11. Pre-action Protocols and Other Alternatives to Discovery

Contents

Summary

11.1 In the Consultation Paper, the ALRC discussed pre-trial oral examinations, pre-action protocols and interim disclosure orders in the context of possible 'alternatives'

to discovery. This chapter primarily focuses on pre-action protocols. It does so for two reasons. First, the United Kingdom (UK) and a number of Australian jurisdictions have advocated their use in order to encourage the swift resolution of civil disputes without the traditional expense caused by, and adversarial approach exhibited in, civil litigation. Secondly, the ALRC's Consultation Paper asked for views on a number of questions related to pre-action protocols as well as its initial proposal for reform.[1]

11.2 The chapter explains what pre-action protocols are, including perceived advantages and disadvantages. It outlines the use of both specific and general pre-action protocols in the UK and legislative developments in Australia. The chapter then considers issues in successfully implementing pre-action protocols and analyses comments made in submissions about the various implementation issues and the ALRC's initial proposal that specific pre-action protocols be developed for particular types of civil dispute in the federal sphere. After the evaluation of available evidence, the ALRC has decided not to make recommendations in relation to the use of pre-action protocols. This decision was made because the ALRC acknowledges that the aims underlying pre-action protocols are broader than simply ameliorating problems with discovery, even if their use can produce indirect improvements to the discovery process. The ALRC concludes that it would be inappropriate to recommend the adoption of specific pre-action protocols from the perspective of wanting to address problems with discovery, when their introduction raises a number of much broader considerations.

11.3 The ALRC's Consultation Paper asked one question about interim disclosure orders and one on how to ensure that other possible alternatives were taken into account.[2] Accordingly, these issues, and other possible alternatives, are the subject of less detailed consideration. The chapter concludes by stating that it would be inappropriate for the ALRC to comment further about these issues given the low level of discussion of them in submissions and, in two cases, given the constraints of the Terms of Reference in this Inquiry.

What are pre-action protocols?

11.4 Pre-action protocols—a series of procedural requirements that are a pre-requisite to commencing litigation—are 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.[3]

11.5 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;

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1 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Questions 5–1, 5–2, 5–3, 5–4, 5–5 and Proposal 5–1.

2 Ibid, Questions 5–8 and 5–9.

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

- 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 the matter, without recourse to court proceedings.[4]

11.6 Pre-action protocols may be prescribed in legislation or in court practice rules. For example, the UK *Civil Procedure Rules* 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.[5] 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).[6] The prospective defendant is then required to formulate a position on liability and send a reply to the prospective claimant within three months.[7]

Advantages and disadvantages of pre-action protocols

11.7 Where they have been introduced, pre-action protocols have met some criticism. However, their potential to promote access to justice, efficiency, and promote cultural change has also gained currency.[8]

Advantages of pre-action protocols

11.8 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.[9] In principle, this should assist in reducing the need for, and cost of, any subsequent discovery of documents.

11.9 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. In the context of pre-action protocols in construction disputes, Paula Gerber and Bevan Mailman note 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

4 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.
5 *Civil Procedure Rules, Pre-action Protocol for Personal Injury Claims* (UK), [2.7].
6 Ibid, [2.6].
7 Ibid, [2.7].
8 See, eg, R Byron, 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (2001) 75 *Tulane Law Review* 1297, 1311.
9 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 109.

> 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.[10]

11.10 Many pre-action protocols also play an important role in encouraging parties to pursue ADR. Where ADR is successful, it results in cost savings both to 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.[11]

Disadvantages of pre-action protocols

11.11 A major concern with pre-action protocols relates to the '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.[12]

11.12 Pre-action protocols also raise a number of access to justice issues, especially for individual litigants—that is, litigants who are natural persons. 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.[13]

11.13 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 complied with the relevant protocol.[14] 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.[15]

11.14 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.[16]

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

11 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.

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

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

14 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.

15 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.

16 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 by the VLRC 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.

Pre-action protocols in the United Kingdom

Specific pre-action protocols

11.15 Pre-action protocols were introduced in the UK in 1999, following Lord Woolf's *Access to Justice* 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.[17]

11.16 Lord Woolf 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.[18]

11.17 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, as set out in the following table:

Pre-action Protocol	*Commencement*
Personal Injury Claims	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 Claims	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

17 Lord Woolf, *Access to Justice: Final Report* (1996), 107.
18 Ibid, ch 10.

11.18 These specific pre-action protocols vary from imposing mandatory procedural obligations on parties, to simply acting as a general guide to good practice. In its 2008 report, *Civil Justice Review*, the Victorian Law Reform Commission (VLRC) noted that the more detailed and lengthy protocols in the UK have, in some ways, constituted their own procedural code.[19] For example, the Pre-action Protocol for Personal Injury Claims 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

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

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

- 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]

11.21 The Practice 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 Practice Direction may not be used for any purpose other than resolving the dispute, unless the other party agrees in writing.[25]

11.22 The Practice 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;

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19 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 113.
20 *Civil Procedure Rules, Pre-action Protocol for Personal Injury Claims* (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].
23 Ibid, [6.1]. While ADR is not compulsory, the Practice 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].

- 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

11.23 The *Civil Procedure Rules* (UK) enable the court to take into account compliance (or non-compliance) with the Practice 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]

11.24 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, rather than 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]

11.25 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, failing to disclose documents requested to be disclosed.[31]

11.26 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;

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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].
31 Ibid, [4.4].

- 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

11.27 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 reforms introduced pursuant to Lord Woolf's report being a plausible explanation.[34]

11.28 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, prior to the introduction of pre-action protocols, would have gone to trial, but are settled as a result of work done in the protocol period; and
- cases that would have settled anyway and compliance with pre-action protocols have only added to the cost.[35]

11.29 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]

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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, Rome, 2009), 28.
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.

11.30 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]

11.31 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]

11.32 These sentiments were also evident in a 2004 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]

11.33 A number of Australian legal professional bodies have also expressed similar concern about the front-loading of costs. For example, the Law Society of New South Wales 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 value claims because of the increased cost involved, and in many cases are completely unnecessary.[43]

11.34 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

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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 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.

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.

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.

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]

11.35 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]

Information exchange and narrowing the issues in dispute

11.36 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.

11.37 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 not be unduly burdensome. 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.[48]

Compliance, enforcement and satellite litigation

11.38 Pre-action protocols have also been criticised for creating a battleground for satellite litigation,[49] 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.

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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.

48 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.

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

11.39 Indeed, non-compliance with the protocols and the lack of proper enforcement of sanctions are among the chief criticisms of reforms introduced following Lord Woolf's report.[50] 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.[51] 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.[52]

11.40 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',[53] 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.[54] This may be a symptom of insufficient training of the judiciary and the legal profession on compliance with any proposed pre-action protocols, and the relative lack of case law in the area.

11.41 Further, sanctions in the form of costs orders may have substantial adverse effects on self-represented litigants, who would require legal advice in the pre-litigation process.[55] There may be concerns that pre-litigation requirements would place further burdens on community legal centres and other such organisations that already feel resource pressures. The prospect of an adverse costs order might also pressure some litigants into abandoning a claim, thus denying them access to justice.[56]

Australian developments

11.42 The possibility of introducing pre-action protocols, similar to those suggested by Lord Woolf, has attracted attention in reports:

- 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* (*Strategic Framework*);[57]

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

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

52 Ibid.

53 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.

