2. Framework for Reform

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Introduction—the reform challenge

2.1 This Report contains 27 recommendations for reform. The recommendations reflect, on the one hand, the Government’s broad objective expressed in report of the Australian Government Attorney-General’s Department Access to Justice Taskforce, A Strategic Framework for Access to Justice in the Federal Civil Justice System (Strategic Framework), of ‘ensuring that the cost of and method of resolving disputes is proportionate to the issues’,¹ and the specific objective as signalled in the Terms of Reference, of identifying law reform options to improve the practical operation and effectiveness of discovery of documents in federal courts.² On the other hand, the recommendations are underpinned by a framework of principles that provide the policy foundation for the law reform solutions contained in this Report.

2.2 This Inquiry focuses on one aspect of practice in the federal courts—the discovery of documents. In advancing law reform recommendations in relation to discovery, the ALRC was mindful of the need to consider the practice in its litigation

² The Terms of Reference are set out at the front of this Report.
context, and not in isolation. In a submission to this Inquiry, the Australian Taxation Office emphasised that:

> It is both important to the cultural change necessary for a change to discovery, but also to litigation generally, that discovery reform be an element of overall efficient case management, rather than a discrete aspect of litigation.³

2.3 Some issues, like pre-action steps and costs, are systemic issues. Discovery may be an issue of concern in both respects, but not in isolation. Where issues are of a systemic kind, the ALRC considers that reform is best considered more generally, not through the lens of a specific doctrine—such as discovery.

2.4 This chapter includes two parts: the first provides a brief analysis of the policy landscape in which discovery operates, including an evaluation of its rationale, its adversarial context and a consideration of the policy tensions presented in a review of its operation; the second provides an outline of the key principles embodied in the recommendations for reform.

**Policy landscape**

2.5 In approaching the problems to be considered, as defined in the Terms of Reference, a key step in the consideration of law reform responses is to identify the overall policy landscape—to evaluate the rationale of discovery in both its historical and contemporary settings, and to consider its role in the context of the adversarial litigation of the common law.

**Evaluating rationale**

2.6 As noted by Professor Camille Cameron and Jonathan Liberman, discovery has ‘a long history in common law systems’, and its centrality to fact-finding and decision-making processes has ‘long been recognised’.

> The primary aim of discovery is to ensure that litigants disclose to each other all relevant, non-privileged documents, whether that disclosure helps or hurts their respective cases, so that they will know the case they have to meet and judges will have the evidence they need to do their job effectively.⁴

2.7 The responsibility of providing discovery was described in a leading 19th century text on the subject, by Edward Bray:

> However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes or thinks in relation to the matters in question. ... In fact, one of the chief purposes of discovery is to obtain from the opponent an admission of the case made against him.⁵

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⁵ E Bray, *The Principles and Practice of Discovery* (1885), 1.
2.8 Bray explained that a party was entitled to discovery for the following purposes:

to ascertain facts material to the merits of his case, either because he could not prove them, or in aid of proof and to avoid expense; to deliver him from the necessity of procuring evidence; to supply evidence or to prevent expense and delay in procuring it; to save expense and trouble; to prevent a long enquiry and to determine the action as expeditiously as possible; whether he could prove them \emph{aliunde} or not; to facilitate proof or save expense.\(^6\)

2.9 The advantages of discovery are said to include:

fairness to both sides, playing ‘with all the cards face up on the table’, clarifying the issues between the parties, reducing surprise at trial and encouraging settlement. Any system of disclosure should have as a broad rationale the just and efficient disposal of litigation. It is against this broad rationale that any reforms should be considered.\(^7\)

2.10 The relevant question in the law reform context is whether this rationale remains valid today.

\textit{History}

2.11 The procedure of discovery derives from early Chancery practice.\(^8\) Common law processes were much more limited, and the methods for getting the evidence of facts in issue before the courts were ‘most rudimentary’.\(^9\) Equity helped ‘to combat the rigidity of the law’, in particular by coming to grant discovery in aid of proceedings on the common law side.\(^10\)

The Chancellor by means of the writ of subpoena and his power to commit for contempt exercised strict control over the persons of all parties to a suit. He could order them to act in any way he saw fit in order to secure justice. Thus he could examine them; and, in aid of proceedings either in his own court or in the courts of common law, could enforce the discovery of documents in their possession. It was because he was able to exercise this control that he was able to give remedies which the common law courts could not give.\(^11\)

2.12 After 19th century reforms of procedure introduced in England, and consolidated in the Judicature Acts of 1873–75,\(^12\) the equitable procedure became more accessible. As explained by Lander J in \textit{Brookfield v Yevad Products Pty Ltd}, the purpose of including a regime which allowed for discovery was ‘to ensure that parties had full access to all relevant material in their hands or their opponents’:

\(^6\) Ibid, 1–2.

