Australian Government
Australian Law Reform Commission

Managing Discovery

FINAL REPORT

Discovery of Documents in Federal Courts

ALRC Report 115

March 2011

This Report reflects the law as at 24 March 2011.

ISBN 978-0-9807194-6-8

Australian Law Reform Commission Reference: ALRC Final Report 115

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 40, 19 Martin Place, Sydney, NSW, 2000, Australia.

All ALRC publications can be made available in a range of accessible formats for people with disabilities. If you require assistance, please contact the ALRC.

Telephone: within Australia (02) 8238 6333

International +61 2 8238 6333

TTY: (02) 8238 6379

Facsimile: within Australia (02) 8238 6363

International +61 2 8238 6363

E-mail: discovery@alrc.gov.au

Homepage: www.alrc.gov.au

Printed by Union Offset Printers

Australian Government

Australian Law Reform Commission

The Hon Robert McClelland MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

31 March 2011

Dear Attorney-General

Review of discovery of documents in federal courts

On 10 May 2010, you issued Terms of Reference pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* for the Australian Law Reform Commission, to undertake a comprehensive review, of the issues of the law, practice and management of the discovery of documents in litigation before federal courts.

On behalf of the Members of the Commission involved in this Inquiry—including Part-time Commissioners, the Hon Justice Arthur Emmett, the Hon Justice Bruce Lander, the Hon Justice Susan Kenny and the Hon Justice Berna Collier, and in accordance with the *Australian Law Reform Commission Act 1996*, I am pleased to present you with the final Report on this reference, *Managing Discovery*: *Discovery of Documents in Federal Courts* (ALRC 115, 2011).

Yours sincerely,

Professor Rosalind Croucher
President

Contents Page

Terms of Reference

TERMS OF REFERENCE

The 2009 report by the Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* examined access to civil justice in the federal system from a system-wide, strategic perspective. In considering barriers to justice in relation to court based dispute resolution, the Taskforce noted the high and often disproportionate cost of discovery and recommended further enquiry on the issue.

I refer to the Australian Law Reform Commission for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* the issues of:

- the law, practice and management of the discovery of documents in litigation before federal courts;
- ensuring that cost and time required for discovery of documents is proportionate to the matters in dispute, including but not limited to:
  - the effectiveness of different types of discovery orders
  - the effectiveness and enforceability of requiring parties to identify and disclose critical documents as early as possible
  - the effectiveness of different costs orders
- to limit the overuse of discovery, reduce the expense of discovery and ensure key documents relevant to the real issues in dispute are identified as early as possible;
- the impact of technology on the discovery of documents.

In conducting its inquiry, the Commission's objective is to identify law reform options to improve the practical operation and effectiveness of discovery of documents. In particular, the Commission shall have regard to:

- alternatives to discovery;
- the role of courts in managing discovery, including the courts' case management powers and mechanisms to enable courts to better exercise those powers in the context of discovery;
- implications of the cost of discovery on the conduct of litigation, including means to limit the extent to which discovery gives rise to satellite litigation and the use of discovery for strategic purposes;
- costs issues, for example cost capping, security for discovery costs, and upfront payment; and

- the sufficiency, clarity and enforceability of obligations on practitioners and parties to identify relevant material as early as possible.

Collaboration and Consultation

In undertaking this reference, the Commission should:

- have regard to the experiences of other jurisdictions, including jurisdictions outside Australia, provided there is sufficient commonality of approach that any recommendations can be applied in relation to the federal courts; and
- consult with key stakeholders including relevant courts and the legal profession.

Timeframe

The Commission will report no later than 31 March 2011.

Dated 10 May 2010

Robert McClelland

Attorney-General

List of Participants

Australian Law Reform Commission Division

Commissioners

Professor Rosalind Croucher, President

The Hon Justice Berna Collier, Part-time Commissioner

The Hon Justice Arthur Emmett, Part-time Commissioner (appointed 28 October 2010)

The Hon Justice Susan Kenny, Part-time Commissioner

The Hon Justice Bruce Lander, Part-time Commissioner (appointed 28 October 2010)

Legal Officers

Patrick Collins, Senior Legal Officer

Justine Clarke, Senior Legal Officer (from January 2011)

Amanda Alford, Legal Officer (September–November 2010)

Jared Boorer, Legal Officer (from October 2010)

Khanh Hoang, Legal Officer (September–November 2010)

Christina Raymond, Legal Officer (November–December 2010)

