disrepair	8 December 2003
Possession Claims Based on Rent Arrears	2 October 2006
Possession Claims Based on Mortgage Arrears	19 November 2008

5.16 These specific pre-action protocols vary from imposing mandatory procedural obligations on parties, to simply acting as a general guide to good practice. The Victorian Law Reform Commission notes that the more detailed and lengthy protocols in the UK have, in some ways, constituted their own procedural code.[19] For example, the Personal Injury Claims Protocol sets out steps that must be taken by both parties, and includes draft templates that can be tailored to meet the circumstances of the particular claim.[20] On the other hand, the pre-action protocol for Disease and Illness Claims provides that:

> This protocol is not a comprehensive code governing all steps in disease claims. Rather it attempts to set out a code of good practice which parties should follow.[21]

General pre-action protocol

5.17 For actions where no specific pre-action protocol applies, the Practice Direction —Pre-Action Conduct (the Direction) sets out the conduct a court would normally expect of prospective parties prior to the start of the proceedings.[22]

5.18 The Direction provides that, unless the circumstances make it inappropriate, the parties should:

19 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 113.
20 *Civil Procedure Rules, Pre-action Protocol for Personal Injury Claim (UK),* Annex A.
21 *Civil Procedure Rules, Pre-action Protocol for Disease and Illness Claims* (UK), [4].
22 *Civil Procedure Rules, Practice Direction: Pre-action Conduct* (UK), [2.1].

- exchange sufficient information about the matter to allow them to understand each other's position and make informed decisions about settlement and how to proceed; and
- make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR to do so.[23]

5.19 The Direction provides guidance on the nature and the extent of the information to be provided in the letter by the claimant, and the response by the defendant.[24] It also provides that documents disclosed by either party in accordance with the Direction may not be used for any purpose other than resolving the dispute, unless the other party agrees in writing.[25]

5.20 The Direction also recognises that there are some types of applications where pre-action protocols 'clearly cannot and should not apply'.[26] These include, but are not limited to: applications for consent orders; applications where there is no other party for the applicant to engage with; most applications for directions by a trustee or other fiduciary; and applications where telling the other potential party in advance would defeat the purpose of the application (for example, an application for an order to freeze assets).[27]

Compliance and enforcement

5.21 The CPR enables the court to take into account compliance (or non-compliance) with the Direction and applicable protocols when giving direction on the management of proceedings and when making orders as to costs.[28] The protocols are not intended to be exhaustive, but rather:

> Protocols are codes of best practice, to be followed generally but not slavishly ... Reasonableness is a watch word. The court is much more interested in compliance with the spirit of the protocol than the exact letter.[29]

5.22 When considering the extent of compliance, the court will take into account:

- the extent to which the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with minor or technical shortcomings;
- the proportionality of the steps taken compared to the size and importance of the matter; and
- the urgency of the matter.[30]

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23 Ibid, [6.1]. While ADR is not compulsory, the Direction gives some options for resolving disputes through: discussion and negotiation; mediation; early neutral evaluation by an independent person or expert; and arbitration.
24 Ibid, Annex A.
25 *Civil Procedure Rules, Practice Direction: Pre-action Conduct* (UK), [9.2].
26 Ibid, [2.2].
27 Ibid, [2.2].
28 Ibid, [3.1].
29 Lord Justice Waller (ed), *The White Book Service 2009* (2009), 2308.
30 *Civil Procedure Rules, Practice Direction: Pre-action Conduct* (UK), [4.3].

5.23 Relevant examples of non-compliance by a party include: not providing sufficient information to enable the other party to understand the issues; not acting within a time limit, or within a reasonable period; unreasonably refusing to consider ADR; or without good reason, not disclosing documents requested to be disclosed.[31]

5.24 If the court is of the opinion that there has been non-compliance, the following sanctions are available:

- staying the proceedings until the steps that ought to have been taken, have been taken;
- an order that the party at fault pay the cost of the proceedings, or part of those costs of the other party;
- an order that the party at fault pay those costs on an indemnity basis;
- if the party at fault is the claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order that the claimant is deprived of interest on all or part of that sum, and/or awarding that interest at a lower rate than that at which interest would otherwise have been awarded; and
- if the party at fault is the defendant, and an order for the payment of damages or some other specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10% above the base rate, than would otherwise have been awarded.[32]

Implementation issues

Front-loading of costs

5.25 A central criticism of pre-action protocols in the UK is that, by requiring more work to be done up front, the protocols have front-loaded cost for litigants and, in some cases, increased the total cost of litigation.[33] For example, one comprehensive cross-section and time-series data study concluded that 'it seems overall case costs have increased substantially over pre-2000 costs for cases of comparable value', with the Woolf reforms being a plausible explanation.[34]

5.26 Professor Michael Zander suggests, in relation to the Woolf reforms, that cases subjected to pre-action protocols can be divided into three categories:

- cases that prior to the introduction of pre-action protocols would have gone to trial, and still go to trial;
- cases that would have gone to trial prior to the introduction of pre-action protocols, but are settled as a result of work done in the protocol period; and

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31 Ibid, [4.4].
32 Ibid, [4.6].
33 H Genn, *Judging Civil Justice (The Hamlyn Lectures)* (2009), 56.
34 P Fenn, N Rickman and D Vancappa, 'The Unintended Consequences of Reforming Civil Procedure: Evidence from the Woolf Reforms in England and Wales' (Paper presented at 26th Annual Conference of European Association of Law and Economics, Roma, Italy), 28.

- cases that would have settled anyway and compliance with pre-action protocols have only added to the cost.[35]

5.27 While Zander notes that the data is unclear, he suggests that if the majority of cases lie in the third category (where extra work is required which brings little or no benefit) instead of the second category (where there are obvious cost savings), then the Woolf reforms have not met the objective of reducing litigation costs.[36] This accords with some views that pre-action protocols in the UK 'provided quicker, although not necessarily cheaper, justice and sensible, effective case handling'.[37]

5.28 While studies that have examined the impact of the Woolf reforms have found positive changes in the culture of litigation marked by greater cooperation and increases in settlement,[38] the problems of cost were still intractable.[39]

5.29 In a 2009 review of the costs of civil litigation in the UK, Lord Justice Jackson was of the opinion that general pre-action protocols lead to substantial delay and additional costs, and recommended that the general protocol be repealed, because 'one size does not fit all'.[40] In addition, in relation to specific pre-action protocols, it was noted that

> there is a clear majority view amongst commercial litigators and counsel, shared by Commercial Court judges, that pre-action protocols are unwelcome in commercial litigation. They generate additional costs and delay to no useful purpose at all.[41]

5.30 These sentiments were echoed in 2004 in a report by the Hong Kong Chief Justice's Working Party on Civil Justice Reform, which cautioned that:

> Pre-action protocols should only be adopted where such front-loading is considered justifiable in that the benefits of early settlement resulting from the protocol are likely to outweigh the disadvantages from such front-loading.[42]

5.31 A number of Australian legal professional bodies have also expressed similar concern about the front-loading of costs. For example, the New South Wales (NSW) Law Society is of the opinion that:

> what constitutes 'cost effective' [pre-action protocols] will vary greatly depending on the nature of the disputes and the parties involved. However, mandatory pre-action protocols will effectively increase the cost of litigation by adding another layer of costs to the litigation process ... Pre-action protocols are also inappropriate for low

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35 M Zander, 'Where Are We Heading with the Funding of Civil Litigation?' (2003) 22 *Justice Quarterly* 23, 23–25.

