Discovery of Documents in Federal Courts

Australian Law Reform Commission

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- Family Law Section, Law Council of Australia
- Business Law Section, Law Council of Australia
- Alternative Dispute Resolution Committee, Law Council of Australia
- Professional Ethics Committee, Law Council of Australia
- Legal Education Committee, Law Council of Australia
- Access to Justice Committee, Law Council of Australia
- Federal Court Liaison Committee, Federal Litigation Section, Law Council of Australia
- Intellectual Property Committee, Business Law Section, Law Council of Australia
- Litigation Rules Committee, Queensland Law Society
- Access to Justice Committee, Queensland Law Society
- Litigation Executive Committee, Law Institute of Victoria
- Australian Law Students Association

As can be seen above, practitioners from a number of Law Council committees, Law Council Sections and Constituent Body committees have been involved in providing comments for this submission, encompassing a wide variety of views. The opinions expressed in this paper are a combination of those comments and represent the voice of the Law Council.

Introduction

The Law Council welcomes the opportunity to provide the following submission in response to the Australian Law Reform Commission's (ALRC) Discovery in Federal Courts Consultation Paper ('the Consultation Paper').

The Law Council regularly contributes to ALRC inquiries and acknowledges the extensive amount of time and effort taken in preparing consultation papers. The Law Council found the ALRC highly flexible and considerate in conducting consultation during this Inquiry. Representatives from various Law Council Sections and Law Council Committees were contacted well in advance of the consultation paper being released and invited to private consultations with ALRC staff, including the ALRC's President. The Law Council also appreciates the extension granted.

However, given the length of the consultation and its timing, obtaining substantial feedback from practitioners has been difficult. The Law Council understands that this is a consequence of the timeframes placed upon ALRC. Further consideration of the time frames and their impact upon stakeholders should be made in light of this reference. Such issues are explored in the Law Council's submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into the ALRC.[1]

Previous Commentary

The Law Council has provided extensive commentary in recent years on discovery, case management and associated access to justice issues, and suggests that in addition to the comments outlined in this submission, and those submissions highlighted in the Consultation Paper,[2] that the following materials may be of assistance to the ALRC:

- Law Council of Australia, submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into Access to Justice, 30 April 2009.
- Law Council of Australia, submission to the National Alternative Dispute Resolution Advisory Council, Inquiry into Alternative Dispute Resolution in the Civil Justice System, 8 July 2009.
- Law Council of Australia, Expert Standing Committee on Alternative Dispute Resolution, Symposium on the Multi-door Court House, Canberra, 27 July 2009.
- Law Council of Australia, submission to the Attorney-General's Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System, 2 December 2009.
- Law Council of Australia, submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the *Civil Dispute Resolution Bill 2010*, 28 October 2010.

1 Law Council of Australia, Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Law Reform Commission, 28 January 2011. Available at: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=D90FB65D-0BBC-98E7-1E84-FA6EA67F0335&siteName=lca.

2 For example, it is noted that the Law Council of Australia, Final Report in Relation to Possible Innovations to Case Management, 21 August 2006, has been referred to a number of times in the Consultation Paper.

- Law Council of Australia, supplementary submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the *Civil Dispute Resolution Bill 2010*, 17 November 2010.

General Comments

Access to Justice Taskforce Report

The Law Council supports the role of the ALRC in looking into the discovery process in the Federal Court, following on from Recommendation 8.2 of the Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* Report ('the Taskforce Report').[3] Recommendation 8.2 stated that:

> *"The cost of discovery continues to be very high, and often disproportionate to the role played by discovered documents in resolving disputes. The Attorney-General should ask the ALRC to conduct an assessment of the effectiveness (including the impact on the length and cost of proceedings) of different discovery orders (general, by category or more limited). This would include an appraisal of the extent to which discovered documents are actually used and are influential in proceedings."*[4]

The Law Council made a detailed submission in response to the Taskforce Report,[5] welcoming the Commonwealth's adoption of a systemic and coordinated approach to access to justice in Australia, while criticising the scope of the Taskforce Report, which was restricted to federal civil justice matters, and the failure to sufficiently address the resourcing implications of the strategy. In regards to Recommendation 8.2 concerns were expressed about reaching a balance when looking at the issue of discovery:

> *"The Law Council is concerned that the recommendation, as presently framed, tends to suggest that discovery rights should generally be dramatically curtailed without necessary regard being had to the impact that this might have on a party with asymmetric access to information and when access is sought to documents which are exclusively all (relevantly) in the possession of the opposing party. It is not hard to think of landmark litigation around the world such as the Tobacco litigation the course of which might have been profoundly changed had the plaintiffs had no access to the discovery of documents and scientific materials exclusively in the possession of the defendant. It would be regrettable if the reference to the ALRC was designed to effectively preclude the successful prosecution of such litigation."*[6]

The Law Council welcomes the expanded terms of reference over that initially proposed in the Taskforce Report. While, the Law Council supports the ALRC Inquiry, there are a number of issues with the focus of the Consultation Paper.

Concerns about the Consultation Paper

The Law Council has some general concerns with the Consultation Paper, including:

- undue emphasis on larger scale litigation and mega-trials;

[3] Australian Government Attorney-General's Department Access to Justice Taskforce, A Strategic Framework for Access to Justice in the Federal Civil Justice System (2009).
[4] Ibid, Rec 8.2.
[5] Law Council of Australia, submission to the Attorney-General's Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System, 2 December 2009. Available at: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=66AC4613-1E4F-17FA-D2B0-81B95366B68A&siteName=lca
[6] Ibid, pg.15.

- inadequate qualitative and quantitative data on the alleged problems with the discovery process;
- insufficient focus on the impact of discovery on smaller scale litigation and self-represented litigants;
- lack of discussion on the role and nature of the adversarial system in Australia; and
- not enough information on the role of 'legal culture' in the discovery process and more broadly within the Australian legal system.

This commentary will be expanded further in the main body of the submission, however it is worth making some further comments about the lack of qualitative and quantitative data on alleged problems with the discovery process.

Alleged Problems with Discovery

Litigants in courts of federal jurisdiction include governments and well resourced and experienced large corporations, as well as 'inexperienced one off litigants of limited or modest means'.[7] Notwithstanding the broad spectrum of litigants, several of the submissions made to the ALRC's Managing Justice enquiry, (two brief excerpts of which are reproduced at paragraph 6.68) reflect that discovery...*'is the bane of the large litigation process*' and problematic in the context of '...*large scale commercial litigation'*.

The general proposition emerges from literature research and anecdotally that in Australia:

- discovery is generally unproblematic;[8] and
- cost blow- outs, delay and *discovery abuse* (to the extent that it occurs) are largely confined to cases involving larger complex litigations.[9]

In terms of exploring how efficiently and effectively the process of discovery performs within the Australian federal courts system, so far as larger complex litigation is concerned there remains little if any recent empirical data.[10]

The inquiries, reports and papers (mentioned in the Consultation Paper at pages 16-22) do not identify common features or risk factors that threaten the efficient operation of the discovery process within the Australian federal courts system. The Law Council's

7 ALRC Managing Justice ; Review of the Adversarial system
8 See for example Legg M J [2007] MULR 6; McKenna J A and Wiggins E C , 'Empirical Research on Civil Discovery' (1998) 39 Boston College Law Review 785; Kakalik J S et al, 'Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data' (1998) 39 Boston College Law Review 613; Beckerman J, 'Confronting Civil Discovery's Fatal Flaws' (2000) 84 Minnesota Law Review 505, 513–14.
9 See for example J Ipp D Reforms of the Adversarial Process in Civil Litigation, Part 1 (1995) 69 Australian Law Journal 790 at 793-794; M J [2007] MULR 6 at 10; see also the views expressed in the Australian Institute of Judicial Administration, Discovery Show and Tell Notes at page 2,downloaded from: www.aija.org.au/Discovery/Discovery%20Notes.pdf
10 See Australian Institute of Judicial Administration Incorporated, The Use of Discovery and Interrogatories in Civil Litigation (1990) which reported on results of a specific study of discovery documents and interrogatories with a view to determining whether cost and delay associated with the process could be reduced. The study concluded that the cost of discovery and interrogatories while significant was not high as a proportion of total legal costs at 2. While compelling, these data are the result of research conducted mid to late 80's and predate the exacerbation caused by electronic document storage, as mentioned in numerous articles, see for example Australian Institute of Judicial Administration Incorporated, Discovery Show and Tell; Notes from Seminar, (2007) available from: www.aija.org.au/Discovery/Discovery%20Notes.pdf

observation (in response to an earlier enquiry) is that it is difficult to provide constructive comment when there is a dearth of empirical data.[11]

Where they have been undertaken, empirical studies show that *discovery abuse* is not a problem in the majority of cases, being linked with matters of complexity typically involving multiple parties, multiple claims, the amount at stake or the type of matter.[12] Empirical evidence from the United Kingdom, United States and other countries should be treated with a degree of caution, given the differences with the legal system and the legal culture in Australia. While the Law Council supports the review and reform of the discovery process, and is of the opinion that amendments could be made, further research is required before any substantial changes are introduced.

The Law Council has previously observed that studies have shown discovery in large complex cases needs to be closely managed in order to avoid costs blow outs and timetabling clashes when hearing dates are vacated:[13]

> *"The question is whether the costs can be reduced without affecting the issue of justice between the parties. This is particularly relevant given that the objectives of discovery are to learn what the case is about, to give full warning of documentary evidence, to obtain admissions and to avoid ambush. But the fact that it may be a problem in large and complex cases, does not mean that discovery is a problem in all cases";*[14]

Where the discovery involves complicating factors, there may be a greater tendency to err on the side of caution in making discovery. Ipp J reflected that,

> '…*prohibitive costs and delay may be caused where there is no wish to abuse the system…in cases where many documents may be relevant, even indirectly the practice is when in doubt, discover. This results in mountains of documents ....in the end, the usual result is that the number of those documents that are critical to the result of the trial are substantially less than fifty'*[15]

The Chief Justice of the Federal Court Keane CJ speaking on discovery was recently reported saying:

> *It does no one any good to have the last three years of a corporations life put on a database so that at a trial, people can meander through it and see if they can find something of interest....the best resource the courts have got are the good lawyers, and the sooner we get them involved the better....a far more effective approach for streamlining litigation would be to encourage senior legal partners and barristers to become involved in cases earlier in the litigation process....*[16]

11 Law Council of Australia, Submission to the ALRC Review of the Adversarial System of Litigation: Issues Paper No 20 (November 1997) at [7.7.1]
12 See generally McKenna J A and Wiggins E C, 'Empirical Research on Civil Discovery' (1998) 39 Boston College Law Review 785; Kakalik J S et al, 'Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data' (1998) 39 Boston College Law Review 613.
13 See for example Australian Law Reform Commission, Review of the Adversarial System of Litigation- Rethinking the Federal Civil Litigation System, Issues Paper No 20 (April 1997) 60; J Ipp D, Reforms of the Adversarial Process in Civil Litigation- Part (1995) 69 Australian Law Journal 790, 793
14 Law Council of Australia, Submission to the ALRC : Review of the Adversarial System of Litigation, Issues Paper No 20 (November 1997)
15 J Ipp D Reforms of the Adversarial Process in Civil Litigation- Part 1 (1995) 69 Australian Law Journal 790 at 793
16 CJ Keane P Chief Justice hits out over Federal Law overload The Australian Financial Review, Friday 21 January 2011 page 1 and pages 14-15.

> *... the explosion of legislation and regulation presents a real threat to the rule of law as there is an inverse relationship between the growth of legislation and the community's capacity to monitor, comprehend and comply with the law*[17]

The Chief Justice reportedly reflected on the said the said this would reduce costs and ease the burden on the judiciary in complex cases.[18]

Case Management and Discovery Practice

Having regard to Australia's adversarial legal system and the 'tension between the key obligations owed by a lawyer, specifically between a lawyer's duty to a client – to represent and protect the best interests of a client – and the overarching duty to the court in the interest of the administration of justice' it is impracticable to expect parties to always be able to resolve discovery issues as between themselves without firm judicial case management.