54 Ibid, 16.

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

56 Ibid.

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

- the National Alternative Dispute Resolution Council (NADRAC) in The Resolve to Resolve—Embracing ADR to Improve Access to Justice in the Federal Jurisdiction;[58] and
- the VLRC in its Civil Justice Review.[59]

11.43 These reports have informed the development of 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. For example, the Civil Dispute Resolution Bill 2010 (Cth) proposes that parties should take 'genuine steps' to resolve disputes before commencing litigation.

Civil Dispute Resolution Act 2011 (Cth)

11.44 The *Civil Dispute Resolution Act* was enacted by Parliament on 24 March 2011. The overall aims of the Act are:

- to change the adversarial culture often associated with disputes;
- 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, to ensure that the issues are properly identified, thereby reducing the time required for a court to determine the matter.[60]

11.45 The Act 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.[61] 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.[62] Non-compliance with the requirement to file this statement 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.[63]

11.46 The 'genuine steps' formulation implemented a recommendation made by NADRAC 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.[64]

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58 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).
59 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008).
60 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth), 4.
61 *Civil Dispute Resolution Act 2011* (Cth) s 6(1).
62 Ibid s 6(2).
63 Ibid s 12(1).
64 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.

11.47 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 was inappropriate.[65] A further concern was that such formulations might 'open the door for satellite litigation about the conduct of the parties in costs hearings'.[66]

11.48 The *Civil Dispute Resolution Act* does not define 'genuine steps' in limited or exclusive terms. Section 4(1A) of the Act provides that:

> For the purposes of this Act, a person takes ***genuine steps to resolve a dispute*** if the steps taken in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.[67]

11.49 This definition is intended to offer guidance to litigants on the nature of the actions that they take which they wish to include in a genuine steps statement, as well guidance to a court in considering whether a litigant took genuine steps.[68] 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'.[69] As the Australian Government Attorney-General noted 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.[70]

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

- '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';[71]
- 'responding appropriately to such notification';[72] 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'.[73]

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65 Ibid, 31.
66 Ibid.
67 Emphasis in the original.
68 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth).
69 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 270 (R McClelland—Attorney-General).
70 Ibid.
71 *Civil Dispute Resolution Act 2011* (Cth) s 4(1)(a).
72 Ibid s 4(1)(b).
73 Civil Dispute Resolution Bill 2010 (Cth);*Civil Dispute Resolution Act 2011* (Cth) s 4(1)(c).

11.51 Under the Act, lawyers have an obligation to advise their clients about the requirements and assist them to comply.[74] For failing to meet this obligation, a lawyer may be ordered to bear adverse costs orders personally.[75]

11.52 The Act 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.[76]

11.53 The Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Civil Dispute Resolution Bill 2010 (Cth) found general support for the Bill's recognition of the importance of mechanisms that assist with the resolution of matters before they proceed to court, or that provide a means to clarify and narrow issues in dispute.[77] However, concerns were raised in the course of the Senate Committee's inquiry, particularly in relation to the mandatory nature of the 'genuine steps' obligation.[78] For example, the Committee noted that the Law Council of Australia (Law Council) had submitted that:

> while it supported early resolution of disputes without recourse to the courts if 'used effectively in the right cases', it had reservations about mandatory pre-action protocols for the federal jurisdiction.[79]

11.54 In relation to concerns about pre-action protocols, the Australian Government Attorney-General's Department submitted that the Bill 'is not a pre-action protocol, nor does it mandate ADR, or indeed, any particular steps'.[80]

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74 *Civil Dispute Resolution Act 2011* (Cth) s 9.

75 Ibid s 12(3).

76 Ibid s 18.

77 Senate Legal and Constitutional Affairs Legislation Committee, *Civil Dispute Resolution Bill 2010 (Provisions)* (2010), [3.1].

78 Ibid, [3.4]–[3.15].

79 Ibid, [3.4] citing Law Council of Australia, *Submission in Response to Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Civil Dispute Resolution Bill 2010* (2010) 8 and Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Provisions of the Civil Dispute Resolution Bill 2010: Transcript of Public Hearing* 11 November 2010, 8 (J Emmerig).

80 Senate Legal and Constitutional Affairs Legislation Committee, *Civil Dispute Resolution Bill 2010 (Provisions)* (2010), [3.9] citing Australian Government Attorney-General's Department, *Submission in Response to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Civil Dispute Resolution Bill 2010* (2010), 2; and Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Provisions of the Civil Dispute Resolution Bill 2010: Transcript of Public Hearing* 11 November 2010, 21 (M Minogue).

11.55 The Senate Committee agreed that the Bill does not introduce a mandatory pre-action protocol, stating:

> while it is obligatory to provide a genuine steps statement, the Bill provides flexibility to the parties to determine the steps that they wish to take to resolve their dispute and allows for circumstances when genuine steps cannot be undertaken.[81]

11.56 However, the Committee recommended that the Bill be amended to provide an inclusive definition of the word 'genuine' to better reflect the intention of the NADRAC report.[82] Two Senators, on the other hand, recommended that the phrase 'genuine steps' should be replaced with 'reasonable steps' to be consistent with the then *Civil Procedure Act 2010* (Vic) and proposed amendments to the *Civil Procedure Act 2005* (NSW).[83]

Amendments to the *Civil Procedure Act 2005* (NSW)

11.57 In May 2009, the NSW Attorney General released *ADR Blueprint: Discussion Paper* raising the introduction of pre-action protocols in the ADR context.[84] Three alternative options were discussed:

- a general pre-action protocol;
- 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,[85] and providing that serious failure to comply with the guidelines could result in an adverse costs order.[86]

11.58 For consideration by stakeholders the *ADR Blueprint: Discussion Paper* proposed amendments to the *Civil Procedure Act* to include the final option. As an alternative. It proposed 'practice directions ... mandating specific steps that must be taken before certain types of cases commence.'[87]

11.59 In August 2009, a draft recommendations report was released,[88] including a recommendation to extend the overriding purpose clause in s 56 of the *Civil Procedure Act* in two respects. This recommendation provided that, first, people in a civil dispute should take all reasonable steps (such as negotiation, mediation and other ADR processes) to resolve the dispute without litigation; and, secondly, if litigation is necessary, before proceedings are commenced the parties should take all reasonable

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81 Senate Legal and Constitutional Affairs Legislation Committee, *Civil Dispute Resolution Bill 2010 (Provisions)* (2010), [3.59].

82 Ibid Recommendation 1. This recommendation was implemented through Government amendments inserting cl 4(1A).

83 Ibid Additional Comments by Liberal Senators [1.1]–[1.4].

84 Department of Justice and Attorney General (NSW), *ADR Blueprint: Discussion Paper* (2009).

85 Ibid, 16.

86 Ibid.

87 Ibid, 17.

88 Department of Justice and Attorney General (NSW), *ADR Blueprint Draft Recommendations Report 1: Pre-action Protocols & Standards* (2009).

steps to agree to the real issues required to be determined by a court.[89] The report recommended that courts be empowered to make adverse costs orders in clear or obvious cases of non-compliance.[90]

11.60 The draft recommendations report also acknowledged that in NSW there were four types of matter that currently require participation in ADR before proceedings in a court or tribunal can be commenced—retail tenancy disputes, farm debt mediations, strata disputes, and common law work injury claims.[91] The report concluded that '[t]here are clearly other types of civil disputes in NSW where it would be appropriate to develop pre-action procedures requiring ADR'.[92]

11.61 In December 2010, the NSW Parliament enacted the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) which, amongst other things, inserts a new pt 2A—providing the steps to be taken before the commencement of civil proceedings—in the *Civil Procedure Act*.[93] Most civil proceedings in NSW courts are subject to the *Civil Procedure Act*.[94]

11.62 In the Second Reading Speech, the NSW Attorney General explained that:

> The reforms will require parties to identify the issues, exchange relevant information and, most importantly, to start talking to one another before they set foot in the courthouse. That not only will increase the chances of early settlement but also should assist the parties to keep the costs of resolution proportionate to the subject matter of the dispute.[95]

11.63 New pt 2A will apply to civil disputes and civil proceedings, other than those expressly excluded.[96] New pt 2A, which will come into force on 1 April 2011, will do two things.