36 Ibid.

37 R Byron, 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (2001) 75 *Tulane Law Review* 1297, 1312.

38 See P Abrams, T Goriely and R Moorhead, *More Civil Justice? The Impact of the Woolf Reforms on Pre-action Behaviour* (2002), prepared for the Law Society and Civil Justice Council, xiii: The study was mainly qualitative and was based on in-depth interviews with 54 lawyers, insurers, and claim managers. See also J Peysner and M Seneviratne, *The Management of Civil Cases: The Courts and the Post-Woolf Landscape* (2005) prepared for the Department for Constitutional Affairs (UK).

39 Ibid.

40 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), 343.

41 Ibid, 345.

42 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), 65–66.

> value claims because of the increased cost involved, and in many cases are completely unnecessary.[43]

5.32 Others argue that the front-loading of costs is justified where the protocols reduce the total cost of litigation.[44] For example, in cases where compliance with pre-action protocols successfully narrows the issues in dispute, there may be cost savings associated with a more expedited, less complex and shorter trial.[45] As Lord Woolf foreshadowed in his report:

> [t]here are practitioners who fear that the use of pre-action protocols will lead to unnecessary front-loading of costs. While the protocols will certainly bring work forward by comparison with the usual present practice, this is to be welcomed. The work has to be done to enable cases to be resolved, and bringing the work forward will enable some cases to settle earlier.[46]

5.33 Thus, while pre-action protocols may have the effect of front-loading costs,

> it does so in a controlled manner while increasing the possibility of settlement ... [This] is preferable to the failure to fully pursue settlement, and ultimately incur significant costs during the course of litigation, where they can escalate in an unrestrained way.[47]

5.34 The ALRC is interested in stakeholder views on how front-loading of costs can be reduced, and what safeguards can be implemented to ensure that individual litigants are not denied access to justice as a result of the operation of pre-action protocols.

Question 5–1 What measures could be taken to reduce the front-loading of costs in relation to pre-action protocols?

Question 5–2 What safeguards could be implemented to ensure that individual litigants are not denied access to justice as a result of pre-action protocols?

Information exchange and narrowing the issues in dispute

5.35 As noted above, where settlement is not achieved as a result of compliance with pre-action protocols, a secondary aim of the protocols is to facilitate relevant information exchange and narrow the issues in dispute. Pre-action protocols can impose requirements for information exchange that range from a simple letter of demand to requiring a detailed narrative and legal analysis, coupled with the provision of documents and information essential to the claim.

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43 Law Society of NSW, *Submission to A Strategic Framework for Access to Justice in the Federal Justice System* (2009), 2–3.

44 M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 50.

45 P Gerber and B Mailman, 'Construction Litigation: Can We Do It Better?' (2005) 31 *Monash University Law Review* 237, 245.

46 Lord Woolf, *Access to Justice: Final Report* (1996), 113.

47 P Gerber and B Mailman, 'Construction Litigation: Can We Do It Better?' (2005) 31 *Monash University Law Review* 237, 245.

5.36 For example, information exchange may be looked at in the context of international arbitration. Under the *International Bar Association Rules on Taking Expert Evidence in International Arbitration* (IBA Rules), each party must 'within a time specified by the Arbitral Tribunal, submit to it and to all other parties all documents available to it on which it relies ... except documents that have already been submitted by another party'.[48] Parties may also submit a Request to Produce, containing a description of each document requested and statements as to how the documents are relevant to the case and material to its outcome.[49] The responding party must then produce such documents, or state an objection in writing to the Arbitral Tribunal. The Tribunal may then make a ruling, and would only compel disclosure where, among other things, 'the issues that the requesting party wishes to prove are relevant to the case and material to its outcomes'.[50]

5.37 Prior to proceedings, the parties submit a claims memorial which contains not only a summary of the facts but also their legal analysis and attaches any documents on which the party intends to rely, including in some instances, witness statements.[51] The ALRC heard in consultations that requiring parties to provide a kind of 'narrative' as a pre-litigation step would aid in narrowing the issues in dispute. One early submission to the Inquiry suggested that the 'the IBA rules and the hybrid approach to discovery should be considered as an alternative to the current regime of discovery'.[52]

5.38 There may be concerns that pre-action protocols governing information exchange cannot operate with sufficient flexibility to take account of the principle of proportionality. In cases where the issues are less complex and the number of relevant documents is small and easily identified, allocating resources to the disclosure of such documents may be cost-effective. In larger, more complex cases, the extent of the obligations imposed on the parties by pre-action protocols might not take into consideration both the nature of the dispute and the usefulness of detailed information exchange, having regard to the front-loading of costs. A measure of flexibility may be necessary to ensure access to justice for all litigants.[53]

5.39 The ALRC is interested in stakeholder views on how pre-action protocols might be best designed to facilitate information exchange between the parties, and whether principles from international arbitration would be instructive in this regard. Further, the ALRC seeks views about what else should be included in pre-action protocols for particular types of proceedings that would aid parties in narrowing the issues in dispute.

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48 International Bar Association, *IBA Rules on Taking Evidence in International Arbitration* (2010), Art 3(1).

49 Ibid, Art 3(a)–(b).

50 Ibid, Art 7.

51 M Born, *International Commercial Arbitration: Commentary and Materials* (2001), 459.

52 Monash University Law Students' Society 'Just Leadership' Program, *Submission DR 01,* 7 October 2010.

53 See Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 104.

Question 5–3 What requirements can be incorporated into pre-action protocols to maximise information exchange between parties in civil proceedings before federal courts?

Question 5–4 What else should be included in pre-action protocols for particular types of proceedings to aid parties in narrowing the issues in dispute?

Compliance, enforcement and satellite litigation

5.40 Pre-action protocols have also been criticised for creating a battleground for 'satellite litigation',[54] arising from disputes as to whether a party has complied with the relevant protocol. It appears important, therefore, that courts play an active role in the enforcement of pre-action protocols, and for sanctions to be clear and effective.

5.41 Indeed, non-compliance with the protocols and the lack of proper enforcement of sanctions are among the chief criticisms of the Woolf reforms.[55] For example, it has been noted that while some courts are willing to strictly enforce compliance with the pre-action protocols, this is by no means universal.[56] As Gerber and Mailman note in relation to the Technology and Construction Court in England:

> There have been instances reported where courts have asked parties at case management conferences whether they have complied with the requirements of the relevant protocols, and the parties have responded 'yes' even when they have not. The courts in these cases did not look behind this, or seek details in compliance.[57]

5.42 John Peysner and Mary Seneviratne have identified that some practitioners in the UK post-Woolf reforms 'thought that the overriding objective gave too much discretion to the courts',[58] resulting in a lack of guidance and inconsistent interpretation of the rules. Views were also expressed that the certainty of the old system resulted in cost savings.[59] This may be a symptom of a lack of education of the judiciary and the legal profession in complying with any proposed pre-action protocols, and the relative lack of case law in the area.

5.43 Further, sanctions in the form of cost orders may have substantial adverse impacts on self-represented litigants, who would require legal advice in the pre-litigation process.[60] There may be concerns that pre-litigation requirements would

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54 M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 54.

55 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), 396.

56 P Gerber and B Mailman, 'Construction Litigation: Can We Do It Better?' (2005) 31 *Monash University Law Review* 237, 249.

57 Ibid, citing C McKenna and C Cummins, *The Construction and Engineering Pre-action Protocol* (2005) <www.law-now.com/> at 25 October 2010. This paper was based on responses from practitioners and judges to a survey evaluating the success of pre-action protocols in the UK.

58 J Peysner and M Seneviratne, *The Management of Civil Cases: The Courts and the Post-Woolf Landscape* (2005) prepared for the Department for Constitutional Affairs (UK), iii.