\(^7\) P Matthews and H Malek, \textit{Disclosure} (2007), 4, [1.03].

\(^8\) Although its origins can be traced to civil law: C Cameron and J Liberman, ‘Destruction of Documents Before Proceedings Commence—What is a Court to Do?’ (2003) 27 \textit{Melbourne University Law Review} 273, 276.


\(^12\) \textit{Common Law Procedure Act 1852}, 17, 18 Viet c 125; \textit{Judicature Acts 1873, 1875}, 36, 37 Viet c 66; 38, 39 Viet c 77.
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[Discovery] was introduced as part of the simplification of the courts’ processes. The Judicature Acts were passed in order to introduce a civil legal system which was understandable and which had procedures which would enable litigation to be conducted efficiently, expeditiously and reasonably inexpensively.13

Contemporary context

2.13 The key elements of Chancery’s discovery procedure, as described by Bray and by Lander J, were to facilitate fact-finding, to save time and to reduce expense. The modern law of discovery reflects the same rationale, as ‘a cornerstone’ of contemporary discovery process:

Inclusion of discovery in the post-Judicature Acts rules of civil procedure was intended to reflect and advance the philosophy behind the Judicature Acts, especially to simplify procedure, to avoid trial by ambush and to increase the prospect of a court deciding a matter on the merits rather than on a technicality. Among the potentially beneficial attributes of the modern common law discovery process are: it assists the parties to prepare for trial; it facilitates settlement; it can (but often does not) reduce time and expense and provide relief for overcrowded court dockets; it may result in narrowing the issues in dispute; and it ‘may prevent a party being taken by surprise at trial and enable the dispute to be determined upon its merits rather than by mere tactics’.14

2.14 An underlying rationale of fairness, of doing justice between the parties—even within the context of litigation which is adversarial—was identified by Lord Donaldson MR in Davies v Eli Lilly & Co, in describing the nature of the right to seek discovery:

The right is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted ‘cards face up on the table’. Some people from other lands regard this as incomprehensible. ‘Why’, they ask, ‘should I be expected to provide my opponent with the means of defeating me?’ The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.15

2.15 A number of submissions commented about the role of discovery today. The Litigation Law and Practice Committee of the Law Society of New South Wales, for example, affirmed that:

discovery is essential to litigation to clarify the issues in dispute and to identify facts and evidence to assist the Court to determine the appropriate outcome. The Committee supports the general approach taken in the Consultation Paper that ‘discovery is a legitimate and valuable mechanism that aids the transparency of litigation in the Federal Court and facilitates an informed analysis by the parties of the strengths and weaknesses of their respective cases’.16

15 Davies v Eli Lilly & Co [1987] 1 All ER 801, 804.
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2.16 The Queensland Law Society submitted that discovery is an aspect of procedure that can lead to the settlement of disputes. It remarked, as ‘a general observation’, that:

> discovery plays a very important role in the administration of justice and in leading to the resolution of many proceedings without the need for expensive trials.17

2.17 While signalling that ‘there is considerable scope to improve the way that discovery operates in the Federal Court’, the Australian Government Solicitor reiterated its importance:

> Discovery (especially in limited terms), in an appropriate case, is an important feature of common law systems which helps to ensure that parties in the adversarial process can proceed on an equal footing and without ambush, and that relevant materials are before the court.18

2.18 In the contemporary context, the rationale of discovery—as reflected in its history—is expressed in s 37M of the Federal Court of Australia Act 1976 (Cth), introduced as part of a package of amendments in 2009 and commencing on 1 January 2010. This provision articulates the ‘overarching purpose’ of civil practice and procedure provisions in the Court:

1. The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
   (a) according to law; and
   (b) as quickly, inexpensively and efficiently as possible.

2. Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
   (a) the just determination of all proceedings before the Court;
   (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
   (c) the efficient disposal of the Court’s overall caseload;
   (d) the disposal of all proceedings in a timely manner;
   (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

3. The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.19

2.19 The articulation of the ‘overarching purpose’ is an innovation that flowed from Lord Woolf’s recommendations in his report on access to justice in England and

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19 Access to Justice (Civil Litigation Reforms) Amendment Act 2009 (Cth).
Wales.\textsuperscript{20} Section 37M of the \textit{Federal Court of Australia Act} applies to all civil proceedings before the Federal Court, and applies to both the Court and parties to the proceedings, ‘in recognition of the fact that it would not be possible for either the Court or the parties to achieve this objective without the assistance of the other’.\textsuperscript{21} Section 37N(2) makes clear that this duty also applies to a party’s lawyer—to act consistently with the overarching purpose and to assist the party to comply with that duty.