11.64 First, it will introduce a general requirement—by way of new div 2—to take reasonable pre-litigation steps. This is essentially the specific draft recommendation outlined earlier. As is the case in the proposed Commonwealth statute, reasonable pre-litigation steps are not defined exhaustively. Rather, new s 18E(2) provides possible illustrative examples such as:

- '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';[97]

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89 Ibid, 7.
90 Ibid, 6.
91 Ibid, 8–9.
92 Ibid, 10.
93 *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) sch 6.
94 Department of Justice and Attorney General (NSW), *ADR Blueprint Draft Recommendations Report 1: Pre-action Protocols & Standards* (2009), 4. The report noted that the Act does not apply to the Dust Diseases Tribunal or to tribunal proceedings more broadly, referring to s 4 and sch 1 of the Act.
95 New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010, 28065 (J Hatzistergos—Attorney General), 28066.
96 *Civil Procedure Act 2005* (NSW) new s 18B(1). New s 18B(2) outlines excluded disputes such as a civil dispute with a person the subject of a specific vexatious proceedings order. New s 18B(3) outlines excluded proceedings such as ex parte civil proceedings or any appeal in civil proceedings.
97 Ibid new s 18E(2)(a).

- 'responding appropriately to any such notification ...';[98]
- 'exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute';[99]
- 'considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court';[100] and
- 'taking part in [ADR] processes'.[101]

11.65 The second notable feature of new pt 2A is that it will establish the framework for the development of specific pre-action protocols. It provides for rules of court (including the uniform rules) to set out a pre-action protocol,[102] as well empowering the Governor to make regulations setting out a pre-action protocol.[103] The Attorney General's Second Reading Speech suggests that it will be the courts that will be driving the development of 'appropriate tailored pre-action protocols in specific matter types'.[104] He also observed that, '[w]hen a bespoke pre-action protocol has been developed, compliance with it will meet the pre-litigation requirements ... to take reasonable steps'.[105]

11.66 New s 18J(1) provides that legal practitioners will have a duty to inform their clients about the applicability of the pre-litigation requirements to the dispute and to advise them about alternatives to the commencement of civil proceedings, including ADR. Section 99 of the *Civil Procedure Act* relevantly provides that where it appears to the court that costs have been incurred improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible, the court may order the legal practitioner to pay the whole or any part of any costs that their client, and/or in the case of a barrister, their instructing solicitor, has been ordered to pay. New s 18J(2) provides that, in determining whether a costs order should be made against a legal practitioner under s 99, the court may take into account the legal practitioner's failure to comply with s 18J(1).

11.67 Similar to the pre-action protocols in the UK, new s 18F provides that documents exchanged pursuant to pre-litigation requirements are subject to protection and their use is limited to resolution of the civil dispute, unless the parties agree otherwise in writing or the court provides leave. The Attorney General explained that:

> it is not intended that the parties be disadvantaged by disclosing relevant information and documents in accordance with the pre-litigation requirements. To this end, these reforms extend the existing protection for documents exchanged in the course of litigation to those disclosed in the pre-litigation process. These measures will ensure

98 Ibid new s 18E(2)(b).
99 Ibid new s 18E(2)(c).
100 Ibid new s 18E(2)(d).
101 Ibid new s 18E(2)(e).
102 Ibid new s 18C(4).
103 Ibid new s 18C(3).
104 New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010, 28065 (J Hatzistergos—Attorney General), 28066.
105 Ibid, 28066. New s 18C(1) of the *Civil Procedure Act 2005* (NSW) has this effect.

> that parties to a dispute can engage in frank and constructive negotiations that maximise the likelihood of settlement.[106]

11.68 New s 18K(1)(a) provides that failure to comply with the pre-litigation requirements does not prevent or preclude a person from commencing civil proceedings—unless the court otherwise orders or the uniform rules otherwise provide.

11.69 Further, the Attorney General explained:

> [The reforms make] it clear that parties are not required to take pre-litigation steps that are unreasonable or disproportionate in terms of costs or time. It also stipulates that a person's situation, which may include, for example, social or economic disadvantage ... can be considered when determining what is reasonable.[107]

11.70 If civil proceedings are commenced, new s 18G(1) provides that the plaintiff should file a 'dispute resolution statement'—similar to the 'genuine steps statement' proposed in the Commonwealth statute—at the time of filing the originating process for the proceedings. The statement must specify the steps they have taken to resolve or narrow the issues, or if no steps were taken, an explanation for that.[108] The relevant defendant must be served with a copy and must also file, when filing the defence, a dispute resolution statement—either stating their agreement with the plaintiff's dispute resolution statement or stating and specifying their disagreement.[109] Non-compliance with the requirement to file this statement does not invalidate the originating process, or the response to that process.[110]

11.71 New s 18L provides that, subject to div 5, or any court rules that provide to the contrary, the costs of compliance with pre-litigation requirements are borne by each party. 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.

11.72 However, new s 18M of the *Civil Procedure Act* relevantly provides that a court may order—on its own motion or on the application of a party to the civil proceedings—that a party pay all or a specific part of another party's costs of compliance with the pre-litigation requirements if it is satisfied that it is reasonable to do so.

Proposed repeal of pre-litigation requirements in Victoria

11.73 The *Civil Procedure Act 2010* (Vic) commenced on 1 January 2011 and adopted recommendations in the VLRC's *Civil Justice Review* that a general pre-action protocol should be implemented in Victoria.[111] The Act requires that: 'each person involved in a civil dispute must comply with the pre-litigation requirements prior to the

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106 Ibid, 28066.
107 Ibid, 28066. New s 18N(2) is the relevant provision.
108 *Civil Procedure Act 2005* (NSW) new s 18G(2).
109 Ibid new s 18H.
110 Ibid new s 18K(2).
111 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 142.

commencement of any civil proceeding in a court in relation to that dispute'.[112] The requirements are to take 'reasonable steps' to resolve the dispute by agreement or to clarify or narrow the issues in dispute.[113] 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, responses and timeframes for response for the purposes of reasonable steps.[114]

11.74 The provisions of the Act relating to pre-litigation requirements were to apply to civil proceedings commenced in the Victorian Supreme, County and Magistrates Courts on and after 1 July 2011.[115] However, in early February 2011 the then recently-elected Victorian Government introduced the Civil Procedure and Legal Profession Amendment Bill 2011 (Vic) that, amongst other things, seeks to repeal the pre-litigation requirements.