59 Ibid, 16.

60 See Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 141 where a number of submissions are summarised addressing these issues.

place further burdens on community legal centres and other such organisations that are already under-resourced. The prospect of an adverse cost order might also pressure some litigants into abandoning a claim, thus denying them access to justice.[61]

Question 5–5 Are cost sanctions an effective mechanism to ensure that parties comply with pre-action protocols?

The Australian context

5.44 The possibility of introducing pre-action protocols similar to those suggested by the Woolf Report has attracted attention in reports by:

- the Access to Justice Taskforce of the Australian Government Attorney-General's Department in *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Access to Justice Report);[62]
- the National Alternative Dispute Resolution Council in The Resolve to Resolve—Embracing ADR to Improve Access to Justice in the Federal Jurisdiction (NADRAC Report);[63] and
- the Victorian Law Reform Commission in *Civil Justice Review 2008* (VLRC Report).[64]

5.45 These reports have informed a less prescriptive approach in Australia—culminating in recent and proposed reforms—that has instead focused on general pre-litigation steps, rather than specific pre-action protocols. The *Civil Procedure Act 2010* (Vic) requires parties to take 'reasonable steps' to resolve their disputes before commencing litigation. Similarly, the Civil Dispute Resolution Bill 2010 (Cth) proposes that parties should take 'genuine steps' to resolve disputes before commencing litigation.

Civil Dispute Resolution Bill 2010 (Cth)

5.46 The Civil Dispute Resolution Bill 2010 (Cth) was reintroduced into Parliament on 20 September 2010.[65] The overall aims of the Bill are:

- to change the adversarial culture often associated with disputes;

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61 Ibid.

62 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

63 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).

64 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008).

65 The Bill was originally introduced into Parliament on 16 June 2010, and then referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 30 July 2010. However, due to the federal election, the Parliament was prorogued, and the Committee ceased its inquiry on 19 July 2010. The Bill was again referred to the Committee on 30 September 2010. The Committee is due to report on 22 November 2010.

- to have people turn their minds to resolution before becoming entrenched in a litigious position; and
- where a dispute cannot be resolved and the matter proceeds to court, the issues are identified reducing the time required for a court to consider the matter.[66]

5.47 The Bill seeks to achieve these aims by requiring parties to file a 'genuine steps statement' at the time of filing the application to commence a civil proceeding.[67] The statement must specify the steps the party has taken to resolve the issues, or if no steps were taken, an explanation as to why no steps were taken.[68] Non-compliance is not a bar to commencing proceedings, but the court may, in the circumstance of non-compliance by any party, award costs in favour of the complying party.[69]

5.48 The 'genuine steps' formulation implemented a recommendation made in the NADRAC Report that:

> The legislation governing federal courts and tribunals require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced.[70]

5.49 The 'genuine steps' formulation was preferred over other formulations, such as 'genuine effort' or 'good faith' requirements. NADRAC considered that the reference to 'effort' was a subjective concept that may be misinterpreted as applying a standard of conduct to some ADR processes that is inappropriate.[71] A further concern was that such formulations might 'open the door for satellite litigation about the conduct of the parties in costs hearings'.[72]

5.50 The Bill does not define 'genuine steps'. Rather, the non-prescriptive approach is intended to 'ensure that the focus is on resolution and identifying the central issue without incurring unnecessary upfront costs, which has been a criticism of pre-action protocols'.[73] As the Australian Government Attorney-General notes in his second reading speech:

> The Bill does not introduce a mandatory alternative dispute resolution or prescriptive or onerous pre-action protocols, nor does it prevent a party from commencing litigation. It is deliberately flexible in allowing parties to tailor the genuine steps they take in the circumstances of the dispute.[74]

5.51 While the consideration of 'genuine steps' is primarily left to the parties, a number of illustrative examples are given in clause 4, including:

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66 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth), 4.
67 Civil Dispute Resolution Bill 2010 (Cth) cl 6(1).
68 Ibid cl 6(2).
69 Ibid cl 12(1).
70 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), 8, 30–35.
71 Ibid, 31.
72 Ibid.
73 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 270 (R McClelland—Attorney-General).
74 Ibid.

- notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
- responding appropriately to such notification; and
- providing relevant information and documents to other persons to enable the other person to understand the issues involved and how the dispute might be resolved.[75]

5.52 Under the proposed law, lawyers will have an obligation to advise their clients about the requirements and assist them to comply.[76] A lawyer may be ordered to bear adverse costs orders personally, for failing to meet this obligation.[77]

5.53 The Bill also provides that the rules of court under the *Federal Court of Australia Act 1976* (Cth) or the *Federal Magistrates Act 1999* (Cth) may make provisions for or in relation to:

- the form of genuine steps statements;
- the matters to be specified in genuine steps statements; and
- the time limits relating to the provisions of copies of genuine steps statements.[78]

Civil Procedure Act 2010 (Vic)

5.54 The *Civil Procedure Act 2010* (Vic) was enacted on 12 August 2010,[79] and adopted recommendations in the VLRC Report that a general pre-action protocol should be implemented in Victoria.[80] The Act requires that 'each person involved in a civil dispute must comply with the pre-litigation requirements prior to the commencement of any civil proceeding in a court in relation to that dispute'.[81] The requirements are to take 'reasonable steps' to resolve the dispute by agreement or to clarify or narrow the issues in dispute.[82]

5.55 As in the Civil Dispute Resolution Bill 2010 (Cth), the meaning of 'reasonable steps' is not defined in the *Civil Procedure Act*. Rather, the Act gives illustrative examples, such as:

- exchanging appropriate pre-litigation correspondence, information and documents;[83] and
- considering options for resolving the dispute without recourse to civil proceedings including resolution through genuine and reasonable negotiations or appropriate dispute resolution.[84]

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75 Civil Dispute Resolution Bill 2010 (Cth) cl 4(1).
76 Ibid cl 9.
77 Ibid cl 12(3).
78 Ibid cl 18.
79 The Act is due to commence on 1 January 2011.
80 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 142.
81 *Civil Procedure Act 2010* (Vic) s 33(1).
82 Ibid s 34(1).
83 Ibid s 34(1)(a).

5.56 Similar to the UK pre-action protocols, documents exchanged pursuant to pre-action requirements are subject to protection and their use is limited to resolution of the civil dispute.[85] Further, non-compliance is not a bar to commencing the proceedings, although the court may, on its own motion or by application by any party, take such non-compliance into account in making cost orders or any other orders.[86] The court may also order that the representative of a party, rather than the party itself, is to bear the cost of compliance if the court has determined that the representative's conduct resulted in another party incurring unnecessary costs.[87]

5.57 Subject to court orders to the contrary, the costs of compliance with pre-action requirements are borne by each party.[88] This is notably different from the costs of discovery, which are typically borne by the party producing the documents (at least, at first instance) and not the requesting party.