The Law Council is concerned that the Federal Court of Australia ('the Court') does not always provide firm and consistent management of discovery. Docket judges should be prompt and robust in relation to making decisions on discovery disputes. As noted in paragraph 3.85 of the Consultation Paper:

> *"[t]he gaming process that occurs between parties, in the absence of firm judicial case management, can lead to costly and incidental litigation over the limits of discovery by categories."*

The Law Council believes that discovery should be dealt with at the Case Management Conference with the Docket Judge taking an active role in the speedy resolution of issues as to the scope and timetable for discovery. As noted in the Taskforce Report:

> *"Judges should be able to provide guidance and feedback to parties about the key legal issues in dispute as early in the process as possible. This will assist parties to focus early on the key issues in dispute and to provide targeted assistance to the court on those issues. This will not only assist parties to direct their efforts and finances to the crucial issues but will also assist parties to make a realistic evaluation of the case, leading to informed and timely settlement decisions."*[19]

The Law Council strongly supports Recommendation 8.5 from the Taskforce Report which provides:

> *"Case management and dispute resolution should be considered central judicial functions and crucial to ensuring fair, cheap and effective access to justice. The Attorney-General should work with the courts and the National Judicial College of Australia to ensure that judicial education includes measures aimed at enhancing the understanding and use of ADR, dispute resolution and case management techniques."*[20]

The Law Council has worked closely with the Court in the consideration of case management practices and will continue to do so. This has had an impact upon the development of case management techniques, with efficiency improving in recent years. However, the Law Council acknowledges that there are different views among members

17 Ibid
18 Ibid.
19 Australian Government Attorney-General's Department Access to Justice Taskforce, A Strategic Framework for Access to Justice in the Federal Civil Justice System (2009), p. 109.
20 Ibid.

of the Court as to the extent to which they should intervene in matters in which they control the docket. For example, The Honorable Michael Black AC QC, Former Chief Justice, Federal Court of Australia has stated, as quoted at paragraph 3.65 of the Consultation Paper:

> *"[the courts] need to take a more interventionist role to avoid having trolley loads of documents being wheeled into court when hardly any of them are likely to be referred to and when every page will add to the cost of the litigation."*[21]

The Law Council is of the view that discussion of such tensions requires further consultation between the Attorney-General, the Court and the National Judicial College of Australia.

The Law Council encourages further investigation by the ALRC as to measures which could improve the fairness, efficiency and consistency of case management procedures. For example, one way to would be to allow decisions in discovery disputes which depart from the standard categories to be publicly available. These decisions could be in the form of short (e.g. one page) written decision outlining the particular discovery orders made or refused. Such promulgation will foster consistent decision making, give parties greater certainty and therefore improve the fairness and efficiency of case management procedures. Further proposals are outlined throughout the body of the submission.

21 Quoted in M Pelly, 'Snail's pace of corporate justice', The Australian (Sydney), 29 June 2007, 31.

Legal Framework for Discovery in Federal Courts

Question 2–1 What issues, if any, arise in the application of the *Peruvian Guano* case to discovery in civil proceedings before the High Court?

The Law Council is of the view that no changes are required to application of the *Peruvian Guano* case for discovery in civil proceedings before the High Court. As noted by the ALRC at paragraphs 2.37 to 2.39 of the Consultation Paper, the nature of the cases before the High Court mean that discovery rarely becomes an issue.

Question 2–2 Does the requirement for leave of the court effectively regulate the use of discovery in civil proceedings in the Federal Court?

Question 2–3 Is the law sufficiently clear on when the Federal Court should grant leave for discovery of documents in civil proceedings?

The Law Council believes that the requirement for leave of the court does not alone effectively regulate the use of discovery. Practitioners are of the view that there is uncertainty in the way in which the leave requirement is interpreted by judges. This could, to some extent, be alleviated by more consistent and effective case management, including greater judicial intervention. Greater supervision and control by judges would ensure that the purpose of section 37M of the *Federal Court of Australia Act 1976* (Cth), aimed at the just resolution of disputes as quickly, inexpensively and efficiently as possible, could more readily be achieved.

Question 2–4 Should the *Federal Court of Australia Act 1976* (Cth) be amended to adopt the provisions of section 45 of the *Federal Magistrates Act 1999* (Cth) in relation to discovery, so that discovery would not be allowed in the Federal Court unless the court made a declaration that it is appropriate, in the interests of the administration of justice, to allow the discovery? If not, should another threshold test be adopted? What should that threshold test be?

The Law Council does not support amending the *Federal Court of Australia Act 1976* (Cth) so as to adopt the provisions of section 45 of the *Federal Magistrates Act 1999* (Cth) in relation to discovery. While the Law Council recognises the role of section 45 in the Federal Magistrates Court, it does not believe that it would be appropriate to apply similar principles in the Federal Court, which is the venue for more complex disputes that generally require discovery. Alternative measures such as discovery masters and discovery plans, as outlined in the responses to Chapter 3, should be explored.

The Law Council favours a neutral threshold test in the Federal Court that does not make a presumption either for or against discovery.

In reference to intellectual property proceedings the Law Council notes that lengthy, burdensome or costly discovery process can often be avoided. Examples include:

- patent cases where the issues relate to construction;
- infringement by products where the features of the product are apparent from inspection and issues of prior publication; and
- trade mark infringement cases where the issue is deceptive similarity.

In other cases, comprehensive discovery is often critical. Examples are some cases relating to:

- allegations of obtaining of inventions;
- disputes as to authorship of copyright works;
- infringement of process patents;
- trade mark cases where the alleged infringer's intentions are in issue; and
- copyright cases involving issues such as the manner in which the alleged infringer created the allegedly infringing work.

Prior to obtaining an order for discovery, a party to intellectual property proceedings in the Federal Court should first be required to show that at least some form of discovery is necessary and proportionate. The 'necessary' and 'proportionate' criteria could be assessed by reference to the likely cost of the discovery, the overall value of the case and the likelihood that such discovery will yield relevant documents.

Finkelstein J notes (referencing the *Federal Rules of Civil Procedure 2009* (US) r 26(b)(2)(C)):

> *"[it is] difficult to avoid the conclusion that the current discovery regime is defective because it does not explicitly force litigants to justify discovery requests (by reference to the costs and benefits) nor does it constrain the trial judge to reject requests not so justified [sic]"*[22]

The Law Council agrees with the ALRC's comments that:

> *'[t]he leave requirement, and the requirements of s 37M of the Act, represents a gatekeeper role for the court to regulate the use of discovery and disallow the unnecessary discovery of documents'*.[23]

However, the Law Council observes that the requirement for leave of the court does not effectively regulate the use of discovery in civil proceedings in the Federal Court because in practice the onus invariably passes to the 'discovering party' to show why the costs of such discovery would be 'disproportionate to the importance and complexity of the matters in dispute'. This onus should lie with the party seeking discovery. The approach presently accepted in relation to interrogatories is a good model.

Question 2–5 Are the categories of documents required to be disclosed under the *Federal Court Rules* (Cth) too broad? If so, where should the parameters be set?

The Law Council does not believe that the categories of documents required to be disclosed under the *Federal Court Rules* (Cth) are too broad. As a baseline the categories are effective, it is more a matter of how the categories are interpreted by the Court and the parties that is the issue.

As the process currently stands, disputes and delay are often associated with the categories system. Costs are also increased by the inconsistencies and lack of information associated with the essentially private nature of case management and, in some cases, by slow or indecisive judicial case management.

While the Law Council recognises the criticisms emanating from the court in relation to “mega-trials” as outlined by the ALRC at paragraph 2.61, it is of the view that such cases

22 National Alternative Dispute Resolution Advisory Council (NADRAC), The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction (2009).
23 Consultation Paper, p 43

are not many in number or proportion of those heard in the court. The occurrence of such cases appears to be exaggerated by the media and many other commentators. The Law Council believes it would be a mistake to adopt a system for all matters aimed at stemming the problems created in large cases.

Different matters required different solutions. For example, in certain cases the Court may look at the introduction of a practice note or controlling the case through the docket system.

There may also be scope for adopting a staged approach to discovery where, rather than creating categories for documents to be disclosed, the parties are each required to discover documents upon which they rely and which they are able to identify as having a direct relevance to the issues as they are known at the time when the discovery is given. The way is then left open for further documents to be produced or sought as the case develops and further directions can be obtained from the court as necessary.

Question 2–6 Should O 15 r 2 of the *Federal Court Rules* (Cth) be amended to adopt the categories of documents discoverable in Fast Track proceedings, so that discovery in the Federal Court is limited to the following documents of which the party giving discovery is aware at the time orders for discovery are made or discovers after a good faith proportionate search:

- documents on which the party intends to rely; and

- documents that have significant probative value adverse to a party's case?

The Law Council supports the preliminary views of the ALRC in paragraphs 2.82 to 2.84 of the Consultation Paper. O15 r2 in its current form strikes an appropriate balance between the need to make discovery and the need to limit the classes of documents to those which have a direct relevance to the issues in a case.

It is expected that those parties who are involved in Fast Track proceedings have a common interest in resolving their disputes quickly. They can be counted on to understand the issues and act appropriately with minimum intervention from the court. They also understand the opprobrium which litigation misconduct brings with it. Litigants not in the Fast Track cannot all be categorised in the same way as those whose cases are accepted into that list.

The Law Council is of the view that judicial management of the discovery process is the key to ensuring that the objectives of justice and proportionality are met.

Question 2–7 Are the disclosure obligations on parties to proceedings before the Family Court working well and is the Court adequately equipped to deal with instances of non-compliance with disclosure obligations?

The Law Council is of the opinion that disclosure obligations on parties to proceedings before the Family Court are working well and the Court is adequately equipped to deal with non-compliance. This is partly due to the pre-action protocol which obliges the exchange of relevant documents before proceedings are commenced and to the culture of discovery peculiar to family law proceedings. Ordinarily in a family law property case, one party knows everything while the other party knows very little. The Consultation Paper has identified at paragraph 2.87 the practical consequences to the outcome of cases in the event that information is concealed.

It is important to emphasise that in addition to the requirement to discover documents, the rules require the provision of information. For example Rule 13.1 provides;

> *13.01(1) Subject to subrule (3), each party to a case has a duty to the court and to each other party* ***to give full and frank disclosure of all information relevant to the case****, in a timely manner*. [emphasis added]

This duty is wider than the production of documents and in appropriate cases the Court has ordered a party to file an affidavit in which, for example, a particular transaction is explained, or which accounts for the disbursement of money.

Having said that, the Family Court, being a court where, prima facie, each party is obliged to pay their own costs as per section 117(1) of the *Family Law Act 1975* (Cth), there is a reluctance to enforce non-compliance with the provision of information at the interlocutory stage by awarding costs. However, this is a matter of discretion and a small complaint in the totality of the scheme.

Proposal 2–1 Section 45 of the *Federal Magistrates Act 1999* (Cth), which provides that discovery is not allowed unless the court declares that it is appropriate in the interests of the administration of justice, should note that disclosure obligations under part 24 of the *Federal Magistrates Court Rules 2001* (Cth) (including the obligations to produce documents under rr 24.04 and 24.05) are not contingent upon compliance with s 45 of the Act.

The Law Council recommends that for family law proceedings section 45 is amended so as not to be applicable to such proceedings and issues of discovery are dealt with by the *Federal Magistrates Court Rules 2001* (Cth) in a similar way to the Family Law Rules.

When the Federal Magistrates Court was established, it was intended that it would be a "simple, cheaper and faster" place in which cases could be determined. Its jurisdiction under the *Family Law Act 1975* (Cth) was limited both in the type of orders it could make and in monetary limits on the jurisdiction.

The Court has developed to a point where it has overlapping, and unlimited, jurisdiction with the Family Court. Federal Magistrates do not determine cases in a summary way. They are obliged to deliver reasoned and detailed judgments which are susceptible to appeal to the Full Court of the Family Court (albeit constituted by a single judge at the Chief Justice's discretion) in which the same standards of judging appealable error apply as to a Family Court judge sitting at first instance.