Librarian

Carolyn Kearney

Project Coordinator

Tina O'Brien

Executive Director

Sabina Wynn

Legal Interns

Mayuri Anupindi

Ming Li

Kate Nielson

Lucinda O'Dwyer

Lauren Loz

Andrew Trotter

Advisory Committee Members

Robert Alexander, General Counsel, Australian Competition & Consumer Commission, Canberra

Dr Peter Cashman, Director, Social Justice Program, University of Sydney, Sydney

Stuart Clark, Chief Operating Officer, Clayton Utz, Sydney

The Hon Justice Ray Finkelstein, Federal Court of Australia, Melbourne

David Gaszner, Thomsons Lawyers, Adelaide

Sue Laver, General Counsel, Telstra, Melbourne

Catherine Leslie, Special Counsel Tax Litigation, Australian Government Solicitor, Sydney

The Hon Kevin Lindgren QC, formerly a judge of the Federal Court of Australia

Bernard Murphy, Maurice Blackburn, Melbourne

Professor Les McCrimmon, School of Law and Business, Charles Darwin University, Darwin

Professor Christine Parker, Faculty of Law, University of Melbourne, Melbourne

Matt Minogue, A/g First Assistant Secretary, International Crime Cooperation Division, Attorney-General's Department, Canberra

List of Recommendations

3. Data Collection

Recommendation 3–1 The Australian Government should work with the Federal Court of Australia and other stakeholders to identify, where possible, relevant data sets, measures and indicators and the means of capturing and reporting relevant data so that an empirical basis is developed in relation to civil litigation costs.

This should include data on the proportionality of costs associated with the discovery of documents—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.

5. Access to Discovery and General Discovery

Recommendation 5–1 The Federal Court of Australia should monitor the operation of the overarching obligation on parties to disclose critical documents in s 26 of the *Civil Procedure Act 2010* (Vic) to assess whether it would be an effective and efficient mechanism to introduce into all or any Federal Court proceedings.

Recommendation 5–2 Federal Court of Australia practice notes should highlight existing mechanisms that enable the production and inspection of documents prior to discovery in proceedings.

Recommendation 5–3 The *Federal Magistrates Act 1999* (Cth) should be amended to clarify that a declaration pursuant to s 45 of the Act is not required for the disclosure obligations in family law matters under pt 24 of the *Federal Magistrates Court Rules 2001* (Cth) to apply.

6. Limited Discovery and Discovery Plans

Recommendation 6–1 The *Federal Court Rules* (Cth) should provide that, before the Federal Court of Australia makes an order for a party to give discovery, a party may apply for an order that the parties file a practical discovery plan setting out the matters on which the parties agree or disagree in relation to the scope and process of any discovery (a discovery plan order).

Recommendation 6–2 Federal Court of Australia practice notes should draw the parties' attention to the rule concerning a discovery plan order and provide that the Court will expect the parties to address, at the earliest practicable stage in proceedings, whether a discovery plan order is likely to be sought.

Recommendation 6–3 Federal Court of Australia practice notes should provide the factors likely to be relevant in an application for a discovery plan order. For example:

(a) the issues in dispute and the likely number of documents or volume of data that might be discoverable in relation to them;

(b) the format in which documents are stored or managed;

(c) the format in which documents would be produced; and

(d) the methods or technologies that might be used in the discovery process.

Recommendation 6–4 The *Federal Court Rules* (Cth) should provide that, if the Court makes a discovery plan order, the parties must discuss in good faith and endeavour to agree upon a practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.

Recommendation 6–5 Federal Court of Australia practice notes should provide that, if the Court makes a discovery plan order, the Court will expect the parties to:

(a) take into account relevant guidelines on the formation and content of discovery plans; and

(b) attend the Court to resolve any areas of disagreement in a discovery plan, or to inform the Court of the reasonableness and proportionality of the proposed discovery plan.

Recommendation 6–6 Federal Court of Australia practice notes should provide a detailed set of best-practice guidelines on the formation and content of discovery plans.