5.58 However, the Act is less prescriptive than the VLRC's recommendations in that it provides no guidance in relation to the content of letters of claims/response and timeframes for response for the purposes of reasonable steps.[89]

New South Wales

5.59 In April 2009, the NSW Department of Justice and Attorney General issued a Discussion Paper raising the introduction of pre-action protocols in the ADR context.[90] In addition to the general pre-action protocol, two further options were canvassed—specific protocols in relation to particular cases and the incorporation of the main elements of pre-action protocols into guidelines that a court could take into account when asked to adjudicate a civil dispute.[91] Serious failure to comply with the guidelines may result in adverse cost orders.[92]

5.60 A Draft Recommendations Report followed in September 2009. It proposed four types of matter that require participation in ADR before proceedings in a court or tribunal can be commenced: tenancy disputes, farm debt mediation, strata disputes and common law work injury claims.[93]

5.61 The draft recommendation would amend or add to the overriding purpose clause in s 56 of the *Civil Procedure Act 2005* (NSW) to require the following:

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84 Ibid s 34 (1)(b).
85 Ibid s 35(1).
86 Ibid s 39.
87 Ibid s 38(2). This provisions appears to be wider than the Civil Dispute Resolution Bill 2010 (Cth), under which only a 'lawyer' may be ordered to pay costs for non-compliance.
88 Ibid s 37.
89 See Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 143–144 outlining matters to be included in such letters. It was also recommended that where a person in dispute makes an offer of compromise before any legal proceedings are commended the court may, after the determination of the court proceedings, take that into consideration on the question of costs in any proceedings.
90 Department of Justice and Attorney General (NSW), *ADR Blueprint: Discussion Paper* (2009).
91 Ibid, 16.
92 Ibid, 16.
93 Department of Justice and Attorney General (NSW), *ADR Blueprint Draft Recommendations Report 1: Pre-action Protocols & Standards* (2009), 8–9.

- people in a civil dispute to take all reasonable steps (such as negotiation, mediation and other ADR processes) to resolve the dispute without litigation; and
- if litigation is necessary, before proceedings are commenced the parties are to take all reasonable steps to agree to the real issues required to be determined by a court.[94]

Queensland

5.62 In Queensland, the majority of personal injury claims are now governed by pre-action procedures after the *Personal Injuries Proceedings Act 2002* (Qld) amended other legislation to provide a framework for pre-action protocols. The legislation is aimed at providing a speedy procedure for the resolution of claims and promoting settlement.[95] Parties are required to—within a certain timeframe—disclose information and documents,[96] join any contributors[97] and provide formal notification of claims.[98] A compulsory conference must be held on completion of the pre-action requirements,[99] and parties are to exchange final offers at the conclusion of the conference.[100]

5.63 In 2003, the Queensland Attorney-General appointed a stakeholder reference group to consider the possibility of common pre-action procedures for personal injury claims. The group issued its report in 2004 and proposed a revised general pre-action protocol that would apply to all cases of personal injury other than dust-related diseases, medical negligence and claims from minors.[101] The ALRC is not aware that these recommendations in relation to a general pre-action protocol have been implemented.

5.64 Some have suggested that, as a result of the specific pre-action procedure being introduced, 'most personal injury litigation has disappeared' in Queensland. Statistical data confirms a drop in proceedings initiated, however, it is difficult to confirm that this is attributable to pre-action protocols.[102]

The need for a tailored approach?

5.65 The above issues concerning implementation have led to considerable support for 'bespoke' or tailored pre-action protocols for specific types of dispute, recognising

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94 Ibid, 7.
95 *Personal Injuries Proceedings Act 2002* (Qld) s 4(2).
96 Ibid ss 30–34.
97 Ibid ss 30–34.
98 Ibid ss 9–20J.
99 Ibid ss 36–38.
100 Ibid s 39.
101 Stakeholder Reference Group, *A Review of the Possibility of a Common Personal Injuries Pre-Proceedings Process for Queensland* (2004).
102 B Cairns, 'A Review of Some Innovations in Queensland Civil Procedure' (2005) 26 *Australian Bar Review* 184. See also, E Wright, *National Trends in Personal Injury Litigation: Before and After the IPP* (2006), prepared for the Law Council of Australia, 20–21. Figure 10 suggests that the combined number of personal injury actions commenced in Queensland Supreme and District Courts (Brisbane Registries) fell from 1176 to 293 for the period 2002–2003.

that in some instances there should be no applicable protocol.[103] Indeed, the relative success of the specific pre-action protocols compared to the general protocol in the UK suggests that their implementation in Australia warrants further consideration.

5.66 Lord Woolf recognised the importance of targeted protocols, stating that pre-action protocols 'are not intended to provide a comprehensive code for all pre-action behaviour, but will deal with specific problems in specific areas'.[104] Indeed, Lord Jackson's review found that general pre-action protocols lead to substantial delay and additional costs, and recommended that the general protocol be repealed, because 'one size does not fit all'.[105]

5.67 The Hong Kong Chief Justice's Working Party on Civil Justice Reform considered that pre-action protocols might have a bigger role to play in specialist lists, rather than general litigation in other courts.[106] The Working Party did not make any recommendations for the adoption of a general pre-action protocol, and concluded that any specific pre-action protocols introduced in specialist lists should be at the discretion of the courts.[107]

5.68 Similarly, the Access to Justice Report cautioned that not all matters that appear before courts will be suitable for pre-action protocols. For example:

> in the migration jurisdiction, claims have already been through an extensive merits review process, and there is a high volume of relatively simple proceedings ... Introducing additional pre-action steps in this process is likely to extend the process and increase costs.[108]

5.69 Rather, it considered that pre-action protocols might best be targeted at categories identified as complex and time consuming, such as: taxation, competition law, consumer protection law, human rights and intellectual property matters.[109]

5.70 The report cautioned that, in designing pre-action protocols, the challenges identified in the UK had to be taken into account, including: effective enforcement mechanisms/sanctions; avoiding excessive front-loading of costs; and safeguards to avoid their misuse as a litigation strategy to inconvenience or intimidate the other party.[110] The report recommended that the Australian Government Attorney-General's Department should work with federal courts to determine types of matters suitable for pre-action protocols.[111]

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103 M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 50. See also Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 104.

104 Lord Woolf, *Access to Justice: Final Report* (1996), 111.

105 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), 343.

106 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), 68.

107 Ibid, 73.

108 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 104.

109 Ibid, 104.

110 Ibid, 104.

111 Ibid, Rec 8.1.

5.71 As Michael Legg and Dorne Boniface note:

> The task is to identify the appropriate categories of case and the pre-action steps that will be beneficial. It should also be noted that pre-action protocols may be the victim of their own success. If the role of the protocol in securing more speedy resolution of dispute is not identified then it may be assumed that the dispute would have resolved without the protocol.[112]

ALRC's views

5.72 While the Australian approaches centred on pre-litigation steps provide a non-prescriptive mechanism encouraging parties to attempt resolution before instituting civil proceedings, there appears to be a strong case for consideration of specific pre-action protocols for particular types of dispute.

5.73 The ALRC considers that the adoption of specific protocols for particular types of dispute should be explored. Given the implications of front-loading of costs, it is imperative that the benefits of pre-action protocols be leveraged efficiently and that the requirements are flexible depending on the size, complexity and nature of the dispute. At the same time, they ought to achieve a measure of efficiency and streamlining of the litigation process. The experience of specific pre-action protocols in the UK suggests that, if tailored properly, they have the potential to be effective in promoting a more cooperative culture based around the early exchange of relevant documents and the narrowing of the issues in dispute. This may have benefits in limiting the overuse of discovery and reducing costs, but also aids in creating ripe conditions for successful ADR.

5.74 The ALRC notes that the genuine/reasonable steps formulation underpinning the Civil Dispute Resolution Bill 2010 (Cth) and the *Civil Procedure Act 2010* (Vic) is intended to encourage parties to attempt to resolve their disputes outside the court system. However, in a discovery context, specific pre-action protocols might prescribe more directly the conduct expected of prospective litigants when it comes to information disclosure and document exchange. For example, the 'genuine steps' taken by the parties may involve exchanging brief notice of a claim and acceptance and offers to negotiate, rather than turning their minds to the issues in dispute, or ensuring the early disclosure of relevant documents. To achieve the particular objectives of discovery earlier in the dispute-resolution process, specific pre-action protocols that are tailored and prescriptive—operating alongside a genuine/reasonable steps requirement—may impose express requirements to disclose relevant documents and information.