11.75 In the Attorney General's Second Reading Speech he explained the Government's rationale:

> The [pre-litigation requirements (PLRs)] require parties to a dispute, save in the case of specified and limited exceptions, to take what the act describes as 'reasonable steps' to resolve their dispute without resorting to litigation. The act is open-ended and unclear as to what parties are required to do to fulfil this requirement.
>
> ... If parties fail to comply with the PLRs, they are liable to be subject to costs penalties.
>
> ... [T]he government's view, and the view of many practitioners, is that to seek to compel parties to [attempt to resolve disputes without resorting to litigation] through these heavy-handed provisions will simply add to the complexity, expense and delay of bringing legal proceedings, because of the need to comply with these mandatory requirements, whether or not they are likely to be useful in any particular case.
>
> In many instances, the PLRs will allow dishonest parties to postpone and frustrate proceedings.
>
> These problems arise because the PLRs apply to all proceedings unless a specified exception is applicable ...
>
> ... Since the election, most parties with whom the government has consulted are of the view that, rather than adding to the complexity of the pre-litigation requirements by including yet more exceptions, it is better to remove the mandatory pre-litigation requirements altogether.
>
> ... [Section 9(2) will be retained and] will give the court discretionary power to take action against parties who act unreasonably in not seeking to resolve their dispute, without burdening all parties with unnecessary procedural requirements.[116]

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112 *Civil Procedure Act 2010* (Vic) s 33(1).

113 Ibid s 34(1).

114 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.

115 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 February 2011, 307 (R Clark—Attorney-General) 307; *Civil Procedure Act 2010* (Vic) s 33(2).

116 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 February 2011, 307 (R Clark—Attorney-General) 307.

11.76 The Explanatory Memorandum explained further that:

> the Bill will allow rules of court to be made for or with respect to any mandatory or voluntary pre-litigation processes in relation to specified civil proceedings or specified classes of civil proceeding.[117]

Queensland—personal injury claims

11.77 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.[118] Parties are required—within a certain timeframe—to disclose information and documents,[119] join any contributors[120] and provide formal notification of claims.[121] A compulsory conference must be held on completion of the pre-action requirements,[122] and parties are to exchange final offers at the conclusion of the conference.[123]

11.78 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 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.[124] The ALRC is not aware whether these recommendations in relation to a general pre-action protocol have been implemented.

11.79 Some have suggested that, as a result of the specific pre-action procedure being introduced, 'most personal injury litigation has disappeared' in Queensland.[125] Statistical data confirms a drop in proceedings initiated, however it is difficult to confirm that this is attributable to pre-action protocols.[126]

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117 Explanatory Memorandum, Civil Procedure and Legal Profession Amendment Bill 2011 (Vic), 1.
118 *Personal Injuries Proceedings Act 2002* (Qld) s 4(2).
119 Ibid ss 30–34.
120 Ibid ss 30–34.
121 Ibid ss 9–20J.
122 Ibid ss 36–38.
123 Ibid s 39.
124 Stakeholder Reference Group, *A Review of the Possibility of a Common Personal Injuries Pre-Proceedings Process for Queensland* (2004).
125 B Cairns, 'A Review of Some Innovations in Queensland Civil Procedure' (2005) 26 *Australian Bar Review* 158, 184.
126 Ibid. 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.

The need for a tailored approach?

11.80 The implementation issues identified earlier have led to considerable support for tailored pre-action protocols for specific types of dispute, recognising that in some instances there should in fact be no applicable protocol.[127]

11.81 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'.[128] Indeed, Lord Jackson's review found that general pre-action protocols led to substantial delay and additional costs, and recommended that the general protocol be repealed, because 'one size does not fit all'.[129]

11.82 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.[130] 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.[131]

11.83 Similarly, the *Strategic Framework* cautioned that not all matters that appeared before courts would 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.[132]

11.84 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.[133]

11.85 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 and sanctions; avoiding excessive front-loading of costs; and safeguards to avoid their misuse as a litigation strategy to inconvenience or intimidate the other party.[134] The report recommended that the Australian Government Attorney-General's

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127 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.

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

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

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

131 Ibid, 73.

132 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.

133 Ibid, 104.

134 Ibid, 104.

Department should work with federal courts to determine types of matters suitable for pre-action protocols.[135]

11.86 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 a dispute is not identified then it may be assumed that the dispute would have resolved without the protocol.[136]

11.87 In the Consultation Paper, the ALRC asked the following questions about pre-action protocols:

- what measures could be taken to reduce the front-loading of costs in relation to pre-action protocols;[137]
- what safeguards could be implemented to ensure that individual litigants are not denied access to justice as a result of the operation of pre-action protocols;[138]
- what requirements could be incorporated into pre-action protocols to maximise information exchange between parties in civil proceedings before federal courts;[139]
- what else should be included in pre-action protocols for particular types of proceedings to aid parties in narrowing the issues in dispute;[140] and
- whether cost sanctions are an effective mechanism to ensure that parties comply with pre-action protocols.[141]

11.88 The ALRC proposed that 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.[142]

Reducing front-loading of costs

11.89 Most of the submissions that responded to the question about measures that could be taken to reduce front-loading of costs,[143] made practical suggestions as to how pre-action protocols could be formulated so as to reduce the front-loading of costs. The measures suggested were either couched in broad terms or else argued that particular matters should be exempt from pre-action protocols.

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135 Ibid, rec 8.1.
136 M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 50.
137 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 5–1.
138 Ibid, Question 5–2.
139 Ibid, Question 5–3.
140 Ibid, Question 5–4.
141 Ibid, Question 5–5.
142 Ibid, Proposal 5–1.
143 Ibid, Question 5–1.

11.90 A number of submissions argued that an essential measure to reduce such front-loading of costs would be to take a tailored approach, whereby pre-action protocols are only used for suitable cases for the application of measures to reduce front-loading of costs.[144] The Civil Litigation Committee of the Law Society of NSW's Young Lawyers (NSW Young Lawyers) submitted that 'research indicates that protocols are likely to be more useful and cost-effective for cases with a significant amount of uniformity'.[145]

11.91 Michael Legg explained:

> Generally speaking [suitable cases] are matters that are likely to be contested and for which the costs associated with compliance with the pre-action protocol are proportionate to what is at stake in the proceedings.[146]

11.92 Several submissions suggested that complex commercial disputes may not be suitable cases,[147] at least for specific pre-action protocols.[148] The Queensland Law Society explained that 'in the case of commercial disputes, the parties may [already] have engaged in an unsuccessful contractual dispute resolution process'.[149] NSW Young Lawyers submitted that commercial litigation in the Federal Court and Federal Magistrates Court would be inappropriate matters for mandatory pre-action protocols.[150]

11.93 The Public Interest Advocacy Centre—whose submission was endorsed by both the Federation of Community Legal Centres (Victoria) Inc and the Public Interest Law Clearing House (Vic) Inc—submitted that 'the diversity of the issues (and evidence) required to successfully bring human rights claims' meant that it would be ill-suited to conceive of a specific pre-action protocol under the 'loose heading' of human rights.[151]

11.94 Other measures that were identified that could possibly assist in reducing the front-loading of costs in relation to pre-action protocols were ensuring that:

- the particular steps proposed to constitute a pre-action protocol had been carefully examined given that different steps will have different impacts on costs;[152]

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144 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

145 NSW Young Lawyers, *Submission DR 19*, 21 January 2011 citing M Legg and D Boniface, 'Pre-Action Protocols' (Paper presented at Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne, 2010).

146 M Legg, *Submission DR 07*, 17 January 2011.

147 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

148 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

149 Queensland Law Society, *Submission DR 28*, 11 February 2011.

150 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

151 Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011.