Recommendation 6–7 The guidelines on the formation of discovery plans in Recommendation 6–5 should direct parties, when forming a discovery plan, to identify where practicable:

(a) likely repositories or custodians of relevant documents—for example, by completing a questionnaire or under pre-trial oral examination;

(b) crucial issues in dispute—for example, by outlining the evidence on which the parties intend to rely or by exchanging critical documents;

(c) search strategies the parties can use to carry out a reasonable search for discoverable documents—such as concept searches or predictive coding;

(d) repositories of documents that are not ‘reasonably accessible’, whether discovery of such documents is justified in the proceedings and, if so, whether the party seeking discovery should bear the costs of accessing the documents—for example, documents stored on backup tapes or data recovery systems;

(e) whether metadata should be discovered, and the methods and technologies that may be used to preserve the integrity of metadata;

(f) methods and technologies that may be used to identify and remove duplicate documents in the discovery process; and

(g) methods and technologies that can be used to estimate the likely time and cost of discovery.

Recommendation 6–8 The guidelines on the content of discovery plans in Recommendation 6–5 should direct parties to include in a discovery plan:

(a) the repositories or custodians of documents to be searched in the discovery process;

(b) specific categories of documents, relevant to the crucial issues in dispute, to be searched for in the discovery process;

(c) specific categories of metadata, relevant to the crucial issues in dispute, to be searched for in the discovery process, and the methods used to extract the metadata;

(d) the terms or functionality of any strategies to be used for carrying out a reasonable search in the discovery process—for example, the keywords or concepts to be used in automated searches;

(e) any repositories of documents to be excluded from the conduct of a reasonable search in the discovery process—for example, backup tapes or data recovery systems;

(f) the methods and technologies to be used to de-duplicate discoverable documents;

(g) the methods and technologies to be used to redact privileged documents;

(h) the form in which the party giving discovery will provide a list of documents;

(i) the format in which documents will be produced for inspection—including examples of document management protocols for the production of electronic documents in proceedings; and

(J) a timeframe and an estimate of the costs of discovery.

Recommendation 6–9 The Federal Court of Australia should monitor and assess whether the reforms in Recommendations 6–1 to 6–8, if implemented, help achieve the overarching purpose of civil practice and procedure set out in s 37M of the *Federal Court of Australia Act 1976* (Cth).

7. Judicial Case Management and Training

Recommendation 7–1 The Federal Court of Australia, in association with relevant judicial education bodies should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings.

Recommendation 7–2 The program referred to in Recommendation 7–1 should cover, among other things:

- the technologies and practices used to discover electronically-stored information;
- the circumstances in which it might be appropriate to order the parties to prepare a discovery plan (see Recommendation 6–1);
- how to evaluate a discovery plan;
- the circumstances in which it might be appropriate to direct a Registrar to make orders in relation to discovery (see Recommendation 8–1);
- the circumstances in which it might be appropriate to order pre-trial oral examination for discovery (see Recommendation 10–2); and
- the availability of costs orders to control discovery (see Recommendation 9–1).

Recommendation 7–3 The Federal Court of Australia should ensure that all judges are actively encouraged and supported to participate in the judicial training program referred to in Recommendation 7–1.

8. Registrars and Referees

Recommendation 8–1 Registrars in each registry of the Federal Court of Australia should be trained and equipped to hear applications in relation to discovery, especially in large or complex proceedings where discovery of electronically-stored information may prove burdensome by way of cost or delay to the parties. This training should include how to prepare and critically interrogate discovery plans and make discovery orders.

Recommendation 8–2 The judicial education and training program in Recommendation 7–1 should address the circumstances in which it may be appropriate for the Federal Court of Australia to direct Federal Court registrars to hear applications in relation to discovery. The training should address the circumstances in which such directions may be appropriate—for example, for complex discovery matters that may require discovery of very large quantities of electronically-stored information.

Recommendation 8–3 Section 54A of the *Federal Court of Australia Act 1976* (Cth) and Order 72A of the *Federal Court Rules* (Cth) should be amended to provide expressly that the Court may refer discovery questions and issues to a referee for inquiry and report.

9. Costs Orders and Reasonable Fees

Recommendation 9–1 Federal Court of Australia practice notes should provide that the Court will expect practitioners to ensure that they have complied with their duty to assist the parties to give discovery and take inspection in accordance with the overarching purpose in s 37M of the *Federal Court of Australia Act 1976* (Cth).

The practice notes should also outline how the court, when awarding costs, may take into account a failure to comply with the duty.

Recommendation 9–2 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that, without limiting the discretion of the Court or a judge in relation to costs, the Court or judge may make an order that:

(a) some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery;

(b) a party requesting discovery give security for the payment of the cost of discovery; and

(c) specifies the maximum cost that may be recovered for giving discovery or taking inspection.