5.75 The ALRC further recognises that the adoption of specific pre-action protocols will need to be coupled with education and support for both the judiciary and the legal profession.

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112 M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 50.

Proposal 5–1 The Australian Government and the Federal Court, in consultation with relevant stakeholders, should work to develop specific pre-action protocols for particular types of civil dispute with a view to incorporating them in Practice Directions of the Court.

Pre-trial oral examinations

5.76 Pre-trial oral examinations are used predominantly in United States (US) jurisdictions as a means of recording the evidence of parties and witnesses. A pre-trial oral examination is simply 'an out-of-court question and answer session under oath, conducted in advance of a lawsuit as part of the discovery process'.[113] Pre-trial oral examinations are also referred to as oral depositions, oral discovery, pre-trial oral examination, examinations for discovery and depositions on oral examinations.

5.77 The purpose of pre-trial examinations, is among other things, to:

- discover evidence and the identity of documents;
- discover how a witness will testify at trial and commit that witness to a version of testimony prior to trial;
- assess the credibility and suitability of the witness;
- preserve testimony in a case where witnesses are unable to testify at trial; and
- test out the strengths or weaknesses of a party's case so as to encourage earlier settlement negotiations.[114]

5.78 Generally speaking, pre-trial oral examinations do not replace the need for oral evidence to be given at trial.[115] However, the content of oral examinations may be relevant in corroborating the testimony and credibility of witnesses at trial. The procedure can be seen as an alternative to the Australian discovery process, as parties seek disclosure of information and documents without any orders from the court or the necessity of an interlocutory process.[116]

Oral depositions in the United States

5.79 The use of oral depositions is an important element of civil procedure in the US, where it is seen as

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113 P Kerley, J Hames and P Sukys, *Civil Litigation* (5th ed, 2009), 247.

114 See Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 394–395 reproducing LexisNexis, Moore's Civil Practice, vol 7 (2006) § 30.41, reproducing a list set out in Schwarzer, Pasahow and Lewis, Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice (2nd ed, 1994), 3–3.

115 See Ibid, 395. However, in the US, when a witness is unable to attend a hearing a deposition may be used as a substitute. Further, depositions may replace live testimony, subject to court findings that the witness is not available due to death, age, illness, infirmity, imprisonment, being outside the court's jurisdiction, or where exceptional circumstances make it desirable to permit the deposition to be used: see *Federal Rules of Civil Procedure 2009* (US), r 32(a)(4).

116 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 386.

> the factual battleground where the vast majority of litigation actually takes place. It may be safely said that Rule 30 [of the US Federal Rules of Civil Procedure governing depositions] has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to a point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial—assuming there is a trial, which there usually is not. The pre-trial tail now wags the trial dog.[117]

Framework for oral depositions

5.80 The framework for discovery, including oral depositions, in civil litigation in the US is governed by the *Federal Rules of Civil Procedure 2009* (US) (FRCP).[118] Oral depositions are preceded by an initial disclosure regime, whereby a party to the proceedings, on its initiative, is to provide certain information to the opposing party.[119] Such disclosures must be made at or within 14 days after a pre-trial conference,[120] which is held as soon as is practicable after the commencement of proceedings.[121] At the pre-trial conference, issues relating to discovery phases, disclosure timing, electronic material, and privilege claims are canvassed.[122] A report of the discovery plan is to be lodged with the court within 14 days of the conference.[123]

5.81 Parties may object to disclosure or discovery requests, and seek a protective order from the court whereby that party is protected from 'annoyance, embarrassment, oppression, or undue burden or expense'.[124] Further, there is an obligation imposed on the court to limit the extent of discovery if it determines that it is 'unreasonably cumulative or duplicative, or obtainable from other source that is more convenient, less burdensome, or less expensive', or if the requesting party already had ample opportunity to obtain the requested information, or the cost of the proposed discovery outweighs its likely benefit.[125]

Who may be examined

5.82 After initial disclosure, a party to the proceedings may depose 'any person' without leave of the court.[126] However, among other things, leave of the court is required where the taking of the deposition would mean that more than 10 depositions

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117 J Moore, *Moore's Federal Practice* (3rd ed, 1997) § 30.02[2].

118 *Federal Rules of Civil Procedure 2009* (US) rr 26–37.

119 Ibid r 26(a)(1)(A). Such information includes: the name and addresses of each individual likely to have discoverable information; a copy, or a description by category and location, of all documents relevant to supporting the party's defences; a computation of damages and documents with respect to a party's computations; and any insurance agreements. Initial disclosure provisions do not apply to certain administrative review proceedings, habeas corpus proceedings, proceedings commenced by a person in custody, or arbitration award enforcement proceedings: r 26(a)(1)(B).

120 Ibid r 26(a)(1)(C).

121 Ibid r 26(f)(1).

122 Ibid r 26(f)(2) and (3). If material is withheld due to privilege claims, the objecting party must expressly make a privilege claim and describe the nature of the documents, communications or tangible things not produced or disclosed: r 26(b)(5).

123 Ibid r 26(f)(2).

124 Ibid r 26(c)(1).

125 Ibid r 26(b)(2)(C). The obligation on the court is of its own motion or can be raised by a party to proceedings by way of motion.

126 Ibid r 30(a)(1).

had been taken by any party to the proceedings, or if the deponent had already been deposed.[127]

5.83 A deponent may be compelled by subpoena to attend an oral deposition, at which the time, the place and production of documents is to be clearly specified.[128] If the subpoena is directed at an organisation, then the organisation's name may be used generally and the matters for examination must be specified with reasonable particularity in order for the organisation to designate an employee to testify on its behalf.[129]

Procedural requirements

5.84 Reasonable written notice advising of the deposition must be sent to every other party to the proceeding.[130]

5.85 There is a requirement that each deposition is to be no longer than seven hours in duration, although a court must allow an extension if it is needed to fairly examine a deponent, or if the deponent, another person, or any other circumstance impedes or delays the examination.[131]

5.86 A deposition must be conducted in the presence of someone who is 'authorised to administer oaths either by federal law or by the law in the place of examination; or ... appointed by the court where the action is pending'.[132] The authorised officer is responsible for ensuring that the deposition as recorded on any medium is accurate and complete,[133] and the witness was duly sworn.[134] In more complex matters, depositions are usually conducted before special masters or magistrates so that a judicial officer can rule on objections and questions.[135]

Examination and objections

5.87 Generally, examination and cross-examination of witnesses giving oral depositions proceed as they do at trial under the *Federal Rules of Evidence 2009* (US) (FRE), although the character of a deposition is necessarily less formal than giving evidence in court.[136]

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127 Ibid r 30(a)(2). Other circumstances include where the party seeks to take the deposition before the conclusion of the pre-trial conference, or where the deponent is confined to prison.

128 Ibid r 30(a)(1), r 45(a).

129 Ibid r 30(b)(6).

130 Ibid r 30(b)(1). The notice must state the time and place of the deposition, and if known, the name and address of the deponent. If the name of the deponent is unknown, a general description sufficient to identify the person, or a class of person to which the person belongs must be stated.

131 Ibid r 30(d)(1).

132 Ibid r 28.

133 Ibid r 30(b)(5).

134 Ibid r 30(f)(1).

135 J Moore, *Moore's Federal Practice* (3rd ed, 1997) § 30.2[3].

136 *Federal Rules of Civil Procedure 2009* (US) r 30(c)(1). *Federal Rules of Evidence* (US) r 103 (dealing with objections and court rulings on evidence) and r 615 (governing sequestration of witnesses) do not apply at a deposition.