In those circumstances, the existence of section 45 is misconceived. In the vast majority of cases it is ignored and on occasions, it has been used capriciously to protract proceedings or deprive litigants of their legitimate expectation to be informed of relevant matters.

There is no statutory duty to disclose in the *Federal Magistrates Court Rules 2001* (Cth). Rules 24.04 and 24.05 require the production of categories of documents which are useful in the simple cases, but those rules do not suffice in more complex financial cases with which the court is now dealing.

Discovery Practice and Procedure in Federal Courts

Question 3–1 What issues, if any, have arisen in the procedures adopted by the High Court for the discovery of documents in civil proceedings?

The Law Council is unaware of any recent instances of discovery in civil proceedings in the High Court, and is therefore unaware of any issues that may have arisen in the High Court's procedures.

The Law Council believes that, if any issues were to arise, they would likely be of a similar nature to issues encountered in other jurisdictions albeit on a lesser scale. As indicated in the answer to question 2-1, and supported by views expressed in reports in other jurisdictions, the application of the *Peruvian Guano* test is unlikely to cause any difficulties in practice in the High Court.

Question 3–2 In general, does the amount of money spent on the discovery process in proceedings before the Federal Court generate:

- too much information;

- too little information; or

- about the right amount of information to facilitate the just and efficient disposal of the litigation?

Where possible, please provide examples or illustrations of the costs of discovery relative to the information needs of the case.

Many of the concerns raised appear to stem from a small number of high profile 'mega-litigation' decisions. Of the decisions relating to discovery disputes, most of these tend to be concerned with obtaining further discovery. This, combined with the ALRC's observations in paragraph 3.62 that the vast majority of litigation settles before trial but after discovery, leads the Law Council to believe that, in general, discovery is resulting in production of about the right amount of information and is in fact facilitating the early resolution of litigation.

To the extent to which parties may, in some cases, discover too much information the Law Council believes it is unlikely to be of such a degree that the receiving party is seriously prejudiced. A party reviewing discovery from another party is generally able to conduct more focused searches to identify documents that they are interested in. The party will not necessarily have to review in detail every document produced by the opponent.

In the Law Council's view, greater costs are incurred by the party giving discovery. The larger the number of documents obtained that must be reviewed to determine what is discoverable, the greater the cost (regardless of the test of relevance). The volume of electronic information, and the relative ease of its recovery, would tend to further increase the volume of material gathered. There is at least a practical likelihood that if more documents are gathered and reviewed, a greater number of documents will be discovered.

However, despite these comments the Law Council is not of the view that the discovery process is operating smoothly. One area where significant costs are incurred, which is adverse to all parties, is through the lack of certainty in how discovery interpreted by the

Court. Decisions should be made quickly by the Court wherever possible so as to reduce the time and costs incurred.

The Law Council also notes the ALRC's observations in paragraph 3.55 of the Consultation Paper that despite 'concerns regarding high costs of discovery, there has been no systematic collection of data on discovery costs in Australia'. The Law Council therefore supports proposal 3-7, which is directed towards obtaining such data.

Question 3–3 Are there any particular approaches to the discovery of electronically-stored information that help to save time and cost in the process? Do any particular approaches cause inefficiencies or waste?

The Law Council considers that approaches which are applicable to the discovery of electronically stored information are in most, if not all, cases equally applicable to hardcopy documents. Distinguishing between these two forms of information may not be encouraging parties to consider different and potentially more efficient methods of undertaking discovery and managing records in the course of litigation.

Some of the approaches to discovery (of electronic and hardcopy documents) that the Law Council believes can save time and costs are identified below:

- Systematic planning of the proposed discovery process before documents are obtained, including:
  - Identifying the systems used and types of records held by the client, and the physical custodians. The ESI questionnaire referred to in *Goodale & Ors v The Ministry of Justice & Ors* [2010] EWHC B40 (QB) is a useful tool in this respect.
  - Identifying how records received from the client and the other party should be managed (this is discussed further below), and considering the related costs.
  - Giving early consideration to document protocols that are compatible with the manner in which the records are proposed to be managed.
- Consider the use of 'early case assessment' tools which can:
  - identify the number and types of records held by the client;
  - identify the extent of duplication of records (which can readily be in the vicinity of 30%);
  - identify likely privileged material;
  - identify plainly irrelevant material;
  - enable parties to identify records for case preparation purposes, without incurring the costs of full-blown discovery; and
  - be used to estimate the costs of discovery.
- Consider managing documents electronically, particularly as the number of documents increases. In this regard:
  - The e-discovery industry is becoming more competitive and costs are declining.

- Smaller law firms, and self-represented litigants, have shown they can be just as capable (if not more so) than better resourced opponents in managing records electronically, and do not necessarily require any specialised software.

- Managing electronic records in their original format avoids the costs of printing or converting to other formats.

- The additional cost of converting hardcopy documents to fully searchable images is only marginally more expensive than photocopying.

- Documents (including hardcopy documents) can be fully searchable. This produces greater efficiencies in the longer term by significantly reducing the time spent locating information and avoiding, or at least reducing, the need for subsequent printing or copying.

- Documents can be sorted chronologically, or by names, at the push of a button. This facilitates the preparation of briefs, witness packs, and court books. It also reduces the scope for errors that can occur with any manual process. Multiple copies can be produced and delivered faster. There is also a reduction in space and physical storage costs.

- Documents can be tagged quickly for issues, relevance, privilege etc and without the risk of manual tags being lost.

- The scope for errors at the time of production is reduced as manual handling is limited. It is also easier to audit the process followed by lawyers in the review process – for example, you can readily identify documents that may not have been reviewed and double-check documents that have been tagged as privileged, relevant etc.

- A number of people can review the entire document set at the same time, and for different purposes. This avoids the costs of producing and managing multiple copies.

- Early conferral with the opponent as to the proposed approach to discovery. This can reduce the scope for disputes and the costs of having to redo discovery. The pre-discovery Conference Checklist referred to in CM6 should be referred to.

Approaches that lead to inefficiencies or waste tend to be the converse of the above. Some particular matters that the Law Council considers can give rise to inefficiency or waste are:

- Converting electronic information to a non-searchable format (i.e. by printing to hardcopy or converting to a non-searchable format).

- Asking the client to forward the text of emails (rather than provide them separately on a form of digital media).

- Using search terms to identify potentially relevant documents for discovery without approval of the Court or the opponent. This can give rise to disputes and costs of having to redo discovery.

- Manual coding and numbering of records is costly and often unnecessary. The embedded metadata within electronic records often suffices for the purposes of discovery and can be automatically extracted.

Question 3–4 Has discovery by categories of documents, or particular issues in dispute, reduced the burden of discovery in proceedings before the Federal Court? If not, what has prevented the parties, their lawyers and the court from cost-effectively limiting the scope of discovery?

The Law Council believes that it is not generally an issue of the categories of documents burdening discovery proceedings before the Federal Court, rather it is the view of the Law Council that there have been problems in the way in which they have been utilised. The Law Council believes that stronger judicial management in relation to discovery may assist in identifying and dealing with such issues. Care has to be taken however to ensure that this does not unnecessarily add to the burden of matters.

As discussed previously, the Law Council is of the view that the greatest burden on parties in relation to discovery is at the stage of gathering and reviewing documents. Where categories are identified by reference to documents relevant to a certain issue, this has a marginal impact in this area because, regardless of the test being used, all of the documents have to be reviewed to ascertain their relevance or otherwise. Practically, it is not feasible to search only for relevant documents. Relevance is not always apparent until a detailed review has been carried out, and may in fact not become apparent until a large volume of other documents have been reviewed.

The Law Council believes that a failure to reach agreed limits on what is being obtained and reviewed can have a significant impact on preventing discovery from being more cost-effective. It is the Law Council's view that this most likely stems from a combination of poor planning on the part of lawyers and the parties, a lack of consultation between the parties, and a lack of judicial management.

CM6 appears to be directed at assisting the parties in this respect, however the Law Council is concerned that it is not being routinely followed in practice. This may be because it requires the Court to have ordered that discovery be given in electronic format which, in turn, depends on the parties persuading the court that the use of technology will help facilitate the quick, inexpensive and efficient resolution of the matter. If the parties make no attempt to invoke these procedures, it is likely that they will simply default to practices they are more familiar with.

As the Consultation Paper recognises, changes in relevance tests appear to have had little practical impact. Indeed, the Law Council considers that narrower tests may require more time to make an assessment as to relevance. The Law Council believes that reforms which reduce the amount of time spent making subjective decisions as to relevance should be considered. Where possible, discovery categories should be formulated in such a way as to avoid the need for incurring the costs of review for relevance. For example, it may be appropriate that invoices for a particular period should be discovered, or that emails between certain people over a defined period be discovered.

This approach can save costs and disputes for both parties. The party giving discovery does not need to incur the costs of review for relevance. The party that receives the discovery does not necessarily need to spend time, or any significant time, reviewing every document discovered – rather they can target the review to specific documents.

The Law Council's preliminary view is that this approach would require changes to the Federal Court Rules.

Standard Discovery Categories

If the threshold test is met, it is suggested that rules analogous to those contained in parts 31 and 63 of the *Civil Procedure Rules (February 2005)* in the United Kingdom (UK) should be applied in appropriate cases. While these rules are similar to *Federal Court Rules* O15 r2(3), (5) and (6), in the UK these rules are applied with greater robustness in comparison to their Australian counterparts. Consequently, while a UK patent case may result in the discovery of 50 documents, the same patent case in Australia may result in the discovery of 50,000 documents. Australian judges must therefore be given clearer directions in applying these rules.

As outlined in part 31 of the *Civil Procedure Rules,* as general practice in the UK the discovering party is ordered to give 'standard discovery', which requires a party to discover only:

> (a) the documents on which he relies; and
>
> (b) the documents which –
>
> > (i) adversely affect his own case;
> >
> > (ii) adversely affect another party's case; or
> >
> > (iii) support another party's case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction.[24]

The search involved in standard discovery must be 'reasonable' having regard to

> (a) the number of documents involved;
>
> (b) the nature and complexity of the proceedings;
>
> (c) the ease and expense of retrieval of any particular document; and
>
> (d) the significance of any document which is likely to be located during the search.[25]

The Law Council suggests that it would be worth adopting the provision in part 31 of the *Civil Procedure Rules* requiring a party to notify the other side of any searches it has not undertaken on the grounds of 'reasonableness' (r31.7); and allowing a party that believes the disclosure of documents given by a disclosing party is inadequate to make an application for an order for specific disclosure (r 31.12).

Secondly (and analogously to the rules contained in part 63 of the *Civil Procedure Rules*) in relation to appropriate intellectual property disputes, standard discovery should only be ordered in relation to certain 'pre-defined' categories of documents. Intellectual property cases often involve the discovery of a large number of technical documents that are not readily transparent to lawyers. It is often the case that such documents were created in foreign jurisdictions and over a long period of time, potentially over 100 years in some copyright cases and typically 15 – 20 years in patent cases. The use of pre-existing categories will reduce discovery disputes and enable parties to approach litigation with a

24 R 31.6 Civil Procedure Rules.
25 R 31.7 Civil Procedure Rules.

reliable expectation as to the scope and cost of discovery. Discovery should only be expanded beyond these pre-defined categories if justified by special circumstances.

Standard discovery should be laid down by practice notes which should be allowed to evolve. Practice notes could be based on the following suggestions.

Patents and designs

In relation to patent cases, the *Civil Procedure Rules* and *Practice Directions* in the UK state that:

Disclosure and inspection (rule 63.9)

6.1 Standard disclosure does not require the disclosure of documents that relate to –

(1) the infringement of a patent by a product or process where –

> *(a) not less than 21 days before the date for service of a list of documents the defendant notifies the claimant and any other party of the defendant's intention to serve –*
>
> > *(i) full particulars of the product or process alleged to infringe; and*
> >
> > *(ii) any necessary drawings or other illustrations; and*
>
> *(b) on or before the date for service the defendant serves on the claimant and any other party the documents referred to in paragraph 6.1(1)(a);*

(2) any ground on which the validity of a patent is put in issue, except documents which came into existence within the period –

> *(a) beginning two years before the earliest claimed priority date; and*
>
> *(b) ending two years after that date; and*

(3) the issue of commercial success.