152 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

- parties were clear on the steps that they need to take;[153]
- protocols were not overly prescriptive;[154] and
- a proportionate approach was taken with respect to compliance with the protocol[155] 'which means [the parties] have a clear idea of what a case is worth' and 'the cost of compliance is a fraction of the amount at stake'.[156]

11.95 A group of large law firms submitted that '[t]his issue goes beyond a discussion limited to discovery' and it 'requires a very detailed response which we feel is beyond the current scope of the Consultation Paper'.[157]

Safeguards for access to justice

11.96 As to the safeguards that could be implemented to ensure that individual litigants are not denied access to justice as a result of the operation of pre-action protocols, submissions expressed a range of possibilities which suggests that a number of measures may be required. The Law Council observed that:

> courts will increasingly be required to assess whether disputants have acted reasonably, genuinely or even in a proportionate manner in respect of their pre-litigation activities. ... [S]ome courts have [already] begun to develop approaches. These broader approaches require courts to (in effect) determine whether an approach is unnecessarily wasteful.[158]

11.97 However, generally submissions varied depending on the view taken about how pre-action protocols could impinge upon access to justice and also depending on the view taken of who constituted an 'individual litigant'.

11.98 Legg submitted that the current requirements in the Commonwealth and the soon-to-be-repealed Victorian legislation on pre-action protocols—that provide that a failure to comply with the protocol does not prevent the commencement of litigation—do not *technically* impede access to justice. He submitted that this was because 'individual litigants ... are not prevented from accessing the court when they do not or are unable to comply with the pre-action protocol requirements'.[159] However, he acknowledged that '[t]his approach does not shield them from a later cost order'.[160]

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153 M Legg, *Submission DR 07*, 17 January 2011.
154 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
155 NSW Young Lawyers, *Submission DR 19*, 21 January 2011; M Legg, *Submission DR 07*, 17 January 2011.
156 M Legg, *Submission DR 07*, 17 January 2011.
157 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
158 Law Council of Australia, *Submission DR 25*, 31 January 2011.
159 M Legg, *Submission DR 07*, 17 January 2011.
160 Ibid.

11.99 For some, however, the costs implications of pre-action protocols were seen as a real impediment to access to justice.[161] For example, NSW Young Lawyers committee submitted that:

> One potential consequence of a failure to comply with an applicable protocol is that, unless the court orders otherwise, the infringing party would be ordered to pay the costs of the other party on an indemnity basis if unsuccessful. The Committee considers that the risk of an adverse costs order is a significant barrier to access to justice for self-represented litigants (and for financially disadvantaged parties generally).[162]

11.100 The Department of Immigration and Citizenship (DIAC) expressed concern that 'the front-loading of costs necessarily entails significant issues with regard to individuals' access to justice'.[163] Accordingly, 'the front-loading of costs must be kept to a level that does not make it prohibitively expensive for individuals to bring actions against Government agencies'.[164]

11.101 By contrast, a group of large law firms submitted that:

> The issue with respect to the application of pre-action protocols to individual litigants appears to arise from concerns that the protocols:
>
> (a) will require those litigants to obtain legal advice regarding compliance with pre-action protocols; or
>
> (b) could have the effect of unnecessarily restricting the individual's access to a fair hearing because his/her claim is deemed 'unmeritorious' prior to being considered by a [c]ourt.
>
> However, the nature of litigation is such that all litigants (not just individual litigants) will require advice and assistance to properly prepare and run a case. The existence of pre-action protocols may add to the matters in relation to which litigants obtain such advice, but their existence will not of themselves require litigants to obtain such advice.[165]

11.102 Legg queried what was meant by the expression 'individual litigant' in the ALRC's question:

> Does it mean:
>
> - a self-represented party who through lack of legal representation is either unaware or unable to comply with the relevant protocol;
> - any natural person, whether legally represented or not; or
> - any person, including corporations who must be legally represented?[166]

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161 Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011, citing Human Rights Law Resource Centre, *Submission in Response to the Victorian Law Reform Commission Civil Justice Enquiry Draft Civil Justice Reform Proposals* (2007).

162 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

163 Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

164 Ibid.

165 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

166 M Legg, *Submission DR 07*, 17 January 2011.

11.103 He submitted that '[t]he amount of leeway a court may or should give in relation to non-compliance is likely to vary depending on which of the above scenarios is applicable'.[167] He identified the following possible safeguards:

- Including the lack of legal representation or lack of financial resources in the matters to be considered in determining what are 'reasonable' or 'genuine' steps in relation to compliance with a protocol.
- Allowing an individual to apply to the [c]ourt to be relieved from compliance with a pre-action protocol.
- The provision of simple pro-forma letters of demand that can be used in relation to certain categories of case.[168]

11.104 NSW Young Lawyers focused on the needs of 'self-represented litigants (and ... financially disadvantaged parties generally)',[169] whereas the group of large law firms focused on the needs of 'all litigants'.[170] Accordingly, submissions proposed different possible safeguards depending on their view of who needed protection with respect to access to justice.

11.105 For NSW Young Lawyers, for example, 'access to justice for individual litigants can best be achieved where the costs of abiding by the protocols are not fixed'.[171] It was of the view that

> there is too much variation within Federal Court matters for fixed costs to provide any reasonable and reliable reimbursement to a party. If fixed costs were to be imposed, it is likely that the paying party would be advantaged at the expense of the party receiving the costs as fixed costs rarely reflect the true costs of litigation. ... [T]his may act to reduce access to justice.[172]

11.106 DIAC referred to the safeguard afforded by O 80 of the *Federal Court Rules* (Cth) which provides for the appointment of pro bono legal assistance by the court.[173]

11.107 By contrast, as the group of large law firms were of the view that '[a]s far as the need to obtain advice is concerned, the position of an individual litigant is no different to the position of any other litigant',[174] they did not consider there to be a need for any safeguards, other than acknowledging that:

> [t]he financial circumstances of the parties may be relevant to costs in circumstances where the court is asked to consider whether it is reasonable to require an individual litigant to comply with any of the steps required under a pre-action protocol.[175]

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167 Ibid.
168 Ibid.
169 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
170 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
171 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
172 Ibid.
173 Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.
174 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
175 Ibid.

Maximising information exchange

11.108 Several submissions critiqued the goal of 'maximising' information exchange.[176] For Legg, information exchange 'needs to focus on quality of information not just quantity'.[177] Both the Queensland Law Society and the group of large law firms thought that specific obligations to maximise information exchange may detract from the primary purpose of a pre-action protocol, namely to effect early resolution of the dispute.[178] The Queensland Law Society explained:

> If such protocols are required, they should not result in parties having to undertake significant, unregulated, searches for records in order to comply. The costs of complying could defeat the objectives of the process.[179]

11.109 The group of large law firms submitted that, 'in some instances, maximising information exchange may broaden, rather than narrow, the issues in dispute'.[180] For this reason—and to avoid possible 'fishing expeditions'—they cautioned that careful consideration needed to be given to the drafting of limits.[181] Rather than focusing on maximising information exchange, there is need for information exchange to be proportionate.[182] The group also submitted that the nature of the dispute was relevant in determining to what extent information should be disclosed pursuant to a pre-action protocol.[183] For example, there could be greater benefit in the early exchange of information in smaller scale disputes and such requirements would be 'particularly ill-suited to large complex disputes'.[184]

11.110 Legg advocated a broader approach: 'a party should disclose the documents or information which demonstrates why it has a cause of action or why it is entitled to relief'.[185] However, he acknowledged that 'such a requirement is more easily stated than complied with',[186] particularly given that '[p]re-action protocols apply prior to the filing of pleadings so that determining what the necessary information to exchange is may be even more difficult to define'.[187] Nonetheless, Legg submitted that:

> these tests may provide some guidance as to what would be an acceptable level of disclosure i.e. the documents or information that a party would reasonably expect to rely on if it was to commence legal proceedings.[188]

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176 Queensland Law Society, *Submission DR 28*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; M Legg, *Submission DR 07*, 17 January 2011.
177 M Legg, *Submission DR 07*, 17 January 2011.
178 Queensland Law Society, *Submission DR 28*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
179 Queensland Law Society, *Submission DR 28*, 11 February 2011.
180 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
181 Ibid.
182 Ibid; see also M Legg, *Submission DR 07*, 17 January 2011.
183 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
184 Ibid.
185 M Legg, *Submission DR 07*, 17 January 2011.
186 Ibid.
187 Ibid.
188 Ibid.