\textbf{Adversarial context}

2.20 Discovery is a doctrine that is part of common law civil procedure, described traditionally as ‘adversarial’. Civil law jurisdictions have been identified as having processes that are traditionally described as ‘inquisitorial’.

The origins of the [civil law] lie in Roman Law and the code civil of nineteenth century France, while the common law derives from medieval English civil society. The transplantation of both legal families throughout the western world and beyond was assured by the French and British empires.\textsuperscript{22}

2.21 In an adversarial system it is the parties, not the judge, who have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute, whereas in the inquisitorial system the judge has primary responsibility. The role of the judge in the adversarial system reflected what Dean Roscoe Pound of Harvard Law School described in 1906 as ‘the sporting theory of justice’ in which the judge played the role of ‘umpire’:

we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of sport.\textsuperscript{23}


\textsuperscript{21} Explanatory Memorandum, \textit{Access to Justice (Civil Litigation Reforms) Amendment Bill 2009} (Cth), [15].


\textsuperscript{23} R Pound, ‘The Causes of Popular Dissatisfaction with the Administration of Justice’ (1906) 29 \textit{American Bar Association Annual Report} 395, 404, 405. The lecture was a call to improve court administration and a preview of his theory of law. It has remained a classic statement on the need for efficient and equitable judicial administration.
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> The terms ‘adversarial’ and ‘inquisitorial’ have no precise or simple meaning and to a significant extent reflect particular historical developments rather than the practices of modern legal systems. No country now operates strictly within the prototype models of an adversarial or inquisitorial system.24

2.23 Moreover, as the ALRC had commented in a preceding Issues Paper, the two systems were ‘far from polar opposites’:

> Both have as their overall objective the establishment of systems for the just resolution of disputes and the maintenance of social order. It is their means of achieving such ends which differ.25

2.24 In this Inquiry, the ALRC was asked 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’. The Consultation Paper traversed a range of examples, including from the United States, the United Kingdom, New Zealand and in international arbitration. In the *Managing Justice* inquiry, the ALRC was given a more direct brief to consider civil litigation procedures in civil code jurisdictions.26 In the course of that inquiry the ALRC analysed the differing models of common law and civil law jurisprudence.

2.25 In the context of this Inquiry, the element of particular interest is the role of the judge and how actively the judicial officer ‘manages’ the given case. In an adversarial model, the role of the judge in the context of discovery was, historically, a somewhat disengaged one—as ‘mere umpire’, as Pound suggested.27 While the models suggest distinct differences between the judge of the civil law compared with the common law tradition, the ‘gap’ is closing:

> Traditionally the common law judge had limited power over the direction or substance of the case and, in reaching a conclusion and writing a judgment, was limited by the facts presented and the arguments raised by the parties. In comparison, the judge in a conventional civil law inquisitorial model is expected to pursue actively whatever avenues will result in resolution of the disputes, in a continuous process of inquiry encompassing trial and pre-trial stages. Judges in Australian courts are becoming more active in defining the issues in dispute and moving cases forward to a

hearing. The development of managerial judging and case management in Australian courts constitute reactions to the procedural excesses of adversarial litigation.28

2.26 In ALRC DP 62, the ALRC pointed to the ‘significant degree of convergence of the practices in common law and civil code countries, in civil matters’. 29 Research by Annette Marfording and Dr Anne Eyland comparing German and Australian civil procedure, published in 2010, pointed similarly to the convergence of the systems. 30 In Australia the ‘civil litigation system is increasingly a blend of adversarial and non-adversarial elements’. 31 As noted in a submission to this Inquiry by Christopher Enright and Simon Lewis, ‘[i]n fact, most systems that are labelled adversarial usually have a significant component that is not adversarial’. 32

In the Managing Justice inquiry, the ALRC concluded that the construct of a dichotomy of systems was therefore ‘too elusive’ as a basis of formulating change to the civil justice system and that ‘the adversarial–non adversarial debate simply obscures effective reform’. 33 The ALRC focused, instead, on change to judicial and administrative processes and informal dispute resolution schemes. 34

2.27 Another model or description of civil litigation was described—‘managerial judging’:

Managerial judging often takes place in the broader context of a case management system, used by courts to control the progress of cases generally. Managerial judging and case management shift the balance towards judicial rather than lawyer or party control of litigation. Another aspect of this form of judicial activism is that sometimes judges act in a ‘facilitative’ rather than an adjudicative manner, that is by encouraging the parties to settle their dispute.35