Recommendation 9–3 Federal Court of Australia practice notes should provide that practitioners may be expected to address whether an order in Recommendation 9–1 should be made. The practice notes should outline relevant circumstances the practitioners may be asked to address, including:

(a) the parties' financial resources;

(b) the likely cost of retrieving relevant documents;

(c) the proportionality of the likely cost to the importance and complexity of the matters in dispute; and

(d) the potential for the order to focus the scope of discovery.

Recommendation 9–4 Federal Court of Australia practice notes should provide that the Court will expect practitioners to ensure that they have complied with their duty to assist the parties to give discovery and take inspection in accordance with the overarching purpose in s 37M of the *Federal Court of Australia Act 1976* (Cth). The practice notes should also outline how the court, when awarding costs, may take into account a failure to comply with the duty.

10. Pre-trial Oral Examinations

Recommendation 10–1 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide expressly that the Court or a judge may order pre-trial oral examination about discovery.

Recommendation 10–2 The *Federal Court Rules* (Cth) should be amended to provide expressly the limited circumstances in which the Court or a judge may order pre-trial oral examination about discovery, for example to:

(a) identify the existence and location of potentially discoverable documents;

(b) assess the reasonableness and proportionality of a discovery plan;

(c) resolve any disputes about discovery.

12. Professional and Ethical Discovery

Recommendation 12–1 Legal professional associations should address discovery in commentary to professional conduct rules. The commentary should explain the application of the rules to discovery, including electronic discovery and outsourced discovery, and should include practical examples.

Recommendation 12–2 Continuing legal education and in-house training programs should include the law, practice and ethics of discovery. Such programs should address the technologies and practices used to discover electronically-stored information and how to prepare discovery plans.

Executive Summary

Contents

Background

Costs, terabytes and efficiency

When Justice Ronald Sackville was faced in *Seven Network Limited v News Limited* (C7) with an estimated cost of discovery of $200 million, compared with a damages estimate of between $195–$212 million, he commented that it 'borders on the scandalous'.[1] Mega-litigation[2] can have mega-costs—with an attendant shock reaction. It prompted Justice Ray Finkelstein to remark that:

1 *Seven Network Limited v News Limited* [2007] FCA 1062, [10].

2 R Sackville, 'Mega-Lit: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.

> The key to discovery reform lies in active and aggressive judicial case management of the process. The most effective cure for spiralling costs and voluminous productions of documents is increased judicial willingness to just say no.[3]

The sheer volume of data available today—running into 'terabytes'[4]—tests the historical rationale of discovery as being to facilitate fact-finding, save time, and reduce expense. The commercial realities of discovery in the context of possibly 'too much information' may represent a significant barrier to justice for many litigants as well as amounting to a huge public cost. As noted in a submission to this Inquiry, '[t]he cost of litigation is borne not by those who choose to litigate but by the broader community, and may impede access to justice'.[5]

Discovery is often the single largest cost in any corporate litigation, giving rise to concern about the scale of costs. Nonetheless, discovery remains an important feature of common law litigation in appropriate cases—ensuring that parties 'can proceed on an equal footing and without ambush, and that relevant materials are before the court'.[6]

A significant landmark in reforming practice and procedure in the Federal Court of Australia was the introduction, on 1 January 2010, of the 'overarching purpose' provision in s 37M of the *Federal Court of Australia Act 1976* (Cth):

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

The docket system; the specialist lists, like the 'Fast Track' and Tax Lists; active case management, reflected in practice notes—all contribute significantly to responding to issues of high costs, large caseloads and other exigencies of litigation.

Inquiry in context

This Inquiry was initiated following a recommendation in the report of the Australian Government Attorney-General's Department's Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009). On 10 May 2010, the Attorney-General, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to identify law reform options to improve the practical operation and effectiveness of discovery of documents in proceedings in federal courts. The underlying premise for this Inquiry was that the costs of discovery, which can be very high, may inhibit access to justice and generate, in addition, an undue public cost.

Concerns about the potentially high costs of discovery had been identified in a number of reviews, summarised in Chapter 1 of this Report, including the prior work of the

---

3 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, 12.