11.111 By contrast, the group of large law firms stated that:

> At a general level, we consider that it is too onerous to require parties attempting settlement in a pre-litigation phase to compile a list of 'critical documents' leading to a formal exchange with the other parties as this could unnecessarily distract or delay any settlement or ADR negotiations and, in our view, will lead to front-loading of costs. We are concerned about the rise of satellite litigation over the meaning of 'documents critical to the resolution of the dispute'.[189]

11.112 The Law Council cautioned against introducing provisions similar to the Victorian provisions, given that they have only been operating for a short time, 'in line with its position on pre-action protocols'.[190]

Narrowing issues in dispute

11.113 Only two submissions specifically responded to the question about requirements to aid the narrowing of the issues in dispute.[191] The Law Council explained that it concurred with some of the commentary in the Consultation Paper that 'obligations imposed on parties by pre-action protocols may not be able to take into account the nature of the dispute'.[192] By contrast, Legg submitted that:

> The issues in dispute may be further narrowed if parties are able to take the next step after the provision of relevant information/documentation and provide their perspective or interpretation as to why they are entitled to relief. The party should 'join the dots' for its opponent so that a party's position is clear.[193]

11.114 However, he acknowledged that such a solution is not problem-free, noting that:

> this additional step will incur additional costs as there is a need to provide a document that is compelling in its reasoning and legal analysis. Consequently, the amount of costs which are front-loaded are increased.[194]

Costs sanctions—an effective compliance mechanism?

11.115 Two submissions advocated the use of costs sanctions as an effective mechanism to ensure that parties comply with pre-action protocols. However, two other submissions expressed concerns. Some other possible compliance mechanisms were identified.

11.116 Both Legg and the NSW Young Lawyers submitted that there was value in using cost sanctions as a mechanism to ensure compliance with pre-action protocols.[195] Legg observed that '[t]he use of costs awards is a traditional sanction in litigation' and could assist to ensure compliance from the beginning, thus effecting the desired

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189 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
190 Law Council of Australia, *Submission DR 25*, 31 January 2011.
191 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 5–4.
192 Law Council of Australia, *Submission DR 25*, 31 January 2011.
193 M Legg, *Submission DR 07*, 17 January 2011.
194 Ibid.
195 NSW Young Lawyers, *Submission DR 19*, 21 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

cultural change.[196] NSW Young Lawyers emphasised that 'the deterrent value of costs sanctions will likely be necessary in order to ensure compliance with pre-action protocols'.[197]

11.117 A number of concerns were also expressed. A group of large law firms were concerned that such sanctions might give rise to further disputes:

> as to whether a party complied with a pre-action protocol, and a resulting risk of increased costs for both parties and impositions on the judicial system. We note also that most cases do not progress to final costs orders or subsequent taxation/assessment, and query how much of a discipline this will impose on any prospective plaintiff or defendant who is minded to abuse the process.[198]

11.118 The Law Council noted that there was little statistical data concerning the effectiveness of costs sanctions:

> Studies compiled after the introduction of the Woolf Reforms in the United Kingdom are difficult to obtain and in any event may be of limited relevance considering the differences in the legal culture and framework in Australia.[199]

11.119 Two submissions identified other options that could act as effective mechanisms to ensure that parties complied with pre-action protocols.[200] NSW Young Lawyers thought that in its discretion in making procedural directions, the Federal Court should be able to take an unreasonable failure to comply with a pre-action protocol into account.[201] The Law Council however thought that the 'management of disputes' would be a 'better' compliance mechanism than costs sanctions.[202] Earlier in the Law Council's submission, it had explained its preference for 'a tailored approach to pre-action protocols and particularly ADR within a multi-door court concept' where pre-action protocols—including discovery—would be managed by a court officer or ADR judge on a case-by-case basis.[203]

Specific pre-action protocols

11.120 There was a general lack of support for the ALRC's proposal that 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.

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196 M Legg, *Submission DR 07*, 17 January 2011.

197 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

198 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011. They only gave a limited response to the question because they argued that it 'appears to us to go beyond the issue of discovery'.

199 Law Council of Australia, *Submission DR 25*, 31 January 2011 citing DoCA (UK), *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (2002).

200 Law Council of Australia, *Submission DR 25*, 31 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

201 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

202 Law Council of Australia, *Submission DR 25*, 31 January 2011.

203 Ibid.

11.121 An issue that arose in two submissions—both in one submission in favour of the ALRC's proposal[204] and in one opposed to it[205]—was the contention that pre-action protocols do not really constitute alternatives to discovery. Both the group of large law firms and the Queensland Law Society were of this view.

11.122 Both acknowledged that pre-action protocols were directed at encouraging the early resolution of disputes, particularly by way of ADR. While a pre-action protocol ordinarily requires the early disclosure of information, neither submission considered that this equated to a true alternative to discovery.

11.123 The group of large law firms explained:

> The Commission's discussion of pre-action protocols suggests that a pre-action protocol might be an 'alternative' to discovery. Similarly, the questions raised in the Consultation Paper suggested that, provided specific issues such as front-loading of costs can be addressed, greater use of pre-action protocols will address problems connected with current discovery practices.
>
> As the Consultation Paper notes, pre-action protocols can be an important case management tool, facilitating ADR processes and early settlement of disputes. Where this is not possible, they may assist in narrowing the issues in dispute, which may reduce the extent of discovery required and thus reduce the time and expense associated with Court proceedings. However, we suggest that the formulation of pre-action protocols raise numerous issues that extend far beyond discovery and the scope of the present Inquiry. An appropriate pre-action protocol may go some way to addressing some of the problems with current discovery practices, but it will generally do so indirectly—by removing the need for litigation altogether, or by narrowing its overall scope. Pre-action protocols may yield some discovery-related benefits, but there does not appear to be any direct or necessary correlation.[206]

11.124 This submission also stated that '[i]t would not be appropriate to tailor pre-action protocols to address specific problems arising in discovery'.[207] The group's reasons for holding this view were that pre-action protocols:

- that are designed to address discovery issues might undermine the settlement of disputes—for example, a pre-action protocol designed to maximise information may be used as a 'fishing expedition'; and
- are not subject to the same regulation as is the case with preliminary discovery—for example, the latter requires that a party must have exhausted all other avenues of enquiry and ensures that they will only be granted discovery for specific limited purposes.[208]

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204 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
205 Queensland Law Society, *Submission DR 28*, 11 February 2011.
206 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
207 Ibid.
208 Ibid.

11.125 The group of large law firms concluded:

> Given the number of other considerations relevant to pre-action protocols, their introduction ought to be considered in a context which is broader than their impact on discovery.[209]

11.126 The majority of submissions that addressed the ALRC's proposal for the development of specific pre-action protocols did not support it,[210] focusing on possible problems with pre-action protocols. Some of the reasons advanced in opposition were that pre-action protocols could:

- increase costs,[211] particularly by way of front-loading costs;[212]
- impinge upon access to justice,[213] particularly by increasing complexities for unrepresented or self-represented litigants;[214]
- be inappropriate for public interest litigation where the aim of litigation is to obtain a legal ruling;[215]
- create some practical difficulties as a general obligation to produce 'key' documents may be too vague and ambiguous;[216] and
- delay the onset of litigation,[217] presumably where litigation is required due to the principles in question or the intransigence of the parties.