The Law Council suggests the same limitations should be placed on discovery of documents in Australian patent disputes before the Federal Court. This is consistent with the approach in *Wellcome Foundation v VR Laboratories*,[26] where the High Court endorsed limitations on the documents that could be discovered in patent cases. As stated by Aitkin J when discussing the concept of obviousness:

> *[D]iscovery should be confined to research and development and experiments before the priority date… [I]f discovery relating to experiments is to be made it should not relate to a period later than the priority date.*[27]

Within these categories the Law Council would expect the following categories of documents should ordinarily be discoverable:

- documents summarising the invention;
- the inventor's notebooks; and
- minutes of relevant meetings of or with the inventor.

26*Wellcome Foundation Ltd v VR Laboratories (Aust) Pty Ltd* [1981] HCA 12
27Ibid at 39

Standard discovery should also expressly exclude documents relevant to quantum until after a determination of infringement has been made. This should be made clear because, surprisingly, it has not always been the practice.

Trade marks, passing off and copyright

In general, there has been less difficulty with the matter specific category process in these sorts of cases and the range and type of issues in dispute is greater. As a result, the Law Council considers that there is more limited scope for standard discovery categories in these cases.

Other than cases where the extent of use is a real issue (for example cases under section 120(3) or 60 of the *Trade Marks Act 1995)* standard discovery in trade mark cases should exclude discovery of documents relating to the extent of advertising, the extent of use of a mark or its commercial success.

Standard discovery should also expressly exclude documents relevant to quantum until after a determination of infringement has been made.

Question 3–5 Has the creation of discovery plans and use of pre-discovery conferences helped to ensure proportionality in the discovery of electronically-stored information in Federal Court proceedings? If not, what has prevented the Court, the parties and their lawyers from establishing practical and cost-effective discovery plans in advance of the search for electronic documents?

In particular, are the expectations stated in *Practice Note CM 6* for parties to exchange their best preliminary estimate of the cost associated with discovery, and to agree on a timetable for discovery, generally being met in practice?

The Law Council supports the objectives of *Practice Note CM 6*. If parties complete and discuss plans at an early stage, and discuss expected costs, any areas of disagreement are likely to be identified, and hopefully resolved, before the parties incur substantial costs in undertaking discovery. That said the Law Council has limited knowledge of practitioners using *Practice Note CM 6*, the checklist or pre-discovery conferences.

As noted in paragraph 3.92 of the Consultation Paper the extent to which judges are involved in resolving disputes relating to an electronic discovery process and determining the use of a discovery plan before making orders for electronic discovery, varies between judges and court registries. The Law Council would like to see judges lead the way in such matters, by encouraging greater use of these techniques (and not just in cases where electronic documents will be discoverable) so as to reduce costs and expedite cases.

Proposal 3–1 Following an application for a discovery order, an initial case management conference (called a 'pre-discovery conference') should be set down, at a time and place specified by the court, to define the core issues in dispute in relation to which documents might be discovered. At the pre-discovery conference, the parties should be required to:

- outline the facts and issues that appear to be in dispute;

- identify which of these issues are the most critical to the proceedings; and

- identify the particular documents, or outline the specific categories of documents, which a party seeks to discover and that are reasonably believed to exist in the possession, custody or power of another party.

Proposal 3–2 Prior to the pre-discovery conference proposed in Proposal 3–1, the party seeking discovery should be required to file and serve a written statement containing a narrative of the factual issues that appear to be in dispute. The party should also be required to include in this statement any legal issues that appear to be in dispute. The party should be required to state these issues in order of importance in the proceedings, according to the party's understanding of the case. With respect to any of the issues included in this statement and concerning which the party seeks discovery of documents, the party should be required to describe each particular document or specific category of document that is reasonably believed to exist in the possession, custody or power of another party.

The Law Council supports the introduction of a pre-discovery conference and the filing of written statements when seeking discovery, as outlined in Proposal 3-1 and 3-2. Written statements should be limited to four A4 pages, so as to limit the time and costs of preparing the statement. A limit on the length would also reduce the impact upon the Court and the other party reviewing the statement.

The Law Council suggests that active judicial case management can be useful where there has been an application for discovery under order 15 of the Federal Court Rules. The benefit of case management is likely to be maximised where the parties are required to articulate in some detail and in some order of priority the issues and facts in dispute, as proposed through a pre-discovery conference. Introducing such a measure will allow the case managing judicial officer to adopt an active interventionist role in determining the scope for discovery.

While the Law Council supports the proposals, it does express some caution about the possible impact these measures could have on smaller cases and whether or not it may impose an additional burden. It is in such cases judicial management could be used as a tool to reduce the potential burden.

Proposal 3–3 Prior to the pre-discovery conference proposed in Proposal 3–1, the parties should be required to file and serve an initial witness list with the names of each witness the party intends to call at trial and a brief summary of the expected testimony of each witness. Unless it is otherwise obvious, each party's witness list should also state the relevance of the evidence of each witness.

The Law Council is of the view that filing and serving an initial witness list would place additional burdens upon the parties in dispute, increasing costs and further limiting access to justice. Following the completion of discovery and inspection of documents there can be an impetus to settle cases on the basis that each party is more aware of the information (at least in documentary form) in the possession of the other party. The Law Council is of the view that Proposals 3.1 and 3.2 would advance that and in appropriate cases without the need for unnecessary discovery.

A summary of witness statements would require the parties to go through what would be a much more complicated and expensive process. Proposals 3.1 and 3.2, as indicated above, are unlikely to add to the expense of the preparation for an argument about discovery in any significant way. However, Proposal 3.3 may impose additional expense on both parties with no apparent compensatory benefit. Procedural overlays in litigation which add significantly to the cost burden on the parties have the potential to advantage a better resourced litigant at the expense of a less well resourced litigant. The Law Council is of the view that Proposals 3.1 and 3.2 could more easily be tailored to any given case.

The Law Council is concerned about the possible implications that would follow from filing and serving an initial list, for example:

- Will litigants be bound to produce evidence from all such witnesses?
- Will litigants be bound to only increase their witnesses list in special circumstances? (e.g. will the other side be able to argue that certain witnesses should not be allowed to give evidence as their existence was known at the time of the filing of the witness list and their names were not on there, i.e. natural justice type arguments)
    - In such circumstances it would require lawyers to turn their minds to final stage case planning very early in proceedings which can be difficult.
- What would be expected of the 'brief summary of evidence' of each witness?
- Would this require solicitors to commence interviewing of each witness at the commencement of litigation?
    - Such a measure would be a very costly process. Alternatively relying upon the client's overview of a potential witnesses' evidence would be risky.
- There could also be a risk of intimidation to witnesses.
- It may potentially limit the nature of discovery

Question 3–6 Should parties be required to produce to each other and the Court key documents early in proceedings before the Federal Court? If so, how could such a procedural requirement effectively be imposed?

The Law Council supports the production of documents by parties to each other early in proceedings before the Federal Court. If the parties agree to exchange relevant documents, as quite often occurs, that can be beneficial in reducing the scope of discovery or eliminating the need for it entirely.

However the Law Council opposes the introduction of a mandatory requirement to produce key documents early because this may not be appropriate in all cases and may increase costs unnecessarily.

Question 3–7 Are existing procedures under O 15 rr 10 and 13 of the *Federal Court Rules* (Cth) adequate to obtain production of key documents to the court or a party? How could these procedures be utilised more effectively?

The Law Council is of the view that the existing procedures under O 15 rr 10 and 13 of the Federal Court Rules (Cth) are generally adequate to obtain production of key documents to the court or a party. However, the Law Council believes that there is some confusion over the way in which sanctions are imposed.

Rule 13 does not provide consequences for failing to produce such document. Obviously to failure to comply with an order of the court may be contempt. However, such failures should attract other consequences such as the judge being able to make adverse findings on a litigant who fails to produce such a document where the document or the contents of the document would have been adverse to his or her case. Cost penalties should also be considered if it results in an adjournment, delay or duplication of work.

Rule 15 could be extended to include not only where a document is 'referred' to but also where the existence of a document is implied. In such circumstances subparagraph (2)

should include a further (d) "that the document does not exist or does not exist to the party's knowledge".

Proposal 3–4 In any proceeding before the Federal Court in which the court has directed that discovery be given of documents in an electronic format, the following procedural steps should be required:

- the parties and their legal representatives to meet and confer for the purposes of discussing a practical and cost-effective discovery plan in relation to electronically-stored information;

- the parties jointly to file in court a written report outlining the matters on which the parties agree in relation to the discovery of electronic documents and a summary of any matters on which they disagree; and

- the court to determine any areas of disagreement between the parties and to make any adjustments to the proposed discovery plan as required to satisfy the court that the proposed searches are reasonable and the proposed discovery is necessary.

If so satisfied, the court may make orders for discovery by approving the parties' discovery plan.

The Law Council supports this proposal in order to streamline and improve the electronic discovery process, regardless of whether or not the expected documents are in an electronic format. However, caution is expressed about the impact of the proposal on relatively small cases. The Law Council suggests that the proposal only be utilised where the number of documents is expected to be greater than 500, so as to reduce the potential burden it could impose upon the parties.

Question 3–8 Should special masters be introduced to manage the discovery process in proceedings before the Federal Court? If so, what model should be adopted?

The Law Council expresses support for the introduction of special masters engaged by and paid for by the Court to manage the discovery process in proceedings before the Federal Court. The Law Council believes that they could be helpful as a case management tool and may be able to reduce the time taken with discovery. This in turn has the potential to reduce costs associated with the discovery process. A special master would also be able to assist judges, by minimising the amount of time spent on discovery, permitting a greater utilisation of a judge's time.

However, a number of questions arise that need to be investigated further, such as:

- Is there going to be an approved list of special masters? If not how are they going to be selected?
- What are the qualifications of a special master?
- What are the costs of a special master? Will they be fixed?
- How are they to be appointed?
- In the United States the role of masters has been extended to include non-legal masters in specific types of cases. Will that be entertained here?
- Will its role be as extensive as in the United States?

The Law Council is particularly concerned about the costs of a special masters scheme. There is the potential that it may be too expensive for self-represented parties, impacting negatively upon those who it is designed to assist.[28]

The Law Council preference is for a docket judge or a retired judge to act as a special master, however it acknowledges that due to resourcing constraints on the courts, that this may not be achievable. Another option which the Law Council favours is the use of Registrars of the Court. In family law proceedings, specifically property settlement matters, the registrars conduct some functions of similar nature to those envisaged by special masters. For example they conduct settlement conference (conciliation conferences) and give opinions on evidence and the party's cases. They also give opinions on discovery and for example recently we had a conciliation conference adjourned for 6 weeks to allow some discovery of a critical point to be provided. The registrars also provide brief overviews to judges but in general the process is confidential. These functions could be extended upon for the occasions of an appointment of a special master. Whoever is chosen as a suitable special master, the Law Council is of the view that they should be an officer of the Federal Court and have appropriate legal qualifications.

The Law Council considers that further research and consultation needs to be undertaken before a special master scheme is implemented in Australia.

Proposal 3–5 Part VB of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide the court with broad and express discretion to exercise case management powers and impose sanctions in relation to the discovery of documents, in line with ss 55 and 56 of the *Civil Procedure Act 2010* (Vic).

While the Law Council supports active judicial case management of the discovery process,[29] it is not of the view that Part VB of the *Federal Court of Australia Act 1976* (Cth) should be amended in line with sections 55 and 56 of the *Civil Procedure Act 2010* (Vic). The Law Council believes that the Court already has discretion under the Federal Court of Australia Act 1976 (Cth) and through the *Federal Court Rules* (Cth). Making amendments such that is in line with section 55 and 56 of the *Civil Procedure Act 2010* (Vic) are not necessary. It should also be noted that the *Civil Procedure Act 2010* (Vic) has only been operating for a very short period of time and its impact has not can not be measured, thus caution should be had before similar amendments are made at the federal level.

Question 3–9 Should there be a presumption that a party requesting discovery of documents in proceedings before the Federal Court will pay the estimated cost in advance, unless the court orders otherwise?