2.28 In this Report, the ALRC’s recommendations are based on a model that is ‘facilitative’, with continuing emphasis on the role of the judge in facilitating the resolution of the matter through active case management to offset what some argue is the problem of the adversarial nature of proceedings—or overly adversarial practice. The ALRC considers that the most effective way to facilitate the resolution of disputes in the Federal Court of Australia is through robust case management—hence the title of this Report, Managing Discovery. Such a model preserves the discretion of the judge

32 C Enright and S Lewis, Submission DR 03, 12 January 2011, including an extract of the booklet, ‘Reforming Discovery in Litigation’ (2011), 11.
34 Ibid, [2.32].
while at the same time introducing greater clarity of expectations in relation to discovery. The principal vehicle chosen for this in this Report is through the mechanism of practice notes, issued by the Chief Justice, as being flexible and responsive tools for guiding practice in the Court and, through the greater certainty of expectation introduced, greater consistency of outcome may be achieved.

2.30 Embracing a facilitative model continues the pattern of civil procedure reform identified in the Managing Justice inquiry and as reflected, for example, in the introduction in the Federal Court of:

- the ‘docket system’, in which cases are allocated to a particular judge who is responsible for the case through the Court;\(^{36}\)
- the ‘overarching purpose’ provision in the Federal Court of Australia Act, aimed ‘to facilitate the just resolution of disputes’;\(^{37}\)
- a suite of case management practice notes issued by then Chief Justice Michael Black on 25 September 2009 concerning, for example, discovery, electronic technology and ‘fast track’ proceedings;\(^{38}\) and
- mediation of disputes.\(^{39}\)

2.31 The model of ‘facilitation’ is used deliberately, and in contrast to the term ‘managerial’, which may be seen to have specific—often negative—connotations. For example, the Hon Chief Justice James Spigelman of the New South Wales Supreme Court has been a strong critic of the use of the language of management in application to the Court. In a speech in September 2006—one of a number along similar lines—he commented that:

> At the heart of managerialism is the assumption that something called ‘management’ is universally applicable to all areas of organised life. This is not a neutral assumption. Nor is the belief in pantometry [universal measurement]. The managerialist focus is on matters capable of measurement, like efficiency and effectiveness. This does not, however, represent the full range of values which are of significance for public decision-making. Other values such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality are also of significance.\(^{40}\)

2.32 The rationale of discovery was that it facilitated fact-finding, to save time and reduce expense. A model that continues to facilitate the resolution of disputes in an expeditious, efficient and relatively inexpensive manner,\(^{41}\) marries the original rationale with contemporary trends in case management. Viewed in this policy context,

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36 See Ch 8.
37 Federal Court of Australia Act 1976 (Cth) s 37M.
38 Practice Note CM 5: Discovery (Federal Court of Australia); Practice Note CM 6: Electronic Technology in Litigation (Federal Court of Australia); and Practice Note CM 8: Fast Track (Federal Court of Australia).
the function of discovery, leading towards the resolution of matters ‘should not be overlooked’.  

2.33 While the sheer volume and range of documents available in contemporary contexts challenges the objective of facilitating fact-finding, documents still play a crucial role in litigation generally:

> Documents are not simply obtained from a client for the purposes of discovery. The primary purpose of gathering documents from a client is to consider and advise on the client’s position. Care must be taken to ensure that any reforms do not hamper the ability of a lawyer to properly advise the client.

2.34 The challenge is to recognise the important role that discovery can play in facilitating the resolution of disputes, but to review its operation in the context of the reality of modern information creation and retention and the development of active case management practices.

**Identifying policy tensions**

2.35 There are several areas of tension that presented challenges in this Inquiry with respect to: the professional obligations owed by lawyers; the public costs of protracted proceedings as against the individual’s right to pursue justice; the explosion in information generation and retention; and the barrier to access to justice as a result of high costs.

**The lawyer’s duties**

2.36 There is an inherent tension between the interests of the party requesting discovery, who seeks to ascertain facts material to the case, and the party giving discovery, who bears the burden of retrieving, reviewing and disclosing documents in response to discovery requests—especially when located in an adversarial context. This tension is reflected particularly in Chapters 5, 6 and 12 of this Report, which discuss discovery practice and procedure and legal ethics in federal courts.

2.37 There is also a tension between the key obligations owed by a lawyer to a client—to represent and protect the best interests of a client—and the overarching duty to the court in the interests of the administration of justice.