4 One terabyte is 1 million megabytes.

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

6 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

ALRC in its major inquiry into the federal civil justice system in the 1990s culminating in the report, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (2000) (*Managing Justice*). The ALRC noted in *Managing Justice* that in 'almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control'.[7]

The law reform brief

The Terms of Reference, included at the front of this Report, set out the extent of the law reform brief in this Inquiry. The ALRC was directed to consider four main issues:

- the law, practice and management of the discovery of documents in litigation before federal courts;
- ensuring that cost and time required for discovery of documents is proportionate to the matters in dispute;
- how to limit the overuse of discovery, reduce the expense of discovery and ensure key documents relevant to the real issues in dispute are identified as early as possible; and
- the impact of technology on the discovery of documents.

In identifying law reform options to improve the practical operation and effectiveness of discovery of documents, the ALRC was also to have regard to:

- alternatives to discovery;
- the role of courts in managing discovery, including the courts' case management;
- powers and mechanisms to enable courts to better exercise those powers in the context of discovery;
- implications of the cost of discovery on the conduct of litigation, including means to limit the extent to which discovery gives rise to satellite litigation and the use of discovery for strategic purposes;
- costs issues, for example cost capping, security for discovery costs, and upfront payment; and
- the sufficiency, clarity and enforceability of obligations on practitioners and parties to identify relevant material as early as possible.

Discovery is only one aspect of practice in the federal courts. However, in advancing law reform recommendations in relation to discovery, the ALRC was mindful of the need to consider the doctrine in its litigation context, and not in isolation. In a submission to this Inquiry, the Australian Taxation Office emphasised that:

---

7 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.67].

> It is both important to the cultural change necessary for a change to discovery, but also to litigation generally, that discovery reform be an element of overall efficient case management, rather than a discrete aspect of litigation.[8]

Key themes

A number of key themes emerged during consultations and submissions in this Inquiry, specifically with respect to the Federal Court:

- while the reform trajectory in the Court was applauded, there were inconsistencies in practice across the bench;
- robust judicial case management is critical in facilitating the resolution of disputes in the Court;
- rigid rules of general application impose unwanted restrictions on judicial discretion;
- expectations of parties in the Court are not always clear—uncertainties that lead to inconsistency of practice and potentially an increase in costs; and
- there is an uneasy tension between the time and money that discovery can involve and the right of parties for a reasonable opportunity to present their case.

A principal challenge in this Inquiry was, therefore, to recognise the important role that discovery can play in facilitating the resolution of disputes, while reviewing its operation in the context of the reality of modern information creation and retention and the development of active case management practices.

Framework for reform

Development of the reform response

Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base. As the ALRC commented in the *Managing Justice* report:

> Deprecation of the legal system and failed efforts at reform often proceed on the basis of anecdote and assumption. This can include both untested and unfounded criticism of some current practices, procedures and institutions, as well as uncritical acceptance of alternatives.[9]

Because of the headlines they generate, cases like C7, and other mega-litigation, may distort an assessment of discovery and the development of reform recommendations in consequence.

The process of building the evidence base in each ALRC inquiry depends on two principal variables: the nature and scope of the inquiry, and the timeframe in which it is to be discharged. The timeframe may put limits on the methodologies that may be used

---

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

9 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [1.36].

to answer the research questions in a particular inquiry—limiting the development of the evidence base. In such cases, the reform recommendations have to be modified accordingly.

A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[10] Under the terms of its constituting Act, the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[11]

The ALRC is committed to ensuring that all stakeholders and interested members of the public have an opportunity to participate in ALRC inquiries. In undertaking this Inquiry, a multi-faceted consultation strategy was required—using a combination of face-to-face consultations and roundtable discussions, online communication tools, and a Consultation Paper. In addition, two seminars were held: one in Melbourne focused on the conduct of lawyers, and the other in Sydney, introduced by the Hon Chief Justice Patrick Keane of the Federal Court, discussed the Inquiry as a whole.

Forty-seven consultations were conducted.[12] Internet communication tools were also integrated into the consultation process, to provide information and obtain comment. A monthly e-newsletter highlighted an 'issue in focus' and the comments received provided additional input. By the end of the Inquiry there were 218 subscribers to the e-newsletter and 30 submissions were received in response to the Consultation Paper.[13]

Principles for reform

The recommendations in this Report are underpinned by eight principles or policy aims: the five 'Access to Justice Principles' proposed by the Access to Justice Taskforce, and three additional reform principles reflective of the particular context of this Inquiry:

(1) *Accessibility*—justice initiatives should reduce the net complexity of the justice system.

(2) *Appropriateness*—the justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.

(3) *Equity*—the justice system should be fair and accessible for all, including those facing financial and other disadvantage and access should not be dependent on the capacity to afford private legal representation.