The Law Council would be concerned if a party seeking discovery was to be required to pay the estimated costs of such discovery in advance. A fear that such an order may be made let alone a presumption that such orders will be made, will unduly obstruct access to the court and access to justice. Those wishing to pursue a meritorious claim must already factor in the risk of adverse costs in the claim was to lose. While the Law Council supports the "English Rule" any further costs threats to litigants creating further barriers to justice are not acceptable.

Question 3–10 Should the Federal Court have explicit statutory powers to make orders limiting the costs able to be charged by a law practice to a client for discovery, to the

28 Victorian Law Reform Commission, Civil Justice Review, Report 14 (2008), 573.
29 Final Report in Relation to Possible Innovations to Case Management (2006) Proposal 5(a) (see ALRC CP2 at [3.99].

actual costs to the law practice of carrying out such work (with a reasonable allowance for overheads, but excluding a mark up or profit component)?

The Law Council opposes the suggestion that the Court should have powers to cap discovery costs. Obligations on practitioners to inform their clients of likely costs are imposed through the Legal Profession Acts.

The Law Council can see some value in the practitioners for party with a substantial discovery burden being required to estimate the cost of discovery at an early stage and not only informing its client but also informing the party seeking discovery of that estimate. These estimates can then a factor to be considered as to the reasonableness of discovery orders requested and the party seeking discovery cannot later complain if it loses and then finds it having to meet those costs.

If the previous recommendations of the ALRC concerning active case management of the discovery process, the early definition of the real issues in dispute, the imposition of procedural obligations of the parties to ensure cost-effective discovery plans and the introduction of amendments to streamline electronic discovery process, as outline in Proposal 3-4, cost caps will not be necessary.

Proposal 3–6 The Federal Court should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings, including the technologies used in the discovery of electronically-stored information.

The Law Council supports this proposal. Increased judicial management of the discovery process is encouraged by the Law Council and judicial training will help formalise and regularise the method and results of such intervention. As well, the speed of developments in technology requires ongoing education so that judges do not find themselves out of the picture.

Proposal 3–7 The Australian Government should fund initiatives in the Federal Court to establish and maintain data collection facilities, to record data on the costs associated with discovery of documents, as well as information on the proportionality of a discovery process—in terms of the costs of discovery relative to the total litigation costs, the value of what is at stake for the parties in the litigation, and the utility of discovered documents in the context of the litigation.

The Law Council supports the proposal for the funding of a careful analysis of the costs associated with discovery in the Federal Court. The Law Council cautions that the study must be undertaken by experts as the conclusions, if they are to be relied on, must be sound. If practitioners are involved in such a process, due consideration must be given to the time and cost involved in retrieving the data, particularly for small firms.

Question 3–11 What issues, if any, arise in the procedures prescribed for disclosure of documents in proceedings before the Family Court?

The *Family Law Rules 2004* provide a comprehensive scheme for the conduct of cases in that court. Rule 1.04 sets out the main purpose of the Rules being to "ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case". In theory the Rules are to be interpreted as implementing that purpose.

Rule 1.06 sets out a number of principles which the court must adopt in the application of the Rules. They include 1.06(c):

"*Identifying the issues in dispute early in the case and separating and disposing of any issues that do not need full investigation and trial".*

"(f) Ensuring that parties and their lawyers comply with these Rules, any Practice Directions and procedural orders";

"(i) Minimising the need for parties and their lawyers to attend court by, if appropriate, relying on documents…"

Rule 1.08 sets out the responsibilities of litigants and lawyers in achieving the main purpose and includes 1.08(1)(b) - complying with the duty of disclosure (see Rule 13.01).

Rule 1.05 requires parties to take prescribed steps laid down in Schedule 1, titled "*Pre-action Procedures*". Rule 1.05(1) indicates that the compliance with *Pre-action Procedures* is mandatory in all cases, save for those set out in Rule 1.05(2).

The *Pre-action Procedures* laid down in Schedule 1 require parties to attempt to resolve dispute before cases are commenced. The required procedures include dispute resolution, negotiation, and … *"complying, as far as practicable, with the duty of disclosure"*. (Part 1(1)(c)). The procedures state that non-compliance may have serious consequences …. *"Including costs penalties"*. This calls into play the provisions of section 117(2A)(c), which states that a court considering making a costs order shall have regard to … *"the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters".*

In financial cases the *Pre-action Procedures* require the parties to exchange:

- A schedule of assets, income and liabilities;
- A list of documents in each party's possession or control that are relevant to the dispute;
- A copy of any document requested by the other party from the list.

The Explanatory Statement relating to the *Family Law Rules 2004* said that Chapter 13 codified the concept of the duty of disclosure, required parties to certify that they were aware of the duty, had complied with it and confirmed that there were significant consequences for failure to comply. It required parties to concentrate on the disclosure relevant only to the issues in dispute, in order to keep in mind the aim of proportionality and the need to focus on those issues in dispute. It was further noted that the "litigation tool" of complete disclosure was an expensive process and was therefore timed to commence only after the Final Resolution event. At that stage the parties, having each complied with their duties of disclosure, should be in a position to know what issued need to be proven and should therefore be able to concentrate on obtaining disclosure relevant to those issues.

The Explanatory Statement noted an important difference between the revised Rules and the earlier Rules. The court's expectation would be that parties would not go on a "fishing expedition" or apply for a general order, but would direct their mind to the higher standard and consider what is directly relevant to the disputed issues.

Rule 13.01 imposes on litigants a duty "to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner".

The disclosure requirements set out in Chapter 13 move from the general statement of principle, to the specific obligation to disclose documents (Rule 13.07). If the obligation of disclosure has not been met then a requesting party may ask the other party for "a list of documents to which the duty of disclosure applies" (Rule 13.20(1)).

Therefore the *Family Law Rules 2004* impose an obligation, and quite specific means by which that obligation of full and frank disclosure must be fulfilled. The Consultation Paper comments at paragraph 3.241 that "disclosure procedures in the Family Court are generally working well". The Law Council agrees with that observation. The *Family Law Rules 2004* have reinforced a culture, in the family law jurisdiction, of full and frank disclosure. However it must be said that:

- Experience is that *Pre-action Procedures* are honoured in the breach more than in compliance. On the other hand once litigation commences the Family Court is prepared to enforce the duty of disclosure and is harsh on litigants who do not comply.

- About 80% of the litigation under the *Family Law Act* is conducted in the Federal Magistrates Court which has its own rules.

Question 3–12 What issues, if any, arise in the procedures prescribed for disclosure of documents in proceedings before the Federal Magistrates Court?

Section 45(1) of the *Federal Magistrates Act 1999* states:

> *"Interrogatories and discovery are not allowed in relation to proceedings in the Federal Magistrates Court unless the Federal Magistrates Court or a Federal Magistrate declares that it is appropriate, in the interests of administration of justice, to allow the interrogatories or discovery".*

In *Genovese v BGC Construction Pty Ltd* (2006) FMCA 1507 the Federal Magistrates Court held that the section *"is directed to a consideration of the interests of the management of justice, which must mean management by the court of the proceedings pending before the court"* (Quoted in *Kennedy & McDermott* (2007) FMCA Fam 524 at para 7).

Part 14 of the *Federal Magistrates Court Rules 2001* deals with disclosure. Compared to the *Family Law Rules 2004* the Law Council notes that:

- The Rules do not set out any general obligation for full and frank disclosure. Whilst it is acknowledged that the Rules are not intended to be a codification of the common law in relation to the obligation of litigants to make discovery, there is no doubt that practitioners operating in the two courts find the *Family Law Rules 2004* more helpful in creating an ethos of full and frank disclosure.

- A declaration under section 45(1) is a prerequisite to orders for general or specific disclosure. Disclosure is not a voluntary process nor can it be compelled by a request for a list of documents to which the duty of disclosure applies as set out in Rule 13.20 of the *Family Law Rules 2004*.

- There are no mandatory Pre-action Procedures.

- The party who is ordered to disclose documents must file an Affidavit of Documents (Rule 14.03). The provision of a list of documents, followed by inspection, is not sufficient. It is considered that this is an unnecessarily formal process compared to the processes of the *Family Law Rules 2004*.

- Experience is that compelling disclosure in the Federal Magistrates Court is much more difficult than in the Family Court.

Ensuring Professional Integrity: Ethical Obligations and Discovery

Overview of the Law Council's Position

The following principles have guided the Law Council's position in response to Chapter 4:

- The duties of professional responsibility that arise from existing legal profession legislation, other relevant legislation (including for example Civil Procedure legislation), common law, Court Rules, Practice Directions and the Rules of Professional Conduct promulgated in each State and Territory, create a framework of legal ethical obligations that is conducive to the proper operation of discovery in the vast majority of cases.

- *Discovery abuse* (to the extent that it occurs) should be properly investigated and solid empirical data produced to inform the development of reform proposals (if necessary). It would be helpful to properly quantify and qualify acts of *discovery abuse* so that risk factors can be identified and measures designed to deal with actual problems developed.

- The Law Council view is that the existing framework of professional responsibilities and ethical obligations is appropriate and promotes high standards of professional conduct. The Law Council does not believe that additional obligations or rules are required.

- The Council of Australian Government's (COAG) National Legal Profession Reform package tightens investigatory and disciplinary processes to reflect a greater emphasis on consumer protection and dispute resolution. No additional disciplinary or reporting measures are required.

- The Law Council is committed to the development of commentary to accompany the new Australian Solicitors' Conduct Rules.[30] The ALRC's concerns in relation to discovery will be referred to the Law Council's Professional Ethics Committee for consideration in the development of the proposed commentary to the Rules.

Features of the COAG Draft Legal Profession Reform Project

The Consultation Paper refers to certain reform measures proposed by the Consultation Draft of the National Legal Profession Reform Project (released in May 2010) that bear on the topic of the enquiry. A final draft of the legislation package was publicly released in December 2010 and now rests with COAG for consideration at its February 2011 meeting.

The National Legal Profession Reform Project package includes a proposed Legal Profession National Law and proposed Legal Profession National Rules. The Australian Solicitors' Conduct Rules and Barrister's Rules are included as schedules to the draft legislation. If adopted these Rules will update and replace the existing state and territory rules that are largely based on the Law Council's Model Rules of Professional Conduct and Practice 2002 and the Australian Bar Association's Barrister's Rules.

30 The Australian Solicitors Conduct Rules have been developed by the Law Council to apply as a uniform national set of conduct rules for solicitors, that will replace the rules currently in place in the States and Territories.

The package represents an increased focus on consumer protection and regulatory compliance. Some measures are new, whilst others are extensions of existing responsibilities that are aimed at achieving a cultural shift within the profession.

The reform measures that are perhaps most relevant to the present inquiry include:

- Clause 3.9.5 of the proposed *National Law* provides that any contravention of the law or rules, is also capable of constituting unsatisfactory professional conduct or misconduct. The practical effect of this provision is to render any breach of the *National Law* or *National Rules* (including the Conduct Rules contained in schedules) potentially subject to disciplinary consequences as well as the full range of determinations, sanctions and civil and criminal penalties provided under the reformed regime.

- Clauses 3.2.4 and 3.2.5 of the *National Law* increase the responsibility and liability of each principal of a law practice to ensure that employee legal practitioners comply with their obligations under the law and rules and that legal services are provided in compliance with the law and rules. The reform package hopes to generate a culture shift. It is envisaged that senior legal practitioners will as a result increase supervision of the law practices' employed legal practitioners work and encourage greater desire to comply with the law and rules.

- In terms of legal costs, the existing legal profession regulatory regime enables clients to recover legal costs that are assessed to have been *grossly excessive*. The reform proposal at clause 4.3.4 of the *National Law* requires that legal costs *charged* by legal practitioners are fair and reasonable having regard to factors set out in that clause.

- Clause 4.3.32 of the *National Law* provides costs assessors may refer to the National Legal Services Commissioner matters in which legal costs *charged* are not fair and reasonable and must refer maters where costs charged *or any other matter raised in the assessment may* constitute unsatisfactory professional conduct or professional misconduct.