**The public cost**

2.38 In a broader sense a tension also arises between the policy drive to reduce the public costs of justice, through a reduction in the time that litigation occupies the courts, and the right of litigants to pursue their rights to achieve justice under the law. Discovery can occupy a great deal of time and money and, as a consequence, ‘is not very efficient’. Counterbalanced against this inefficiency is that ‘a party is entitled to
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a reasonable opportunity to present their case.\textsuperscript{45} Chief Justice Spigelman has spoken publicly about the tensions between ‘efficiency’ and ‘justice’:

The promotion of efficiency is not just about saving money for government, although that is a perfectly legitimate consideration. It also involves substantive issues; the quality of justice being degraded by delay, access to justice, fairness and, ultimately, public confidence in the administration of justice.\textsuperscript{46}

2.39 In this Inquiry, the Law Society of New South Wales pointed to the ‘volatile tension’ between the competing interests of reducing public cost and the parties’ rights:

In contemporary practice the Courts and commercial litigants have struggled from time to time to balance the competing interests of ‘quick and cheap’ resolution of civil litigation, with the need to identify and discover electronically stored information most relevant to the issues in dispute, to ensure that the determination is also ‘just’.\textsuperscript{47}

2.40 In its review of the civil justice system in Victoria, the Victorian Law Reform Commission (VLRC) identified similar tensions:

Courts are required not merely to adjudicate disputes but to do so in a manner which is ‘just’ and ‘fair’. These fundamental requirements create tension with the goals of achieving the economical and expeditious resolution of civil proceedings. Achieving a just outcome means not only obtaining the correct result but doing so ‘within a reasonable time and by a proportionate use of court and party resources’.\textsuperscript{48}

The information challenge

2.41 There is also an overarching challenge that, as information technology has developed, so too has the exponential growth and storage of documents in an electronic format. This has required, in part, the development of document management policies and practices to respond to the voluminous nature of information capture.

2.42 The challenge posed by electronic forms of communication and storage in the context of seeking to improve the practical operation and effectiveness of discovery of documents is, in practical terms, one of simply ‘too much information’;\textsuperscript{49} and the ‘nearly universal use of email creates a range of issues relating to the efficient and cost effective operation of the discovery process’.\textsuperscript{50} Hence ‘the starting point for any discovery exercise today is a vast collection of documents stored in a myriad of places and formats’.\textsuperscript{51} When this is placed in the context of commercial litigation, the volume of information becomes particularly problematic:

\begin{itemize}
  \item \textsuperscript{45} Ibid.
  \item \textsuperscript{46} J Spigelman, \textit{Judicial Accountability and Performance Indicators} (2001).
  \item \textsuperscript{47} Law Society of NSW, \textit{Submission DR 22}, 28 January 2011.
  \item \textsuperscript{49} e.law Asia Pacific Pty Ltd, \textit{Submission DR 16}, 20 January 2011.
  \item \textsuperscript{50} NSW Young Lawyers, \textit{Submission DR 19}, 21 January 2011. In \textit{Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia} [2007] WASC 65 there were nearly 11.5 million emails for the relevant four-year period.
  \item \textsuperscript{51} Law Society of NSW, \textit{Submission DR 22}, 28 January 2011.
\end{itemize}
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The use of electronic communications, tools and related technology in modern business has meant that an enormous number of documents and communications are created, sent and stored electronically, in many different formats. Accordingly the discovery of electronic documents, and the problems and challenges that it raises, are key issues in any analysis of discovery practice and procedure. Even small and fairly focused disputes can raise issues requiring the examination of large numbers of electronic documents to identify relevant communications or documents. In light of this, and the fact that most relevant materials are stored and managed electronically by parties, for discovery processes to be effective and cost efficient, it is essential that technology be used proactively in those processes.\(^52\)

2.43 Such observations about the nature of information and its management reveal particular consequences in the context of litigation: underlying information management practice (or lack of it); and the problems of information retrieval—even with good information management systems in place. With respect to information management practice, the Association of Legal Support Managers (Queensland) commented that:

Perhaps the single greatest challenge in discovery is how to effectively and efficiently deal with the ever increasing volume of records being retained by organisations (noting that, due to email and social networking, many of the records retained may not relate directly to the business at all). Technology has facilitated the easy retention of all records coming into, leaving, or created in, organisations. Conversely, technology has also made it particularly difficult to destroy records that are no longer required. The appropriate destruction of records is made more complex by numerous legal considerations.