5.88 Objections may be raised in the course of the examination of witnesses giving oral depositions. Objections are noted on the record, and must be stated succinctly and in a non-argumentative manner.[137] Once the objection has been recorded, the deponent must answer the question, or may be instructed not to answer by counsel 'only when necessary to preserve privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)' of the FRCP.[138]

5.89 Under Rule 30(d)(3), a party or deponent may apply to a court to cease or limit the deposition on the ground that 'it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party'.[139]

Sanctions

5.90 Pursuant to Rule 37 of the FRCP, a court may provide for orders and sanctions for breach of deposition obligations.[140] A failure by a deponent to answer a question, or to give complete disclosure, answers or responses, can be the subject of a motion to compel.[141] The deposition can be suspended immediately for the purposes of the motion. In considering a motion to compel, the court must have regard to, among other things, whether the information sought is relevant and whether it is protected under privilege.[142]

5.91 If the court grants a motion, an order compelling discovery or disclosure is made, and should the order not be complied with, the court is able to impose sanctions including the striking out of pleadings in whole or in part, staying proceedings, dismissing the action, entering default judgement, or treating the non-compliance as contempt of court.[143]

5.92 If an order to compel is made, the court will, in appropriate cases, require the party necessitating the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion.[144]

Advantages and disadvantages of oral depositions

5.93 There is scant empirical evidence as to the effectiveness of oral depositions in the US. However, commentators broadly agree, in principle, on the benefits and disadvantages to oral depositions.

5.94 Those who champion depositions argue that they can be the most effective device available to litigators, and the most influential to case development and

137 *Federal Rules of Civil Procedure 2009* (US) r 30(c)(2).
138 Ibid r 30(c)(2).
139 Ibid r 30(d)(3).
140 Ibid r 37.
141 Ibid r 37(a)(1).
142 J Moore, *Moore's Federal Practice* (3rd ed, 1997) § 37.22.
143 *Federal Rules of Civil Procedure 2009* (US) r 37(b)(1) and (2).
144 Ibid r 37(a)(5)(A).

outcomes.[145] It is argued that depositions promote efficiency by facilitating settlement and, where no settlement is achieved, narrowing the issues in dispute if a trial is required.[146]

5.95 The principal disadvantage of depositions relates to cost.[147] Parties incur the cost of having a lawyer defend a deposition and preparing affidavits for each of their witnesses, as well as conducting examination of the opposing party's witnesses. Where the amount in dispute is small, the expense of conducting a deposition may not be reasonable, proportional or affordable, especially for individuals and the self-represented. On the other hand, depositions can be particularly costly for large corporations or governments where the number of possible deponents is large.[148]

5.96 Others, however, highlight that depositions are vulnerable to egregious abuse without court supervision.[149] Abuses may extend to scheduling of depositions for 'mere witnesses', or those with only peripheral involvement in the dispute. Lawyers may frame questions in a manner to create costs and seek informational advantage over the other party.[150] Concerns have also been raised that lawyers have coached witnesses, adopted obstructive behaviour in depositions, and used insulting and discriminatory language.[151]

5.97 In sum, the literature suggests the following advantages and disadvantages of oral depositions.

Advantages of oral depositions

- Helping to efficiently define the issues in dispute and focusing the parties' attention on the real issues. Deponents may be asked about the content of documents and not just their location and identity.
- Preventing ambush tactics of producing surprise evidence or witnesses in a trial. Oral depositions ensure that any relevant issues or persons are identified and can be explored prior to trial.
- Reducing the cost of discovery—including undue financial burdens placed on requesting parties who have no foreknowledge of where key documents are held, and on respondent parties to categorise or synthesise vast quantities of information.

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145 See P Hoffman and M Malone, *The Effective Deposition* (2nd ed, 1996); *Hall v Clifton Precision* 150 FRD 525 (US District Ct, Penn., 1993); See also J Moore, *Moore's Federal Practice* (3rd ed, 1997) § 30.02[2].

146 M Legg, 'The United States Deposition: Time for Adoption in Australian Civil Procedure?' (2007) 6 *Melbourne University Law Review* 146, 165.

147 Ibid, 158.

148 Ibid, 160.

149 J Kerper and G Stuart, 'Rambo Bites the Dust: Current Trends in Deposition Ethics' (1998) 22 *Journal of the Legal Profession* 103, 104.

150 M Legg, 'The United States Deposition: Time for Adoption in Australian Civil Procedure?' (2007) 6 *Melbourne University Law Review* 146, 160.

151 See J Cary, 'Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation' (1996) 25 *Hofstra Law Review* 561.

- Reducing cost in relation to obtaining witness statements, which may be very costly in large scale litigation.
- Enabling parties to test the strengths and weaknesses of their case before the hearing. This may lead to earlier settlement of the dispute, or if settlement does not occur, matters in dispute may be significantly narrowed.
- Locking a version of witness testimony in to place, and where it is inconsistent at trial, the deposition can serve as evidence to challenge witness credibility.
- Witness testimony can be a substitute for giving evidence where the witness cannot attend court or has passed away.

Disadvantages of oral depositions

- Potential for increase cost and delay by adding an extra interlocutory step in relation to contested oral depositions.
- Potential for the process to be used as a 'fishing expedition'—oral discovery could lead to more abuse than if merely on documents alone. Parties may depose those with only peripheral involvement in the dispute, or examine topics beyond those in issue.
- The informality of an examination could exacerbate power imbalances between the parties and/or witnesses. Depending on how the deposition is conducted, witnesses may be more or less cautious and subsequently have their versions of events discredited in court.
- The financial outlay required to conduct an oral deposition—including payment of witness expenses, transcription costs in addition to counsel fees—may not be met by some litigants.
- The potential for oppressive tactics to be used against vulnerable witnesses, including preventing a witness from answering, threats of physical violence, insults and discriminatory language.

Pre-trial oral examinations in the Australian context

Oral deposition-like processes in Australia

5.98 A number of legislative provisions exist in Australia that allow a court or a government agency to make orders or compel a person to be subject to oral examination. Some of these are discussed below.

Federal Courts

5.99 Under the *Federal Court Rules* (Cth), the court is empowered to make orders 'for the attendance of any person for the purposes of being examined', or for 'the production by him of any document or thing specified or prescribed in the order'.[152] The court is also empowered 'for the purposes of proceedings in the Court' to make

152 *Federal Court Rules* (Cth) O 33 r 13.

orders for the examination of any person on oath or affirmation before a judge or other appointed examiner.[153]

5.100 Similarly, the *Family Law Rules* (Cth) gives power to a court with jurisdiction under the *Family Law Act 1975* (Cth) to request, at any stage in a case, the examination on oath of any person before a court or court officer, or to authorise a person to conduct an examination.[154]

Corporations Act 2001 (Cth)

5.101 Under sections 596A and 596B of the *Corporations Act 2001* (Cth), 'eligible applicants'[155] are able to request that a court issue a summons for the examination of a person concerning 'examinable affairs'.[156]

5.102 During the examination, the court may give directions concerning, among other things: matters to be inquired into; the procedure of the examination; the presence of any other persons at an examination; and access to the records of the examination.[157] The court also has power to consider whether questions put to the summoned person is 'appropriate'.[158] Generally, the examination should be held in public unless the court considers that there are special circumstances.[159]

5.103 The purpose of such an examination was expressed by the authors of *Australian Corporations Law Principles and Practice*, and quoted by the VLRC, as 'not in the nature of legal proceedings before a court; they are more in the nature of investigative procedures where the court has a presence for the purpose, basically, of seeing fair play between the persons interrogating and the persons being interrogated'.[160]

Government agencies

5.104 A number of government agencies—largely regulatory and investigatory bodies—have powers to compel a person to appear for examination under oath in a setting other than in court at trial.[161] For example:

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153 Ibid O 24.