- Clause 5.4.4 specifies a range of conduct capable of being unsatisfactory professional conduct or misconduct and includes for example charging more than a *fair and reasonable* amount for legal costs in connection with the practice of law.

- Clauses 4.6.1 and 4.6.2 allow the National Legal Services Commissioner to conduct an audit of a law practice's compliance with the *National Law* and *National Rules* and to issue the law practice with management directions. The Commissioner will have power to do so in circumstances where the Commissioner considers reasonable grounds exist based on conduct or complaint. In doing so, Chapter 7 of the reforms grants the Commissioner substantial powers of investigation and enquiry.

Professional Responsibilities

Legal practitioners owe simultaneous duties of professional responsibility to the Court, their clients and others. These duties originated as statements of the ethical underpinnings of legal practice and legal profession idealisms that now have authoritative force sounding in the common law, state/territory legislation and rules of professional conduct.

While ethical, legal and professional responsibilities arise from a range of sources, they create a framework of concurrent independent obligations that regulate and influence every aspect of how lawyers undertake the practice of law.

The Consultation Paper refers to '*Legal Ethical Obligations' as* defined at paragraph 1.48:

> *'...the more general professional and ethical duties placed on lawyers, over and above those specifically developed to govern legal practice, acknowledging the distinction often made between rules that are professionally binding on a lawyer- ethical rules- and rules that are legally binding.'*

Concurrent yet independent obligations

While not mutually exclusive, the lawyers' obligations can appear to overlap or conflict.

It can be difficult at times for clients or indeed the public to understand how lawyers resolve any perceived tension. For example, a client may wish to conceal something the lawyer is obliged to reveal to the court, an opponent or colleague.[31] Further, the public is at times concerned to find that a lawyer's duty is to passively conceal a fact that, if disclosed would or could impact the outcome of a proceeding before the court.[32] However inconvenient to the clients interests the obligations may be, they are fundamental to the way our system of justice is intended to work.[33]

When referring to the operation of the concurrent obligations Mason CJ in *Gianarellii v Wraith* said:

> "*The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest. So in Swinfern v Lord Chelmsford Pollock CB, after speaking of the discharge of counsel's duty as one in which the court and the public, as well as the client, had an interest said:*
>
> > *The conduct and control of the cause are necessarily left to counsel…a counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, counsel would perform their duties under the peril of an action under every disappointed and angry client.*
>
> *.... the performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case…*
>
> *...It is not that the barristers' duty to the court creates such conflict with his duty to his client that the dividing line is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary..."*[34]

31 *Chamberlain v The Law Society of the Australian Capital Territory* (1992) 43 FCR 148.
32 *Tuckiar v R* (1934) 52 CLR 335
33 CJ Pagone GT, Divided Loyalties? The Lawyer's Simultaneous Duty to Client and The Courts. Monash Guest Lecture in Ethics: 20 November 2009 at 16
34 (1988) 165 CLR 543, 556-7

Duties relevant to litigators

*A*ll lawyers are subject to duties of candour and honesty notwithstanding the fundamental characteristics of the adversarial system.[35]

The expression of certain aspects of these duties are particularly relevant to the present inquiry and include the obligation not to wilfully mislead the court as to the law or the facts and also to inform the court of any binding authority whether in favour or against the interest(s) for which the lawyer appears.[36]

While in general terms, passive withholding of material is permissible,[37] it must not amount to the court being misled by deliberately taking improper advantage of an adversary's error[38] or remaining silent where erroneous statements of law have been made in a judge's charge to a jury.[39]

Question 4–1 In practice, how do lawyers make decisions about whether to discover a document which falls within the scope of a discovery request or order, but that is not substantially relevant to the issues in dispute?

Question 4–2 In practice, how do lawyers make decisions about whether to discover relevant documents that may potentially fall outside the scope of a discovery request or order?

It is the Law Council's view that legal practitioners are generally competent, diligent and conscientious in determining the relevance and admissibility of evidence.

Pagone J spoke of the lawyer's duty of independence as follows:

> *"The preparation of the evidence for trial requires lawyers to exercise independent legal judgment to assist the court in reaching the correct outcome. The guiding principle is that the evidence presented to the court should be that which is necessary, relevant, admissible and probative: in other words, that the lawyer tenders evidence which in the lawyers independent judgment is considered to bear upon the question in dispute, is admissible and will assist in proving the case for the client."*[40]

If a document falls within the scope of a discovery request or order, a client is required to provide written information under oath/affirmation about the document which is or was in his/her possession whether or not he/she is bound to produce it. The lawyer relies on the documents disclosed to the lawyer. The client relies on the advice the lawyer as to the content of the affidavit the client must swear.

In preparing an Affidavit of Documents upon the making of an order of discovery Lord Atkin in considering the lawyers' obligations, remarked*:*

35 See for example J D Ipp, "Lawyers' Duties to the Court" (1998) 114 Law Quarterly Review 68.
36 *Glebe Sugar Refining Company Ltd v Trustees of the Port and Harbours of Greenock* (1921) 125 LT 578, 579 (Lord Birkenhead LC)
37 See for example *Tombling v Universal Bulb Co Ltd* (1951) (CA) Lord Denning said "...he [Counsel] must not, of course , knowingly mislead the court, either on the facts or on the law, but short of that , he may put such matters...such as in his discretion he thinks will be most to the advantage of his client....
38 See for example Chamberlain v The Law Society of the Australian Capital Territory (1992) 43 FCR 148.
39 *R v Southgate* [1963] 1 WLR 809.
40 CJ Pagone GT, Divided Loyalties? The Lawyer's Simultaneous Duty to Client and The Courts. Monash Guest Lecture in Ethics: 20 November 2009 at 13

> *"…he is at an early stage of the proceedings engaged in putting before the court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance… if he has reasonable grounds for supposing that there are others, he must investigate the matter: but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed towards him."*[41]

His Lordship said that where there is fraud:

> "…*the duty is especially incumbent on the solicitor where there has been a charge of fraud: for a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution."*[42]

A solicitor's fiduciary duty of loyalty prevents the provision of advice - as to the relevance or importance of documents to the opponent, whose interest conflicts with those of the solicitor's own client.[43] In *Tuckiar v the King*,[44] the High Court stipulated that a client must have confidence in his legal representation. The concept is fundamental not only to the solicitor-client relationship but also to the administration of justice and perception of integrity of the profession.[45]

Determining relevance

Scholars agree the process by which lawyers determine relevance involves judgments about probabilities and uncertainties and by the application of ordinary reasoning or common sense. The proper application of reasoning can nevertheless, lead lawyers to validly form diametrically opposite views.

In Victoria, the *Civil Procedure Act 2010* places a prohibitive duty on a solicitor, by his/her action to cause the clients to not disclose all documents that relate to the issue in dispute.[46]

At common law, a solicitor is required to adhere to the terms of the discovery order and advise the client of his/her obligations; make "*an appraisal of the case and form his own opinions as to what documents probably are in existence and actively to seek out from the client or his interstate or foreign principal whether or not ... documents exist*"[47] examine the documents discovered by the client to ensure, as far as possible, that no relevant documents have been omitted.[48]

His Honour Ipp J reflected that even where there is no intention of abusing the system, when in doubt, the practice is to err on the side of caution and to discover documents that *may* be relevant:

> *'…this results in mountains of documents ...the usual result is that the number of those documents that are critical to the result of the trial are substantially less than fifty..."*[49]

41 *Myers v Elman* [*1940*] AC 282; [1939] 4 All ER 484 at 512
42 Ibid.
43 *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248, 53
44 (1934) 52 CLR 335
45 *Tuckiar v The King* (1934) 52 CLR 335 at 346.
46 *Civil Practice Act 2010* (VIC) s14, s26.
47 *Ferguson v Mackaness Produce Pty Limited* [1970] 2 NSWR 66 at 68; see also *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 435 at [8].
48 *Woods v Martins Bank Limited* [1959] 1 QB 55 at 60.
49 J Ipp D Reforms of the Adversarial Process in Civil Litigation- Part 1 (1995) 69 Australian Law Journal 790 at 793

Question 4–3 Is discovery used as a delaying strategy in litigation before federal courts? If so, how and to what extent?

Question 4–4 Is discovery used to increase legal costs unnecessarily, either for the profit of law firms, to exhaust the resources of opposing parties, or for any other reason? If so, how, to what extent, and for what reasons?

The Law Council's view is that legal practitioners ordinarily act ethically and professionally in discharging their obligations in relation to discovery. Legal practitioners that engage in *discovery abuse* risk exposing themselves, depending in each case on the severity of the conduct to civil, criminal and disciplinary sanctions.

Given the extent of judicial oversight, case management and court procedures, the scrutiny of other parties involved in the litigation as well as that of clients themselves, the opportunity for undetected *discovery abuse* to occur is minimal. Practitioners involved in impropriety whether or not such conduct is detected, suffer damage to reputation that in highly competitive legal services market would have a deleterious impact on career prospects and lead to loss of professional regard from colleagues and opponents.

Damage to reputation

Damage to a lawyer's professional and personal reputation from the sanction of exposure has serious consequences for a legal practitioner's career. A lawyer's effectiveness for his or her client depends upon enjoying a reputation for maintaining an appropriate standard of behaviour...as reputation is fundamental to the lawyer's task.[50]

Delaying strategy and costs blow outs

It is a recurrent theme of articles, commentaries and indeed the ALRC Consultation Paper that where it occurs, *discovery abuse* is a form of tactical jockeying for the purpose of gaining advantage or increasing costs. It is relevant to note the Victorian Law Reform Commission has referred to a culture in the Australian legal system of leaving no stone unturned and of continually searching for the "smoking gun". It is also relevant to note that obligations on practitioners in this regard are continuing and that commentators have remarked that there is a tendency to err on the side of caution where doubt exist about whether or not to disclose.

As mentioned in the introductory remarks of the Law Council's response to Chapter 4 Questions, our concern for any proposed changes is for adequate consideration to be given to the balance that must be struck. The question must be framed in terms of whether costs or alleged delaying conduct can be addressed without affecting the issue of justice between the parties and having regard to the objectives of discovery. Those objectives are generally to learn what the case is about, to give full warning of documentary evidence, to obtain admissions and to avoid ambush.

Information about the prevalence of improper conducts and of the associated risk factors which appear to be largely confined to large and complex litigations, is required to inform any decision governments might make about whether or not further regulation is necessary or desirable.

[50] CJ Pagone GT, *Divided Loyalties? The Lawyer's Simultaneous Duty to Client and The Courts.* Monash Guest Lecture in Ethics: 20 November 2009 at 16

Question 4–5 How does delegation of responsibility for reviewing and categorising documents relevant to the discovery process affect the practice of discovery in litigation before federal courts?

Question 4–6 How does outsourcing discovery overseas affect the practice, including the cost and efficiency, of discovery in litigation before federal courts?

The Law Council is of the view that delegating or outsourcing the review and categorisation of discovery materials is not a widespread practice. While it would involve some measure of duplication of effort, logistically it may be impossible to otherwise perform a large discovery within time allocated to do so and may offer a commercial advantage.

It is noted that the responsibility of the lawyer on the record is unaffected by his/her delegation of some of the discovery tasks.

Question 4–7 Are relevant and discoverable documents wrongfully destroyed in anticipation, or in the course, of litigation before federal courts? If so, how, by whom, and to what extent? If this occurs, are the current provisions in New South Wales and Victoria effectively addressing this problem?

Question 4–8 Is the discovery process deliberately abused by lawyers working in litigation before federal courts? If so, how and to what extent?

It is the Law Council's generally held view that the deliberate destruction of legitimate discovery materials and other acts of *discovery abuse* are rare.

It is often said that the destruction without a trace of electronically stored documents is very difficult. As mentioned above, there is no evidence of systemic problems across discovery generally. It is also noted that the risk of detection is likely to be an effective factor that mitigates against any temptation to engage in such practices. Where improper conducts occur, adequate legal regulatory tools exist to address non compliance with obligations and the law.

Question 4–9 Are lawyers and litigants properly informed about their professional and legal responsibilities in relation to discovery? If not, what are the best ways of ensuring that lawyers and litigants are properly informed about their professional and legal responsibilities in relation to discovery?