Compounding the difficulties faced when dealing with these increasing number of records is the fact that many organisations do not have in place systems for managing records. Accordingly, when a lawyer wishes to undertake a review of records for the purpose of case preparation or discovery, the lawyer often encounters large numbers of disorganised records and is tasked with having to create a system for managing those records before any consideration can be given to commencing a review.\(^53\)

2.44 The volume of electronic information has a multiplier effect in terms of the expertise required to manage it:

The expense associated with retrieving electronic records includes the cost of information technology experts, the providers of litigation support systems (often not associated with law firms) and other providers of document storage systems devoted to holding vast repositories of documents gathered in discovery for the duration of the litigation. These expenses can constitute a large proportion of the costs associated with producing documents on discovery and are additional to the lawyers in reviewing the potentially discoverable material. The costs to the litigant include the time spent in gathering documents which is time diverted from the objects of the litigant’s business.\(^54\)

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\(^52\) Allens Arthur Robinson, Submission DR 10, 19 January 2011.
\(^53\) Association of Legal Support Managers (Qld), Submission DR 29, 11 February 2011.
\(^54\) Law Society of NSW, Submission DR 22, 28 January 2011.
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2.45 The arduous nature of the process due to so much information means that ‘delay is itself a by-product’, particularly where the range of material sought is wide. As noted by the Civil Litigation Committee of NSW Young Lawyers:

in general, more information is generated than is necessary for the just and efficient disposal of the litigation. The Committee is of the view that this is a product of both the increased level of electronic documents being generated in modern commerce and the considerable onus placed on practitioners and parties to discover all relevant documents in a party’s possession.

2.46 A number of commentators have noted the distorting effect that technology has had on discovery costs. For example, the Hon Acting Justice Ronald Sackville of the New South Wales Supreme Court, formerly a judge of the Federal Court, remarked extra-curially that:

extraordinary and disproportionate costs are frequently incurred by parties to litigation. Far too often the search for the illusory ‘smoking gun’ leads to squadrons of solicitors, paralegals and clerks compiling vast libraries of materials, much of which is of no significance to the issues in the proceedings. The problem has been compounded, not alleviated, by the exponential growth of electronic communications which can be tracked and often reconstructed after deletion.

2.47 The sheer volume of data that must be managed in modern trade and commerce can blow out the cost of searching through electronic material for the purposes of discovery, resulting in costs disproportionate to the value of the documents discovered—in terms of their use in litigation. The increasing amount of information which contemporary litigants must deal with was highlighted in *Betfair v Racing New South Wales*. In this case, one source of discoverable documents was ‘an electronic data warehouse containing the electronic records of over 2.52 million customers and occupying some 21 terabytes of memory growing at 70 gigabytes per day’.

2.48 The great mass of information available tests the rationale of discovery—to facilitate fact-finding, save time and reduce expense. Rather than assisting in narrowing issues, it can overwhelm the litigation and affect, in the Hon Chief Justice Spigelman’s words, the ‘quality of justice’.

Access to justice

2.49 Many commentators have pointed to the often high costs of discovery. For example, in its *Final Report in Relation to Possible Innovations to Case Management*, the Law Council of Australia stated that discovery ‘is often the most expensive, or at least one of the most expensive steps’. The VLRC concluded that, given the cost of

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56 Ibid.
58 *Betfair v Racing New South Wales* [2010] FCA 603.
59 Ibid, [331]. A terabyte is 1 million megabytes.
discovery, ‘the objectives of the process are either not being achieved or can only be achieved at great cost’. In such circumstances, there are concerns that litigants are being priced out of the court system. Chief Justice Spigelman remarked that ‘when senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often $2m, the position is not sustainable’. The commercial realities of discovery of this order may represent a significant barrier to justice for many litigants, as the Commercial Litigation Association stated in its submission to Lord Jackson’s *Review of Civil Litigation Costs* in England and Wales in 2009:

> Indeed the realisation must be if the situation is distilled in to the simple question ‘justice or costs?’ costs, commercially, must prevail.

2.50 At the end of the 19th century there may only have been a few documents even in complex litigation and hence an obligation to make discovery was not onerous. A process that may have been fair and aided the administration of justice can become unfair and obstructive of the administration of justice in the contemporary information context—unless tightly controlled. The task in this Inquiry was to develop recommendations for reform, through a consultative process, that balanced these tensions fairly and practically. It is not a straightforward task—given the policy tensions outlined above and the differing responses they may evoke. The Australian Government Solicitor (AGS) commented that:

> Perhaps unsurprisingly there are differing views within AGS as to the scope of appropriate reform. This is reflective of differences within the broader profession about what is undoubtedly a difficult issue.

### Principles for reform

2.51 The principles for reform in this Inquiry include five principles proposed by the Access to Justice Taskforce—accessibility, appropriateness, equity, efficiency and effectiveness; as well as three specific principles relevant to this Inquiry—proportionality, consistency and certainty. The Access to Justice Principles ‘set out the objectives of the Australian civil justice system’ and provide a basis for policy-making. The referral of this Inquiry to the ALRC is an aspect of advancing policy-making with respect to a particular aspect of the civil justice system.