154 *Family Law Rules 2004* (Cth), r 15.72(1).

155 Defined in s 9 of the *Corporations Act 2001 (Cth)* as: the Australian Securities and Investments Commission (ASIC); a liquidator or provisional liquidator; an administrator of the corporation; an administrator of a deed of company arrangement executed by the corporation; or a person authorised by ASIC to make such an application.

156 Defined in s 9 of the *Corporations Act 2001 (Cth)* as the promotion, formation, management, administration or winding up of the corporation; any other affairs of the corporation; or the business affairs of an entity connected with the corporation that appear to be relevant.

157 *Corporations Act 2001* (Cth) ss 597B, 596F.

158 Ibid s 597(5B).

159 Ibid s 597(4).

160 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 392 citing LexisNexis Butterworths, *Australian Corporations Law Principles and Practice*, [5.7B.0010], citing *Re Monadelphous Engineering Associates (NZ) Ltd (in liq); Ex parte McDonald* (1988) 7 ACLC 220, 223.

161 This is not an exhaustive list of agencies that have such powers. For a more a detailed consideration of agencies with deposition-like powers, see Ibid, 392–394.

- the Australian Competition and Consumer Commission may issue a notice requiring persons to appear before it to give evidence on oath or affirmation, in relation to purported breaches of the *Trade Practices Act 1974* (Cth);[162]
- the Australian Securities and Investment Commission (ASIC), in investigating suspected breaches of the *Corporations Act*, can compel a person to appear before an ASIC member for examination on oath if ASIC 'on reasonable grounds, suspects or believes that a person can give information relevant to a matter';[163]
- the Commissioner of Taxation can give notice compelling a person to give oral evidence on oath or affirmation, in connection with the administration of the *Income Tax Assessment Act 1936* (Cth);[164]
- the Commonwealth Ombudsman may, in the course of conducting an investigation, require a person to appear before him or her or an appointee for the purposes of answering relevant questions;[165]
- the Australian Commission for Law Enforcement Integrity can summon a person to give evidence (including to produce documents or things) as part of a 'hearing' directed either to investigating a 'corrupt issue' or conducting a public inquiry;[166] and
- the Australian Communications and Media Authority may require a person to appear before its delegate for examination on oath or affirmation in connection with an investigation it is conducting.[167]

A case for oral depositions in Australia?

5.105 The possibility of adopting US style deposition into the Australian civil justice system has been raised in reports by the VLRC, the Law Council of Australia, the litigation funder IMF,[168] as well as some in academic circles.[169]

5.106 The ALRC in its 2000 report, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report 89), noted the following in respect of depositions:

> Some practitioners argued for the introduction of depositions in representative proceedings ... The Commission heard that depositions potentially could add significant cost and delay. The Commission notes that the judge may order depositions to be taken if it is considered necessary in a particular case, pursuant to the general discretion in s 33ZF of the Federal Court Act to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding' or the

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162 *Trade Practices Act 1975* (Cth) s 155.
163 *Australian Securities and Investment Commission Act 2001* (Cth) s 19(2).
164 *Income Tax Assessment Act 1936* (Cth) s 264.
165 *Ombudsman Act 1976* (Cth) s 9(2).
166 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 82(4).
167 *Broadcasting Services Act 1992* (Cth).
168 IMF Australia, *Submission by IMF to Victorian Law Reform Commission Civil Justice Review* (2007) <www.imf.com.au/> at 24 October 2010.
169 M Legg, 'The United States Deposition: Time for Adoption in Australian Civil Procedure?' (2007) 6 *Melbourne University Law Review* 146.

> provision dealing with examination of witness in Order 24 of the Federal Court Rules. The Commission is not disposed to make any recommendation in relation to the introduction of depositions at this stage. However, it is a subject which also could be considered in a review of Part IVA of the Federal Court Act.[170]

5.107 Oral depositions were also considered in the Federal Court Liaison Committee (the Committee) of the Law Council of Australia's *Final Report in Relation to Possible Innovations in Case Management*. The Committee proposed that 'the Court be at liberty to permit oral depositions, limited by number, witness, length and subject matter'.[171] The Committee commented that:

> This proposal proved very controversial. A widespread reaction to it was adverse on the grounds that it would be likely to be productive of unnecessary expense and even that it would constitute a reversal of the current policy of discouraging interrogation. Most practitioners opposed the proposal with support coming primarily from those with practical experience of both US depositions and trial practice.[172]

5.108 However, it was also noted that 'based on the American experience, it would seem clear that, potentially, in addition to any function which oral depositions may perform in promoting settlement, they may have a valuable role in relation to discovery and the limitation on evidence and dealing with experts'.[173] In particular, 'oral depositions offer an alternative to interminable document discovery ... in relation to certain documents, issues can be quickly dealt with by some questions of a witness which would otherwise be difficult to track through a paper trail'.[174] The Committee concluded that:

> Depositions would not be appropriate in many cases. Where cases are complex and the evidence of key witnesses may be significant, they may be, however, a very effective case management tool.[175]

5.109 The Committee recommended that 'the Court introduce, on a trial basis, an entitlement for the parties to examine on oath individuals employed by or on behalf of a party or witnesses proposed to be relied upon by that party'.[176] This proposal has not been implemented.

5.110 In its 2008 *Civil Justice Review Report*, the VLRC undertook detailed analyses of oral depositions in Canada, the US and UK jurisdictions.[177] The VLRC concluded that, subject to appropriate safeguards to curb potential abuse of the process and the escalation of costs, provisions ought to be made for pre-trial oral examinations.[178] In particular, it recommended that pre-trial examinations only be permitted with leave of

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170 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.102].
171 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), Proposal 5(e).
172 Ibid, [107].
173 Ibid, [114].
174 Ibid, [127].
175 Ibid, [124].
176 Ibid, Rec 5.4.
177 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 394–410.
178 Ibid, 415.

the court. This would give the court an opportunity to determine whether examination is necessary or desirable in a given case and, if so, allow the court to set the conditions for the examination to ensure that the process is not abused, control cost and protect vulnerable witnesses.[179]

5.111 In many other respects, the model recommended bears similarities with the procedure set out in the US. The VLRC summarised the key features of its proposal in the following way:

- examinations would only be possible by consent, with leave of the court;
- parties would be expected to attempt to agree on the details of the examinations;
- the court would have the power to make directions limiting the number and duration of examinations;
- it should not be necessary to require examinations to be conducted before an independent third party in most instances, but in appropriate cases, examinations may be held before an examiner who is not a judicial officer (including an independent legal practitioner);
- there would be a process for identifying appropriate corporate deponents;
- examinees would be entitled to refuse to answer questions on the ground of legal professional privilege, and protected against disclosure or future use of self-incriminating information revealed in response to a question;
- objections to particular questions asked during the course of an examination would be noted on the record for determination by the court in the event that the answer is later sought to be introduced into evidence;
- the transcript of the examination would be able to be introduced into evidence at trial in a number of circumstances; and
- subject to certain limits, the costs of examinations should be recoverable as costs of the proceedings.[180]

5.112 The VLRC's recommendations for pre-trial oral examinations were not implemented in the Civil Procedure Bill 2010 (Vic).[181] Rather, s 57 of the incoming *Civil Procedure Act* provides for oral examination in the context of discovery only where documents have already been produced by way of subpoena, and pursuant to leave being granted by the court, a party may cross-examine or conduct an oral examination of a deponent of an affidavit of documents prepared by or on behalf of any party to a proceeding.[182] The ground for application for leave must be that there is a reasonable belief that the party to be examined may be misinterpreting their discovery obligations, or failing to disclose discoverable documents.[183]

179 Ibid, 415.
180 Ibid, 415.
181 Civil Procedure Bill 2010 (Vic).
182 *Civil Procedure Act 2010* (Vic) s 57.
183 Ibid s 57.