The already substantial ethical obligations relating to discovery (as noted by the ALRC) imposed on legal practitioners clearly encompass the requirement that practitioners and litigants are fully informed and aware of their responsibilities.

There are many judicial pronouncements that remind members of the profession of the enormous responsibility associated with the process of discovery.[51]

The process of discovery is also often the topic of Continuing Professional Development which lawyers must mandatorily undertake every year and which comprises a component on ethics. The Law Council is aware of proposals for the development of a process of certification that may also assist in ensuring that discovery responsibilities remain at the forefront of those lawyers involved.

[51] See for example the remarks of the Chief Justice of the Federal Court above.

Question 4–10 Are existing general legal ethical obligations in professional rules sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery?

Question 4–11 Should professional conduct rules be amended to include specific legal ethical obligations concerning discovery?

The Law Council is satisfied the existing statement of obligations arising from the framework of legal ethical obligations created by legislation, Court Rules, Practice Directions and the rules of professional conduct is sufficiently clear and specific to ensure that lawyers are aware of their obligations relating to discovery.

The 2010 Australian Solicitors' Conduct Rules will offer an enhanced and modern restatement of those obligations, structured under a principle-commentary approach. It is expected the updated Rules will be implemented – and the commentary published - before the remainder of the National Legal Profession Reform package presently before COAG. The Law Council considers it unnecessary and undesirable to include additional specific Conduct Rules or obligations relating to discovery.

Proposal 4–1 The Law Council of Australia, the Australian Bar Association and legal professional bodies in each state and territory should develop commentary as part of, or as a supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the discovery of documents.

Proposal 4–2 The Australian Government, state and territory governments, the Law Council of Australia, the Australian Bar Association and legal professional bodies in each state and territory should ensure legal profession legislation and/or professional conduct rules provide that a law practice can only charge costs for discovery which are fair and reasonable.

The Law Council is already committed to development of commentary to the Australian Solicitors' Conduct Rules in 2011.

The commentary will be designed to explain and where relevant illustrate by example the application of the ethical principles embodied in the Rules. One aim of a detailed commentary is to improve the clarity of the Professional Conduct Rules and their application in practice, particularly in challenging circumstances. The logic is that increased clarity of the Rules will flow on and result in enhanced awareness and understanding of the solicitor's ethical obligations. See also the comments made above.

Question 4–12 How should lawyers determine what are fair and reasonable costs in the context of discovery?

The nature of the discovery exercise means that discovery will ordinarily represent a significant proportion of the overall costs in a litigated dispute.

The Law Council believes that lawyers should be entitled to recover the legitimate cost of the work properly and reasonably undertaken in relation to discovery. The Law Council's generally held view is that lawyers are well placed to determine what are *fair and reasonable* costs and they are obliged to make disclosures about the proposed course of action in the client's matter and the likely costs involved, as part of the retainer negotiations with clients. Adequate legislative and disciplinary provisions exist to address and sanction acts of overcharging.

Question 4–13 How might law firms foster a culture of reasonable and ethical discovery practice?

As previously stated the Law Council is of the view that discovery is generally undertaken reasonably, ethically and professionally.

A greater awareness of the risks to reasonable and ethical discovery would assist practitioners to remain vigilant and to develop responses/processes to properly manage stressors and difficulties if/when they eventuate. As indicated above, the Law Council considers these are properly matters for commentary to the statements of principle sets out in the Conduct Rules.

Question 4–14 What is the best way to ensure clients, lawyers and courts report allegations of lawyer misconduct to relevant disciplinary bodies?

Question 4–15 Should professional conduct rules provide that a practitioner must promptly disclose to the relevant legal professional body the occurrence of any misconduct arising in the context of discovery?

Question 4–16 If practitioners should be required to disclose misconduct in accordance with Question 4–15, what conduct should they be required to disclose?

If it were speculated that acts of misconduct are occurring but are not being reported, it would be helpful to address the causes of inaction.

The Law Council is of the view that legal practitioners generally discharge their obligations ethically and professionally and that acts of misconduct are rare. This view is supported by data contained in the reports produced by the independent legal services commissioners in Australian state/territory jurisdictions. While no inference about the association between misconduct and *discovery abuse* is possible from these data, the reports show very few overall findings of misconduct are made. [52]

As mentioned above the application of the test of relevance involves a subjective assessment that can legitimately result in differences of opinion amongst lawyers. However, this does not necessarily indicate impropriety. Though they are not precluded from doing so, solicitors' professional conduct rules do not impose a prescriptive duty to report the perceived misconduct of their colleagues. The Law Council is of the view it is neither necessary nor desirable to reconsider this position.

The Law Council notes that the COAG reforms introduce a greater liability and responsibility on law practice principals who will be held accountable for the acts of employed solicitors in the employ of the law practice. Please refer to earlier remarks on other measures proposed under the COAG package.

Question 4–17 In practice, how often do costs assessors refer lawyers to disciplinary bodies for investigation of suspected gross overcharging?

52 In NSW the Office of the Legal Services Commissioner receives all complaints about lawyers, investigates and reports annually on occurrences of unsatisfactory professional conduct and professional misconduct (as defined). See for example in relation to NSW the Office of the Legal Services Commissioner 2009- 2010 Annual Report available at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/OLSC_2009_2010_AnnRep.pdf/$file/OLSC_2009_2010_AnnRep.pdf and the Professional Standards 2010 Annual Report available at http://www.lawsociety.com.au/idc/groups/public/documents/internetcostguidebook/430730.pdf

The Law Council is of the view that legal practitioners generally do not engage in acts of gross overcharging.

Enquiries about the extent to which gross overcharging in relation to discovery has been an issue reported by costs assessors for possible disciplinary proceedings should be directed to the relevant State and Territory legal profession regulatory authorities. The data about findings in disciplinary proceedings contained in the reports of disciplinary authorities do not suggest that gross overcharging is a pervasive practice.

Additional emphasis on consumer protection is anticipated under the COAG reform proposals.

Question 4–18 Are existing legal professional disciplinary structures sufficient to deal with allegations of discovery abuse?

Question 4–19 If existing legal professional disciplinary structures are not sufficient to deal with allegations of discovery abuse, how should lawyers be disciplined for:

- a failure to comply with discovery obligations; or

- conduct intended to delay, frustrate or avoid discovery of documents?

The ALRC notes in the Consultation Paper, and the Law Council agrees, that there does not appear to be widespread misconduct in relation to discovery.

It is the Law Council's view that existing disciplinary structures are sufficient and appropriate to deal with allegations of *discovery abuse*. The Law Council agrees with the ALRC that the principle-rule-commentary approach will enhance understanding and assist solicitors to interpret and comply with their ethical obligations. Please note previous remarks above that relate to this point.

Question 4–20 What impact, if any, has electronic discovery had on the legal ethical obligations owed by lawyers?

The electronic management and storage of data adds to the complexity and burden of the discovery process but does not otherwise extend or alter the nature of solicitors' duties.

It is understood that technology based tools such as improved search software will generally assist to improve the processes for managing electronic discovery. The Law Council agrees with the ALRC that a principle-rule-commentary approach will guide and assist solicitors to interpret and comply with their ethical obligations.

Question 4–21 Are existing general legal ethical obligations in professional rules sufficiently specific and clear so that lawyers are aware of their obligations in the context of electronic discovery?

Question 4–22 Should professional conduct rules be amended to include specific legal ethical obligations concerning electronic discovery?

For reasons set out above, the Law Council does not consider it appropriate or desirable that Conduct Rules be made in relation to electronic discovery, and that issues in electronic discovery are more appropriately dealt with in the commentary to the principle ethical obligations.

Proposal 4–3 The Law Council of Australia, the Australian Bar Association and the legal professional bodies in each state and territory should develop commentary as part of, or a

supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the electronic discovery of documents.

The Law Council intends to refer the ALRC's concerns for issues relating to discovery to its Professional Ethics Committee for consideration in development of the commentary to the Conduct Rules.

Please refer to previous remarks to **Question 4.11** above regarding the role of the rules and commentary.

Question 4–23 Are law students and lawyers studying the legal and ethical responsibilities of lawyers with respect to discovery? If so, is existing training and education sufficient?

Question 4–24 How should law students and lawyers be trained in the legal and ethical responsibilities of lawyers with respect to discovery?

Question 4–25 Is discovery abuse and misconduct likely to be reduced in practice if law students and lawyers are provided with more education about the legal and ethical responsibilities of lawyers with respect to discovery?

Proposal 4–4 Providers of legal education should give appropriate attention to the legal and ethical responsibilities of lawyers in relation to the discovery of documents in existing and proposed civil litigation, case management and ethics subjects that form part of:

- law degrees, particularly those required for admission to practice as a solicitor or barrister;

- practical legal training required for admission to practice as a solicitor or barrister; and

- continuing legal education programs, including those required for obtaining and maintaining a practising certificate.

The Law Council is of the view that practical legal training is the best forum to investigate further education with respect to discovery. The ethical aspect of practical training is an important component, being reflected in the mandatory ethics course. Discovery practice could form one of the topics contained in an ethics course.

The Law Council suggests that the ALRC look at the Australian Learning and Teaching Council Learning and Teaching Academic Standards Project: Standard Statement for the Bachelor of Laws when it is released in 2011. The outcomes from the Project will include commentary on the role of ethics education for law students, which may be of assistance to the ALRC in answering the questions and proposals above.

The Law Council also notes that Continuing Legal Education (CLE) courses on discovery are regularly available to practitioners, which investigate the ethical obligations on both parties. The Law Council is of the view that practical legal training and CLE is the most appropriate forum in which to provide further training on the ethical implications of discovery.

Proposal 4–5 Legal professional bodies should issue to their members 'best practice' notes about the legal ethical obligations of lawyers with respect to discovery.

As previously mentioned, the Law Council's Professional Ethics Committee ('the Professional Ethics Committee') is charged with the development of commentary to support the Australian Solicitors Conduct Rules.

The Professional Ethics Committee has already identified that further 'Best Practice' or guidance product may be developed after the completion of the commentary to the Australian Solicitors Conduct Rules. The ALRC's proposal in this regard will be referred to the Professional Ethics Committee for consideration.

Alternatives to Discovery

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

Concerns relating to cost front loading and pre action protocols have been expressed in a range of reports.[53] Much of this commentary has originated in response to the UK pre-action requirements and protocols. As the ALRC has noted, in the United Kingdom, it has been suggested that lawyers' costs can increase as a result of pre-litigation protocols since lawyers may undertake significant amounts of work before commencing proceedings.[54] The Law Council noted in its submission on the C*ivil Dispute Resolution Bill 2010* (Cth):

> *"[t]he Law Council is concerned with the introduction of mandatory pre-action protocols generally, and particularly in connection with commercial litigation in the Federal Court and Federal Magistrates Court. The Law Council believes that resolution of certain matters without recourse to courts can be more expensive and time-consuming if not properly done, thus resulting in added costs and denial of, or delay in, access to justice."*[55]

The Jackson Review found that some lawyers were front loading costs as a result of the protocols and were running up costs by in effect serving draft pleadings and extensive documentation on one another and by not considering the principles of proportionality in terms of pre-action costs incurred in certain types of matters.[56] It is for this reason that the Jackson Review recommended abandoning an overarching protocol in favour of specific protocols and considered that in the commercial arena the protocol had not worked effectively because lawyers had created lengthy and substantial (and costly) pre-action letters. Lord Jackson suggested that a new Commercial Courts Guide that stressed inexpensive and concise pre-action letters would be more helpful.