2.52 A number of the inquiries referred to in Chapter 1 that have considered civil justice procedure, including discovery, have also identified key principles to underpin

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64 Phase 2 Submission, Commercial Litigation Association, cited in R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 37, [3.5]. Lord Jackson’s report is described in Ch 1.


67 Ibid, 61.

68 The review was ‘necessary and timely’, according to Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
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reform in relevant jurisdictions. There are considerable similarities of aspiration and principle, with slightly different emphasis and particularity, as well as overlap in ideas.

2.53 Together, the eight principles provide the framework for the law reform recommendations in this Report. This section considers how the principles have been expressed in the various inquiries referred to in Chapter 1 and how they inform the development of law reform responses.

Accessibility

2.54 The first principle proposed by the Access to Justice Taskforce is ‘accessibility’:

Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.69

2.55 The VLRC similarly identified ‘accessibility’ as a desirable aspiration of the civil justice system, explaining it as follows:

Accessibility has a number of dimensions. Excessive cost, complexity or delay will undermine or prevent accessibility.

Accessibility will also depend on awareness of legal rights and of available procedural mechanisms for the enforcement of such rights. In many instances ‘injustice results from nothing more complicated than lack of knowledge’.70

2.56 Lord Woolf’s review of civil procedure in England and Wales included several goals that echo the principle of accessibility—that the civil justice system should:

• be ‘understandable to those who use it’;
• ‘offer appropriate procedures at a reasonable cost’; and
• ‘deal with cases with reasonable speed’.71

Appropriateness

2.57 The second principle proposed by the Access to Justice Taskforce is ‘appropriateness’:

The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.

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Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.  

2.58 In Lord Woolf’s goals for the civil justice system the concept of appropriateness is expressed as offering ‘appropriate procedures at a reasonable cost’ and being ‘responsive to the needs of those who use it’.  

Equity  

2.59 The third principle proposed by the Access to Justice Taskforce is ‘equity’:

The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.

2.60 The principle of ‘equity’ concerns both fairness and financial accessibility. Other expressions of reform principles include both ideas, but arrange them differently. For example, the VLRC expressly identifies ‘affordability’ as a desirable goal and, as noted above, includes excessive cost as a barrier to ‘accessibility’. Lord Woolf included cost in his goal of offering appropriate procedures ‘at reasonable cost’. Both identify fairness as a specific goal. For the VLRC, fairness was a fundamental requirement of civil justice:

Justice requires not only ‘fair’ results but also outcomes arrived at by fair procedures.

As Justice Gaudron has observed (albeit in the context of the criminal trial): ‘The requirement of fairness is not only independent, it is intrinsic and inherent.’

Efficiency  

2.61 The fourth principle proposed by the Access to Justice Taskforce is ‘efficiency’:

The justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating.

The costs of formal dispute resolution and legal assistance mechanisms—to Government and to the user—should be proportionate to the issues in dispute.
2. Framework for Reform

2.62 In other relevant inquiries noted in Chapter 1, efficiency is expressed, for example, in goals such as:

- timeliness;\(^79\)
- ensuring a case is dealt with as expeditiously as is reasonably practicable and that the resources of the court are distributed fairly;\(^80\)
- dealing with cases with reasonable speed;\(^81\) and
- to facilitate the settlement of disputes.\(^82\)

**Effectiveness**

2.63 The fifth principle proposed by the Access to Justice Taskforce is ‘effectiveness’:

The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis.

All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.\(^83\)

2.64 In other relevant inquiries noted in Chapter 1, effectiveness can be seen, similarly, in the goals of:

- cost-effectiveness;\(^84\) and
- that the system should be effective: adequately resourced and organised.\(^85\)

2.65 ‘Efficiency’ and ‘effectiveness’ are principles that are expressly reflected in the overarching purpose provision of the *Federal Court of Australia Act*, set out above.\(^86\)

**Proportionality**

2.66 Proportionality is a strong theme in the recommendations of the reviews of the civil justice system summarised in Chapter 1. Lord Woolf’s final report, for example, emphasised that ‘to preserve access to justice for all users of the system it is necessary to ensure that individual users do not use more of the system’s resources than their case requires.’

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86 *Federal Court of Australia Act 1976* (Cth) s 37M.
In the 2009 report of his review of civil litigation costs, one of Lord Jackson’s key recommendations was that of proportionality—that the costs system should be based on legal expenses that reflect the nature and complexity of the case. The VLRC also listed proportionality as one of the desirable goals of the civil justice system:

It is increasingly accepted that the costs incurred by the parties and by the public in the provision of court resources should be ‘proportional’ to the matter in dispute. Relevant dimensions of the matter in dispute include the amount in issue or its importance. As one author has suggested, there is a widely-held belief that we must ‘match the extensiveness of the procedure with the magnitude of the dispute’.