5.113 Legg has argued that the use of depositions in Australia would aid in promoting settlement, or if no settlement occurs, a narrowing of 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 agree with and why. In a complex case, those points of disagreement may be numerous but there will 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.[184]

5.114 The introduction of depositions, Legg notes, would result in 'a major transformation of civil procedure in Australia',[185] as affidavit evidence would be substantially reduced or replaced by depositions. This has both practical and cultural implications for the profession:

> Legal practitioners would need to move from drafting affidavits with only the witness present to the adversarial deposition... 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 ... This may impact law school and professional qualification curricula.[186]

ALRC's views

5.115 The ALRC has heard uniformly in consultations that narrowing the issues in dispute prior to discovery, or prior to the commencement of litigation, is essential to limiting the cost of litigation. The ALRC agrees with the VLRC that the primary object of oral examinations is not preparation for trial, but the narrowing of issues in dispute in order to facilitate settlement, or if the matter proceeds to hearing, to restrict or eliminate the need to call or test particular evidence.

5.116 The ALRC recognises that the introduction of depositions would have a significant impact on legal culture in Australia, in particular, the need for lawyers to be educated and trained in the use of oral depositions. However, the ALRC notes that the process of oral examination is not entirely new; such powers for oral examination are available to the Federal Court and courts exercising Family Law jurisdiction, as well as federal regulatory bodies.

5.117 The experience in the US suggests that there are benefits to depositions in terms of promoting settlement and narrowing the issues in dispute. The challenge lies in leveraging these benefits, while ensuring the procedure is not subject to abuse by parties, and controlling cost implications. The ALRC agrees with the VLRC that a necessary safeguard is that depositions only be taken with leave of the court, and allowing the courts to set the limits and parameters in which depositions take place.

5.118 The ALRC is interested in stakeholder views about whether cost issues could be controlled by limiting oral examinations to particular types of disputes, and which, if

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184 M Legg, 'The United States Deposition: Time for Adoption in Australian Civil Procedure?' (2007) 6 *Melbourne University Law Review* 146, 165.

185 Ibid, 167.

186 Ibid, 167.

any, mandatory considerations a court should take into account in granting leave for oral examinations.

Proposal 5–2 A new pre-trial procedure should be introduced to enable parties to a civil proceeding in the Federal Court, with leave of the Court, to examine orally, on oath or affirmation, any person who has information relevant to the matters in dispute in the proceeding.

Question 5–6 Could cost issues in proceedings before federal courts be controlled by limiting pre-trial oral examinations to particular types of disputes?

Question 5–7 What mandatory considerations, if any, should a court take into account in granting leave for oral examination?

Other alternatives

Interim disclosure orders

5.119 The VLRC Report recommended another alternative to traditional discovery, which it called 'interim disclosure orders'.[187] Under the proposal, in order to reduce the delays and costs arising from discovery, a court would have the discretion to order a party to provide another party with access to all documents in the first party's possession, custody or control that fall within a general category or general description of issues in dispute in the proceedings, subject to:

- the documents falling within a category of documents where such a category or description is approved by the courts;
- the documents are able to be identified and located without unreasonable burden or unreasonable cost to the first party;
- the cost of the first party differentiating documents within such a general category or description which are (i) relevant or (ii) irrelevant to the issues in dispute between the parties are in the opinion of the court excessive or disproportionate;
- access to irrelevant documents is not likely to give rise to any substantial prejudice to the first party which is not able to be prevented by way of court order or agreement between the parties; and
- access is to facilitate the identification of documents for the purpose of obtaining discovery of such identified documents in the proceedings.[188]

5.120 Access does not allow the other party to copy, produce or make records of, photograph or otherwise use—either in connection with the proceedings or in any other way—documents or information examined as a result of such inspection, except to the extent that would allow the other party to describe or identify an examined document

187 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 468.
188 Ibid, 474.

for the purposes of obtaining discovery of such an identified document in the proceedings.[189]

5.121 Other safeguards include that, access would be limited to lawyers for a party, and any disclosure to this provision does not give rise to a waiver of privilege.[190]

5.122 The VLRC considered that such interim access would: facilitate access to documents quickly; avoid the party in possession spending time reviewing such documents prior to the determination of what documents should be produced by way of discovery and the necessity of preparing a list of documents; and transfer the cost of initially reviewing the documents to the party seeking the documents.[191]

Civil jurisdictions

5.123 The ALRC also notes that there is some suggestion that reforms should also consider civil law jurisdictions, such as that in Germany, as one possible alternative to discovery in federal courts.[192] However, the ALRC considers that a review of the civil law system, and how it deals with discovery, is beyond its Terms of Reference.[193]

Current courts processes

5.124 The VLRC's recommendation bears similarities to the Practice Note SC Eq 3, which applies in the Commercial List and Technology and Construction List in the NSW Supreme Court's Equity Division.[194] Under the practice direction, parties may 'take a peek' at their opponents database of documents on a without prejudice basis.[195] The parties may then call for the production of particular non-privileged documents they wish to obtain, and the court may grant discovery.[196]

5.125 The ALRC notes that creative judicial case management can initiate the use of alternatives to discovery. For example, the ALRC heard in consultations that instead of granting leave for discovery of documents relating to the corporate structure of an organisation, judicial officers can ask the party to tender an affidavit outlining the structure of the organisation. Further examples include that, under the *Federal Court Rules*, the court has the power to order the production of documents for inspection where it appears on a list of documents filed by a party or where a document is referred to in the pleadings.[197] Under the *Evidence Act 1995* (Cth), where the parties make

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189 Ibid, 475.
190 Ibid, 475.
191 Ibid, 468.
192 R Ackland, 'We Should Look to Germany for Justice', *Sydney Morning Herald* (online), 1 October 2010, <www.smh.com.au/>.
193 See Terms of Reference at the front of this Consultation Paper. Specifically, the ALRC is to 'have regard to the experiences of other jurisdictions, including jurisdictions outside Australia, provided there is sufficient commonality of approach that any recommendations can be applied in relation to the federal courts'.
194 Supreme Court of NSW, *Practice Note No. SC Eq 3: Supreme Court Equity Division—Commercial List and Technology and Construction List* <www.lawlink.nsw.gov.au/> at 20 October 2010.
195 Ibid, [29]
196 Ibid, [31]
197 *Federal Court Rules* (Cth) O 15, r 11.

agreement as to facts in writing,[198] then discovery in relation to those issues is not required.

5.126 Such powers, when used in conjunction with other case management processes discussed in Chapter 3—such as pre-trial conferences, requiring the parties to tender a list of issues in dispute, or a 'discovery plan' setting out where and how a search for documents relating to those issues is to be conducted—may achieve the same aims of facilitating quick access to documents, and identifying which documents are to be discovered.

5.127 The ALRC is interested in stakeholder views about whether there is a need for a new procedure for access to information in civil proceedings, such as interim disclosure orders. If the current alternatives are adequate, the ALRC is interested in view about the best way of ensuring that the federal court considers such alternatives.

Question 5–8 Is there a need for new procedures for access to information in civil proceedings, such as interim disclosure orders?

Question 5–9 What is the best way of ensuring that federal courts consider alternatives to the discovery of documents in civil proceedings?

198 *Evidence Act 1995* (Cth) s 191.