11.127 Of the twelve submissions that responded to this issue,[218] only three were clearly in favour of it,[219] and arguably each was in favour of the wording of the

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209 Ibid.

210 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

211 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

212 NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011;

213 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011;

214 Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011 citing Human Rights Law Resource Centre, *Submission in Response to the Victorian Law Reform Commission Civil Justice Enquiry Draft Civil Justice Reform Proposals* (2007).

215 The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011.

216 Australian Taxation Office, *Submission DR 14*, 20 January 2011.

217 Queensland Law Society, *Submission DR 28*, 11 February 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

218 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Australian Taxation Office,

proposal rather than the use of specific pre-action protocols as an alternative to discovery per se. For example, for the group of large law firms, '[p]re-action protocols are not an "alternative" to discovery',[220] although they considered that they 'may indirectly assist in resolving problems associated with the discovery process'.[221]

11.128 All three submissions that supported the ALRC's initial proposal agreed that there needed to be a tailored approach to pre-action protocols.[222] Legg explained:

> [A]s the success of pre-action protocols depends on a bespoke approach it follows that there must be research or at least consultation to determine which categories of case benefit from a protocol and what pre-action steps those cases should be subject to.[223]

11.129 The Law Council was of a similar view, arguing that '[d]etailed examination rather than a hasty implementation of specific pre-action protocols for streams of matters is required'.[224]

11.130 Legg also submitted that the proposed consultation would be 'essential so that norms of conduct and the goals of specific protocols are not devoid of reality and bear some resemblance to what can be reasonably expected'.[225]

11.131 For the Law Council, the proposal could be improved by use of the concept of a multi-door court house—as originally suggested in 1976 by Professor Frank EA Sander of Harvard Law School and which encompassed ADR.[226]

11.132 These three submissions were muted as to the advantages of specific pre-action protocols, as is illustrated by the comment of the large law firm group that—at best—pre-action protocols 'may indirectly assist' in addressing problems with the discovery process.[227]

ALRC's views

11.133 The ALRC considers that the question of measures that could be taken to reduce the front-loading of costs in respect of pre-action protocols goes beyond a discussion limited to discovery. As pre-action protocols are not an 'alternative' to discovery, the formulation of pre-action protocols raises a range of issues that extend beyond discovery and the scope of this Inquiry. Nevertheless there is value in canvassing the views on the matters raised as submissions provided constructive comments and insights.

Submission DR 14, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

219 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

220 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

221 Ibid.

222 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

223 M Legg, *Submission DR 07*, 17 January 2011.

224 Law Council of Australia, *Submission DR 25*, 31 January 2011.

225 M Legg, *Submission DR 07*, 17 January 2011.

226 Law Council of Australia, *Submission DR 25*, 31 January 2011.

227 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

11.134 The ALRC considers that some of the views expressed in submissions in respect of reducing the front-loading of costs reflect good sense. The ALRC considers that the measures suggested could possibly assist in reducing the front-loading of costs. However, the ALRC acknowledges that it may be a challenge to design pre-action protocols that meet all of these requirements. For example, there is a tension between ensuring the clarity of the steps while not being overly prescriptive.

11.135 The ALRC considers that a number of the safeguards to ensure access to justice that were suggested in submissions have merit, as reflected by the adoption of some in a number of jurisdictions. For example, the proposed amendments to the *Civil Procedure Act 2005* (NSW) specifically state that a court may have regard to whether or not the persons in dispute were legally represented in determining whether to take the failure to comply with the pre-litigation requirements into account.[228]

11.136 With respect to the question on requirements that could maximise information exchange, the ALRC agrees that, in a pre-litigation phase, it is preferable to aim for proportionate information exchange rather than focus on maximising information exchange.

11.137 Submissions took varying approaches as to what the requirements should be to assist this goal. Given the ALRC's view that pre-action protocols are only tangentially relevant to discovery, the ALRC considers that this Inquiry is not the appropriate place to express a concluded view.

11.138 Submissions diverged in their response to the issue of the effectiveness of costs sanctions as a compliance mechanism. The ALRC notes that while the use of costs awards is a traditional sanction in litigation, there is little statistical data available to assess the effectiveness in the context of pre-action protocols. The ALRC considers that it cannot express a view on the effectiveness of cost sanctions as a compliance mechanism in this context.

11.139 In the Consultation Paper, the ALRC expressed the initial view that there was a strong case for the development of specific pre-action protocols for particular types of dispute, as they could prescribe more directly than 'genuine' or 'reasonable' steps requirements the conduct expected of prospective litigants when it comes to information disclosure and document exchange.[229]

11.140 In light of submissions received—particularly the view expressed in two submissions that a pre-action protocol does not constitute a true alternative to discovery—the ALRC has re-evaluated the merits of its initial proposal.

11.141 The ALRC acknowledges that pre-action protocols aim to do more than ameliorate problems with discovery. This is particularly clear when one reflects on the fact that pre-action protocols are concerned with steps taken before the issuing of civil

228 *Civil Procedure Act 2005* (NSW) new s 18N(2)(a).

229 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), [5.72]–[5.74].

proceedings, whereas discovery is a procedure commonly sanctioned by the court in such proceedings. The two different procedures operate in different spheres.

11.142 The ALRC agrees with the large law firm group that '[p]re-action protocols may yield some discovery-related benefits, but there does not appear to be any direct or necessary correlation'.[230] While pre-action protocols may result in benefits in the discovery sphere—such as promoting a more cooperative culture and the narrowing of the issues in dispute, possibly resulting in reduced overuse of discovery, possibly reduced costs, and possibly the settlement of the dispute before a need for discovery arises—these are indirect, albeit positive 'by-products'.

11.143 The ALRC considers that there are a number of considerations relevant to the introduction of specific pre-action protocols. Indeed, the need to consider a number of issues is reflected by the series of questions that the ALRC asked of stakeholders, for example about measures to reduce the front-loading of costs, safeguards to ensure that access to justice is not impinged, and the effectiveness of cost sanctions to ensure compliance. The introduction of pre-action protocols should be considered in a context which is broader than their impact on discovery.

11.144 The ALRC concludes that it would be inappropriate to recommend the adoption of specific pre-action protocols from the perspective of wanting to address problems with discovery when they are not primarily aimed at remedying problems with discovery and given that their introduction raises a number of much broader considerations. In light of these considerations, the ALRC makes no recommendations in relation to the use of pre-action protocols.

Interim disclosure orders

11.145 In its *Civil Justice Review*, the VLRC recommended another alternative to traditional discovery—'interim disclosure orders'.[231] In order to reduce the delays and costs arising from discovery, the VLRC recommended that 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 to the first party of 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';

230 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
231 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 468.