2.67 The principle of proportionality, while a significant conceptual driver in reform of civil justice procedure, must also be used with some caution. The VLRC, for example, identified the ‘numerous dimensions to the civil justice debate about proportionality’:

Although disputes of relatively low value or importance should clearly not require disproportionate private or public resources for their resolution, there is a vexed policy issue as to whether high value civil disputes should be permitted to consume substantial publicly funded court resources, particularly where the parties in dispute are commercial leviathans involved in a commercial dispute with purely financial dimensions and where such parties can readily afford the costs of mediation, arbitration or other ‘private’ methods of resolving their dispute.

There is also an important question about whether the ‘imposition’ of ‘proportionality’ in certain contexts may favour certain litigants, including those with disproportionately greater resources.

2.68 Moreover, cases that may have significant ‘public interest’ dimensions may not be readily amenable to a test of proportionality:

in such cases, whether the likely legal costs are ‘proportionate’ to the importance and complexity of the issues in dispute will inevitably involve value judgments and subjectivity.

2.69 The difficulty with a concept of ‘proportionality’ is that, on the one hand, it embodies utilitarian ideas of the fair use of public resources; but, on the other, if it places artificial constraints on the conduct of litigation, it may ‘disadvantage particular litigants and impair the quality of justice delivered’. In this regard, the concept of proportionality reflects an inherent tension between ideas of utility and those of

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91 Ibid, [4.1.4].
autonomy, where proportionality may be seen to be an ‘effectiveness’ measure at the sake of individual justice. Allens Arthur Robinson stated that:

The principal function of the civil justice system is to resolve disputes between parties efficiently and justly according to law. When considering any reform to the civil justice system, great care should be taken to ensure that the reform is carefully planned, supported by evidence and that measures intended to promote efficiency do not undermine the goal of justice according to law.\(^2\)

2.70 Rather than promoting proportionality as a specific principle, the review of civil justice in Hong Kong identified as an underlying objective the need ‘to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings’.\(^3\)

2.71 The overarching purpose provision of the *Federal Court of Australia Act* expressly includes proportionality as an objective. Section 37M(2)(e) specifies as an objective: ‘the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute’.

### Consistency

2.72 A specific principle of significance is that the civil justice system should be consistent in the application of laws and in practice. The VLRC identified ‘consistency and predictability’ as desirable goals of the civil justice system:

Inconsistency and unpredictability in the civil justice system are highly undesirable for a variety of obvious reasons. Conduct in the community generally, by individuals, entities and governments, is regulated according to perceptions of the applicable law and predictions about the likely outcome of litigation.\(^4\)

2.73 While ‘consistency’ may be considered an element of ‘equity’ in the Access to Justice Principles—as an element of fairness at a broad level—it emerged as a matter of particular relevance in this Inquiry. Concerns were expressed, in particular, about inconsistency with respect to judicial case management practice. The ALRC considers, therefore, that it is a significant framing principle for law reform recommendations in relation to discovery of documents. Consistency also reflects the overall aim of all the Access to Justice Principles in ‘delivering fair and appropriate outcomes, and maintaining and supporting the rule of law’.\(^5\)

### Certainty

2.74 Certainty is a complementary principle to consistency—in that issues of uncertainty may lead to inconsistency. Lord Woolf’s report included the goal that the system should ‘provide as much certainty as the nature of particular cases allows’.\(^6\)

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The ALRC considers that certainty is also a significant framing principle for law reform recommendations in the context of discovery of documents. In particular, if the expectations, both of parties and of the court, are made clear, greater consistency in practice can be facilitated. Certainty may also be considered an aspect of ‘accessibility’, assisting parties to understand and exercise their rights, and also the expectations of them in civil litigation.

**The use of reform principles**

2.75 The eight reform principles identified above provide a policy framework for the consideration of specific reform recommendations. As overarching principles they assisted the ALRC in the evaluation of potential alternatives for reform.

2.76 In identifying principles to provide a framework for reform, caution needs to be expressed, however, that the principles need to be considered as a whole, as undue emphasis on one may distort the policy outcome. As noted by the Public Interest Advocacy Centre:

> the challenge in reforming the discovery process is to ensure that the drive for improving the efficiency of the process does not create barriers to individuals accessing justice.97

2.77 Throughout this Inquiry the ALRC used the eight reform principles as the basis for analysing the evidence with respect to the various questions and proposals set out in the Consultation Paper, to inform the reform response presented in this Report and to improve the practical operation and effectiveness of discovery of documents in federal courts.

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