(4) *Efficiency*—the justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes; and the costs of formal dispute resolution and legal assistance

10 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 202.

11 *Australian Law Reform Commission Act 1996* (Cth) s 38.

12 A list of those consulted is set out in Appendix 2 of this Report.

13 A list of submissions is set out in Appendix 1 of this Report.

mechanisms—to Government and to the user—should be proportionate to the issues in dispute.

(5) *Effectiveness*—the interaction of the various elements of the justice system should be designed to deliver the best outcomes for users; and all elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.

(6) *Proportionality*—the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(7) *Consistency*—the civil justice system should be consistent in the application of laws and in practice.

(8) *Certainty*—the civil justice system should provide as much clarity of expectations, both of parties and of the court, as the nature of particular cases allows.

The principles form, at a policy level, the foundation of the interlinking recommendations in this Report.

Focus of the recommendations

Having considered carefully the views, concerns and feedback expressed during consultations and in submissions, and having conducted its own research and deliberations, the ALRC has developed and presents 27 policy recommendations for improving the practical operation and effectiveness of discovery of documents in federal courts.

The focus of the recommendations is principally on the Federal Court. The recommendations target a key theme in submissions and consultations that, to the extent that there is a problem in relation to discovery of documents in federal courts, it lies principally in the area of practice. Any uncertainty as to what is expected of parties and any inconsistency in case management by judges increases, the potential for litigation to become protracted and costs to balloon.

In this Report, the ALRC's recommendations are based on a model that is 'facilitative', emphasising the role of the judge in facilitating the resolution of the matter through active case management to offset what some argue is the problem of the adversarial nature of proceedings—or overly adversarial practice. Embracing a facilitative model continues the pattern of civil procedure reform identified in the ALRC's *Managing Justice* inquiry[14] and reinforced by trends since—for example through the introduction of s 37M of the *Federal Court of Australia Act.*

The ALRC considers that the most effective way to facilitate the resolution of disputes in the Federal Court is through robust case management. Such a model preserves the discretion of the judge while, at the same time, introducing greater clarity of expectations in relation to discovery. A key focus of the recommendations is on

14 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000).

reinforcing the flexibility that Federal Court judges have in the case management of litigation so that, for example, any discovery regime can be tailored to suit the particular issues in each case. To achieve this, the ALRC makes a number of recommendations for reform of the *Federal Court of Australia Act* and the *Federal Court Rules* (Cth), supported by a suite of practice notes.

Practice notes, issued by the Chief Justice, are flexible and responsive tools for guiding practice in the Federal Court. Practice notes can set out clearly what the Court expects of practitioners, through which greater consistency of outcome may be achieved. Practice notes for participants are complemented by judicial education and training directed towards reinforcing judicial understanding of powers and encouraging their more consistent application. Recommendations for reform focus on the educative function of practice notes, to bring to the attention of parties—and to encourage the use of—the various ways in which discovery may be managed effectively and efficiently in proceedings. This provides guidance on the best practices of the parties, which may also be a valuable resource for judges in scrutinising applications and submissions. These reforms are also supported by recommendations for legislative amendments—to governing Acts and court rules—that provide statutory powers to facilitate the implementation of other reforms and to drive cultural change.

Federal Court

The ALRC's recommendations with respect to the Federal Court emphasise the gatekeeper role of the Court in regulating discovery and the development of discovery plans and the use of other 'tools' that the Court might use to manage it—discovery plans, registrars and referees, costs orders and pre-trial oral-examination. The recommendations focus on clarifying what is expected of the parties and their lawyers, complemented by education and training of both practitioners and judicial officers. The ALRC also acknowledges the limited data available to provide evidence of relevant matters—for example, to assess the proportionality of costs—and therefore recommends initiatives with respect to data collection and evaluation.

Access to discovery

The ALRC considers that a party should only be able to apply for discovery if it is necessary for the just determination of the issues in the proceedings. In Chapter 5, the ALRC expresses support for proposed amendments to the *Federal Court Rules* that will impose a clear obligation on parties to justify applications for discovery orders and, in turn, ensure that the Court scrutinises the need for discovery in each case. This will improve consistency in the way judges regulate access to discovery in the Federal Court. The ALRC also recommends that Federal Court practice notes should highlight existing mechanisms that enable the production and inspection of documents prior to discovery in proceedings.[15] The ALRC considers that early disclosure of documents should only occur in cases where the parties or the Court consider it appropriate.