- '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'.[232]

11.146 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.[233] However, there would be a practical exception to allow the other party to describe or identify an examined document for the purposes of obtaining discovery of such an identified document in the proceedings.[234] Other safeguards include access being limited to lawyers for a party, and any disclosure not giving rise to a waiver of privilege.[235]

11.147 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.[236]

11.148 The VLRC's recommendation bears similarities to a practice note applying in the Commercial List and Technology and Construction List in the NSW Supreme Court's Equity Division.[237] Under the practice note, a party may 'take a peek' at an opponent's database of documents on a 'without prejudice' basis.[238] The parties may then call for the production of particular non-privileged documents they wish to obtain, and the court may grant discovery.[239]

11.149 The VLRC's recommendation does not appear to have been specifically included in the suite of recommendations that were adopted and implemented by way of the enactment of the *Civil Procedure Act 2010* (Vic). However, that Act empowers a court to 'make any order or give any directions in relation to discovery that it considers necessary or appropriate'.[240] An order for interim disclosure may be such an order.

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232 Ibid, 474.
233 Ibid, 475.
234 Ibid, 475.
235 Ibid, 475.
236 Ibid, 468.
237 Supreme Court of NSW, *Practice Note No. SC Eq 3: Supreme Court Equity Division—Commercial List and Technology and Construction List* <http://www.lawlink.nsw.gov.au/> at 20 October 2010.
238 Ibid, [29].
239 Ibid, [31].
240 *Civil Procedure Act 2010* (Vic) s 55(1).

Submissions and consultations

11.150 In the Consultation Paper, the ALRC asked whether there was a need for new procedures for access to information in civil proceedings, such as 'interim disclosure orders'.[241] Only three submissions addressed this question.[242]

11.151 The Law Council appeared to support the approach, as it was of the general view that:

> [a] proposal ... that facilitate[s] the parties' understanding of the relevant dispute/s and the provision of access to relevant information for this purpose allows for higher prospects of settlement and/or the efficient conduct of the proceedings.[243]

11.152 Legg provided a personal anecdote to demonstrate that the Federal Court's case management powers were already sufficiently broad to 'craft' such procedures. He explained that he had

> previously acted for a client that provided discovery in federal court proceedings in a manner similar to that described for interim disclosure orders. The author's client collected all of its documentation that was relevant to the case based on a general discovery approach and then allowed the opponent to informally inspect the documents to indicate which materials it wanted discovery of. The subset indicated by the opponent then became the client's discovery. This approach differed from the interim disclosure orders described in that a review of all documentation took place before informal inspection was granted.[244]

11.153 Legg then referred to the relevant law in both the United States and Australia on the issue of preventing waiver of privilege when a party voluntarily provides access to privileged documents to their opponent by way of 'quick peek' and 'claw back' agreements. A 'quick peek' agreement refers to the situation where party A's counsel is permitted to review party B's relevant information; and party B only conducts its privilege review afterwards, in respect of that information which has been identified as being relevant by party A's counsel.[245] By contrast, in a 'claw back' agreement 'the parties agree to produce material in the usual manner without any intention that privilege be waived'.[246] Legg stated that, to his knowledge, 'there is no case law [in Australia] specifically applying [the relevant] principles to interim disclosure orders containing "quick peek" or "claw back" agreements'.[247] He concluded:

> There must be some level of uncertainty as to the effectiveness of such procedures in protecting privilege which may make lawyers and parties wary about adopting them, even if they could reduce costs. A court rule or statutory solution may be needed to provide certainty.

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241 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 5–8.

242 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

243 Law Council of Australia, *Submission DR 25*, 31 January 2011.

244 M Legg, *Submission DR 07*, 17 January 2011.

245 Ibid.

246 Ibid.

247 Ibid.

> It should also be noted that even if waiver of privilege is avoided the content of the privileged information is still seen by an opponent who may consciously or unconsciously use that knowledge in their litigation strategy. Some parties will not want to take this risk.[248]

11.154 The need to adequately address issues such as privilege, confidentiality, and the use of the documents was also of concern to the group of large law firms.[249] For this reason, they did not agree with the use of interim disclosure orders.

ALRC's views

11.155 The ALRC notes the concerns expressed in submissions about the need to ensure that privilege is not waived in circumstances where that is not the parties' intention. However, detailed consideration of this issue is outside the scope of this Inquiry.

11.156 The ALRC notes that a key feature of the model for interim disclosure orders, recommended by the VLRC in its *Civil Justice Review*,[250] is that the documents are able to be identified and located without unreasonable burden or unreasonable cost to the first party. It is unclear from Legg's anecdote whether, in that case, the prior privilege review of the documentation was so extensive as to be considered an unreasonable burden or unreasonably costly. If such a privilege review can be conducted, without unreasonable burden or cost, then arguably at present it is open to the Federal Court to order, or open to a party to request an order for the kind of interim disclosure order that Legg mentioned.

Other possible alternatives

Civil jurisdictions

11.157 The ALRC notes the suggestion that reforms should also consider civil law jurisdictions, such as that in Germany, as one possible alternative to discovery in federal courts.[251]

11.158 Only one submission mentioned the German model.[252] A group of law students reviewed the German system and concluded that it was not the most instructive, '[g]iven the differing legal heritage and procedure of common and civil law jurisdictions'.[253]

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248 Ibid.

249 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

250 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 468.

251 R Ackland, 'We Should Look to Germany for Justice', *Sydney Morning Herald* (online), 1 October 2010, <http://www.smh.com.au/opinion/society-and-culture/we-should-look-to-germany-for-justice-20100930-15zcz.html>.

252 Just Leadership Program, *Submission DR 01*, 7 October 2010.

253 Ibid. The ALRC acknowledges and thanks Monash Law Students' Society 'Just Leadership' Program Participants for their research undertaken in respect of the German system.

11.159 As noted in the Consultation Paper, the ALRC considers that a review of the civil law system, and how it deals with discovery, is beyond its Terms of Reference.[254] Chapter 2 discussed the civil law tradition.

Ensuring other possibilities are considered

11.160 In the Consultation Paper, the ALRC asked for stakeholder views about the best way to ensure that federal courts consider alternatives to the discovery of documents in civil proceedings.[255]

11.161 Only two submissions addressed this question.[256] They advanced four possibilities to ensure that federal courts considered alternatives to the discovery of documents in civil proceedings, namely:

- consultation with relevant stakeholders;[257]
- a court rule or practice note;[258]
- judicial education;[259] or
- an innovative judicial decision.[260]

11.162 The Law Council submitted that the 'best way' was through consultation with relevant stakeholders.[261] It suggested that:

> representatives of the Australian Government and the Federal Court and relevant stakeholders should meet to discuss alternatives to the discovery of documents in civil proceedings.[262]

11.163 By contrast, Legg submitted:

> A practice note that links minimising the cost of discovery to the overarching purpose by requiring consideration of whether the information sought can be obtained from another source or through an alternative mechanism for accessing documents that is cheaper and quicker than discovery, would be a starting point. There then needs to be some examples of what those other sources or mechanisms may be. In terms of mechanisms it may mean using subpoenas, interrogatories or depositions instead of discovery if they are more efficient.[263]

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254 See Terms of Reference at the front of this Report. 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'.

255 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 5–9.

256 Law Council of Australia, *Submission DR 25*, 31 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

257 Law Council of Australia, *Submission DR 25*, 31 January 2011.

258 M Legg, *Submission DR 07*, 17 January 2011.

259 Ibid.

260 Ibid.

261 Law Council of Australia, *Submission DR 25*, 31 January 2011.

262 Ibid.

263 M Legg, *Submission DR 07*, 17 January 2011.

11.164 The four possibilities advanced in submissions all appear to be sound ways of ensuring that federal courts consider alternatives to the discovery of documents in civil proceedings. As this issue generated such a low level of discussion, the ALRC considers that it would be inappropriate to comment other than to suggest that Australian Government policy makers, members of the judiciary, and judicial education providers may possibly find it useful to reflect on these possibilities.