The Law Council cautions that pre-action protocols of the sort provided for in the *Civil Procedure Act 2010* (Vic) and the *Civil Dispute Resolution Bill 2010* (Cth) may have a disproportionate effect on certain matters. As the Victorian Supreme Court Chief Justice Warren noted in the course of an address to the Victorian Commercial Bar Association Reception:

> *"[p]re-action protocols are one significant example [of the challenge of proposed reforms to civil litigation for commercial litigators and advocates]. It needs to be recalled that commercial litigation is conducted differently from most other litigation. By the time commercial litigators are ready to initiate proceedings, mostly, they have been through all the processes contemplated by proposed pre-*

53 Michael Legg and Dorne Boniface in Pre-action protocols in Australia, (2010) 20 JJA 39 at 50; H. Genn, Judging Civil Justice – The Hamlyn Lecture 2008 at 56; M. Zander, The Woolf Reforms: What's the Verdict? in D Dwyer (ed), The Civil Procedure Rules Ten Years On, at p418; P. Fenn, N Rickman and D Vancappa, "The Unintended Consequences of Reforming Civil Procedure: Evidence from the Woolf Reforms in England and Wales", 26th Annual Conference of European Association of Law and Economics, Italy,28; Lord Justice Jackson Review of Civil Litigation Costs: Final Report, December 2009.
54 Jackson R, Review of Civil Litigation Costs, Final Report (2010) (Jackson Review) p 28, referring to Jackson R, Review of Civil Litigation Costs, Preliminary Report (2009) (Preliminary Report) p 1.
55 Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Civil Dispute Resolution Bill 2010, p 8.
56 Jackson Review, Ibid, p 350.

action protocols. Indeed, in England Lord Justice Jackson in his report has recommended that pre-action protocols not apply in commercial litigation."[57]

The need for a tailored approach to pre-action protocols and particularly Alternative Dispute Resolution (ADR) within a multi-door court concept may be preferable to general protocols and may provide an effective method for the management of disputes and increased compliance by parties. In 1976, Harvard Law School Professor Frank E.A. Sander, promulgated the theory of the "multi-door court house".[58] The theory involved the prospect of disputes being attracted to a single location, where experts in a wide variety of dispute resolution processes (of which litigation is one) recommend one or more processes, simultaneously or sequentially, to the disputants. Sander suggested that a court house ought to have many doors and that disputants ought to be able to choose what form of dispute resolution might best fit their needs.[59]

This concept contemplates that a disputant attends a court house and initiates a claim by way of preparation for ADR and complies with pre-action protocols under the supervision of a court officer/ADR judge in the ADR section of the court. If ADR fails, the claim proceeds to a court hearing. Pre-action protocols including discovery are managed specifically, in a bespoke manner by a court officer/ADR judge at this early stage. Obviously urgent matters, interlocutory matters and particular disputes identified by a court officer/ADR judge when initiated in the ADR section of the court may require a different approach. In these circumstances when urgent attention is required or a matter should by-pass the dispute resolution or ADR area of the court these matters may be directed to proceed to judicial determination without complying with pre-action protocols.

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

While the Law Council adopts a cautionary approach to pre-action protocols, for reasons cited above, it acknowledges 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. This requires courts to develop broad principles that could be relevant in the pre-litigation area and more specifically those that can apply to individual, self represented and other litigants who may have special circumstances that create difficulties in terms of compliance with pre action protocols.

The Law Council notes that some courts have begun to develop approaches. These broader approaches require courts to (in effect) determine whether an approach is unnecessarily wasteful. For example, Pembroke J recently considered issues relating to broader obligations by those involved in court proceedings:

> ***Duty to Court***
>
> *19 It is common for some litigants to want to use their evidence as an opportunity to unburden themselves in unmanageable detail of the many facts which have preoccupied them in the years preceding the hearing of their case. But a fair hearing of their case can be seriously hindered by such unfiltered outpourings. That is why, among other things, counsel have a duty to the court which is additional to their duty to the party whom they represent. This duty is a legal duty, not merely a rule of practice or etiquette …*

57 Remarks of the Honourable Marilyn Warren AC, Chief Justice Of Victoria, on the occasion of the Victorian Commercial Bar Association Reception, Supreme Court Library (6 May 2010), p 2, http://www.commercialcourt.com.au/PDF/Documents/Victorian%20Commercial%20Bar%20Reception.pdf.
58 Frank E.A. Sander, Varieties of Dispute Processing, 70 FRD 79 at 111-134
59 See also Law Council Expert Standing Committee on Alternative Dispute Resolution, Symposium on the Multi-door Court House, Canberra, 27 July 2009.

20 The efficient hearing of a large or complex case requires recognition of that duty and sensible co-operation and sound judgment on the part of the Bar … The coming years may see principles emerge to guide judicial intervention against evils – the waste of time and money – that result from unhelpful or excessive tenders of both oral and documentary evidence … But whether or not legal principles capable of dealing with these evils emerge, there must be an ethical duty on counsel to abstain from excessive tenders. Lord Hoffmann said that counsel "should not waste time on irrelevancies even if the client thinks that they are important."

21 For those reasons, a strictly adversarial approach to the presentation of a party's case must sometimes be tempered. Counsel's duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence. In all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client's best interest. It is more likely to ensure that a just result is reached – sooner and with less expense.[60]

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

The Law Council notes that the pre-action approach in Victoria (that is part of an overarching obligations approach that is considerably wider than that proposed so far by the Commonwealth) seeks to impose significant sanctions on participants who fail to act appropriately in respect of an exchange appropriate documentation in the pre litigation setting. Section 34 and Section 35 of the *Civil Procedure Act 2010* (Vic) provide that:

Section 34 – Pre-litigation requirements

(1) Each person involved in a civil dispute must take reasonable steps, having regard to the person's situation and the nature of the dispute—

(a) to resolve the dispute by agreement; or

(b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.

(2) For the purposes of this section, ***reasonable steps include, but are not limited to—***

(a) the exchange of appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute*; ....* [emphasis added]

Section 35 – Protection and use of information and documents disclosed under pre-litigation requirements

(1) A person involved in a civil dispute who receives any information or documents provided by another person involved in a civil dispute in accordance with the pre-litigation requirements is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with—

(a) the resolution of the civil dispute between the persons involved in the civil dispute; or

[60] *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822.

(b) any civil proceeding arising out of the civil dispute.

(2) ***The obligation under subsection (1) is taken to be an obligation to the court, contravention of which constitutes contempt of court.*** [emphasis added] *(3) A person involved in a civil dispute or a party—*

(a) may agree in writing to the use of information or documents otherwise protected under subsection (1); or

(b) may be released from the obligation imposed under subsection (1) by leave of the court.

(4) Without limiting this section or discovery in any civil proceeding any documents exchanged in accordance with the pre-litigation requirements—

(a) are required to be discovered in any subsequent civil proceeding to be admissible in that proceeding; and

(b) may be available for use in any subsequent civil proceeding accordingly.

(5) Nothing in this section limits any other undertaking to a court (implied or specific) whether at common law or otherwise, in relation to information or documents disclosed or discovered in a civil proceeding.

Given that the *Civil Procedure Act 2010* (Vic) has only been operating for a short period of time it is difficult to provide comment on these provisions. However, the Law Council is concerned about the potential for increasing costs and cautions against introducing similar provisions at the federal level, in line with its position on pre-action protocols.

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

As noted above the Law Council has reservations towards pre-action protocols on the grounds that they may front load costs and lack specificity to deal with different disputes.

The Law Council concurs with some of the commentary in paragraph 5.38, that obligations imposed on parties by pre-action protocols may not be able to take into account the nature of the dispute.

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

Lord Justice Jackson found that there were serious problems of non-compliance with pre-action protocols in England and Wales.[61] It may be prudent as he has suggested that:

> *"non-compliance with pre-action protocols be addressed through amendment to the Civil Procedure Act (UK) so as to permit any party to apply to the court if another party fails to comply causing serious prejudice. The remedies a court could grant include:*
>
> *(i) the parties are relieved from the obligation to comply or further comply with the protocol;*
>
> *(ii) a party must take a specific step which might be required in order to comply with the protocol;*
>
> *(iii) the party in default pay such costs as may be summarily assessed by the court as compensation for losses caused by the default; and*

[61] Michael Legg and Dorne Boniface in *Pre-action protocols in Australia,* (2010) 20 JJA 39 at 56; Lord Justice Jackson, *Civil Litigation Costs Review – Final report (December 2009)* n 2, p 396.

(iv) the party in default forego such costs as may be specified in the event that it subsequently secures a favourable costs order"[62]

There is little statistical data available to examine the effectiveness of costs sanctions and compliance with pre-action protocols. Studies compiled after the introduction of the Woolf Reforms in the United Kingdom are difficult to obtain[63] and in any event may be of limited relevance considering the differences in the legal culture and framework in Australia. Indeed it should be noted that even within Australia, there are differences in the legal culture, by virtue of the federal structure.

Costs sanctions are not necessarily the only useful tool for compliance. Management of disputes is better able to provide a bespoke method of pre-action protocols and compliance. The need for a tailored approach to pre-action protocols and particularly ADR within a multi-door court concept, as noted above, is preferable from the perspective of the Law Council.

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

The Law Council agrees with the proposition that representatives of the Australian Government and the Federal Court and relevant stakeholders should meet to discuss the development of appropriate pre-action protocols.

There is a concern noted by some that the introduction of pre-action protocols are likely to increase costs and create an additional hurdle for litigants prior to the initiation of court proceedings. If pre-action protocols are to be developed they should be considered carefully and take into account both models for the implementation of protocols that is, pre and post filing of proceedings and the concept of the multi-door court house (see above at Question 5-5).

A close examination of the interaction of current civil justice reform legislation in Australia at state and federal level[64] and any proposal for pre-action discovery or the provision of pre-action oral evidence is required. Ramifications relating to the confidentiality of information provided pursuant to civil justice reform legislation and the disclosure of any information exchanged during formal discovery for court proceedings (pre or post initiation of court processes) requires examination prior to any new regime being implemented.

Again, it is important for a tailored approach to pre-action protocols, particularly in relation to ADR in conjunction with pre-trial discovery. A bespoke process for developing pre-action protocols may be implemented through a multi-door court house system as discussed above.[65] Detailed examination rather than a hasty implementation of specific pre-action protocols for streams of matters is required.

Proposal 5–2 A new pre-trial procedure should be introduced to enable parties to a civil proceeding in the Federal Court, with leave of the Court, to examine orally, on oath or

[62] Lord Justice Jackson *Civil Litigation Costs Review – Final report (December 2009),* n 2, p 396; quoted in Michael Legg and Dorne Boniface in *Pre-action protocols in Australia,* (2010) 20 JJA 39 at 56.
[63] See United Kingdom Department of Constitutional Affairs, *Further Findings – A continuing evaluation of the Civil Justice Reforms*, 2002.
[64] For example: *Civil Dispute Resolution Bill 2010 (Cth), Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, (Vic), Civil Procedure Act 2010 (Vic)* and the *Courts and Crimes Legislation Further Amendment Bill 2010 (NSW).*
[65] See also The Law Council Expert Standing Committee on ADR, *Symposium on the Multi-door Court House*, Canberra, 27 July 2009 and above at Question 5-5.

affirmation, any person who has information relevant to the matters in dispute in the proceeding.

The introduction of a new pre-trial procedure to enable parties to a civil proceeding in the Court, with leave of the Court, to examine orally, on oath or affirmation, any person who has information relevant to the matters in dispute in the proceeding will have a significant impact on the legal culture in Australia. Procedures are already varied within the different registries of the Court and dependent upon the presiding Judge, that to introduce such a measure could have a disproportionate impact upon the Court.

It is recommended that before implementing such a procedure that detailed consultation with relevant stakeholders in respect to this issue occur. Such a consultation should include a detailed study of the experiences in Victoria, the United States and the United Kingdom, with empirical and qualitative data.

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

The Law Council refers to its comments on Proposal 5-2.

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

The Law Council refers to its comments on Proposal 5-2.

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

As a general proposition, proposals that facilitate 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. The concern that the introduction of pre-action protocols are likely to increase costs and create an additional hurdle for litigants prior to the initiation of court proceedings needs to be balanced with the benefits for disputants to have early access to information via pre-action protocols. Again, the Law Council agrees with the proposition that representatives of the Australian Government and the Federal Court and relevant stakeholders should meet to discuss the development of appropriate pre-action protocols including any new disclosure orders.

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

Consultation with relevant stakeholders is the best way of ensuring that federal courts consider alternatives to the discovery of documents in civil proceedings. Specifically, the Law Council agrees with the proposition 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.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.