15 Rec 5–2.

General discovery

The ALRC concludes, in Chapter 5, that broad parameters should remain for general or standard discovery in Federal Court proceedings and that any appropriate limitations or non-standard criteria should be sought by the parties and imposed by the Court on a case-by-case basis to suit the particular issues in dispute. The ALRC also supports proposed amendments to the *Federal Court Rules*, to clarify that the 'direct relevance' test applies where the Court orders discovery of specific categories of documents, unless such standard criteria is displaced by those orders.

Limited discovery

The ALRC supports, in Chapter 6, the use of limited discovery orders in the Federal Court suited to particular issues in dispute or specific categories of documents. This chapter considers a variety of means by which the crucial issues in dispute might be highlighted in order to assist the categorisation of documents for discovery. The ALRC considers that the parties and the Court should be encouraged, on a case-by-case basis, to adopt appropriate means to clarify the important issues in dispute to focus the scope of discovery in proceedings.

Discovery plans

The ALRC recommends, in Chapter 6, the introduction of procedures in the Federal Court, in suitable cases, for the development of discovery plans setting out the practical steps required of the parties in the process of discovery. This will enable the parties and the Court to consider, in particular, the cost and time implications of discovery processes when seeking and making orders for discovery. It will also create certainty in the discovery process by delineating the extent of the parties' practical obligations in advance. The ALRC recommends that the *Federal Court Rules* be amended to provide that, before the Federal Court makes an order for a party to give discovery, a party may apply for an order that the parties file a practical discovery plan setting out the matters on which the parties agree or disagree in relation to the scope and process of any discovery (a discovery plan order).[16] The ALRC also recommends changes to the *Federal Court Rules* to provide that, if the Court makes a discovery plan order, the parties must: discuss in good faith and endeavour to agree upon a practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.[17]

These changes to the Rules are complemented by recommendations for practice notes concerning: the factors likely to be relevant in an application for a discovery plan order;[18] and, if the Court makes a discovery plan order, what the Court will expect the parties to do.[19] The ALRC also recommends that the practice notes be complemented by a detailed set of best-practice guidelines on the formation and content of discovery

16 Rec 6–1.
17 Rec 6–4.
18 Rec 6–3.
19 Rec 6–5.

plans.[20] The practice notes will provide guidance for the parties as to the circumstances in which it may be appropriate to prepare a discovery plan and, in such cases, the matters that should be addressed in the plan. In addition, best-practice guidelines will provide a valuable resource for judges in scrutinising the proportionality and necessity of the measures proposed in discovery plans.

The ALRC also recommends that the Federal Court should monitor and assess whether the reforms recommended in Chapter 6, if implemented, help achieve the overarching purpose of civil practice and procedure set out in s 37M of the *Federal Court of Australia Act*.[21]

Judicial education and training

The recommendations in Chapter 7 are designed to encourage the judiciary to take a more robust approach to the existing powers to control discovery. The Federal Court has extensive case management powers and, building upon this strong base—but also responding to criticism heard throughout the Inquiry—the ALRC recommends that the Federal Court, in association with relevant judicial education bodies, should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings.[22] The training should encourage judges to manage discovery confidently and robustly, and so facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible. The need for training in methods of discovering electronically-stored information was singled out as being particularly pressing, especially so that judges are able to interrogate detailed discovery plans. The ALRC also acknowledges that regular training—properly resourced, of high quality and professionally appropriate—is an essential aspect of long-term cultural change. Accordingly, the ALRC also recommends that all judges are actively encouraged and supported to participate in this training.[23]

Registrars and referees

As part of the 'toolkit' of case management solutions available to Federal Court judges, in Chapter 8 the ALRC discusses the ways in which judges may be supported in relation to discovery matters—in particular through the use of registrars and, in limited circumstances, referees. In some complex cases, the Court and the parties may benefit from the assistance of a person who can engage at length and with a high degree of technical competence in the detail of a discovery process. The occasional and targeted use of such persons need not be inconsistent with active judicial case management.

The ALRC recommends that registrars in each registry of the Federal Court should be trained and equipped to undertake the tasks delegated to them, including preparing and critically interrogating discovery plans and making discovery orders, especially in large

20 Recs 6–6 to 6–8.
21 Rec 6–9.
22 Recs 7–1, 7–2.
23 Rec 7–3.

or complex proceedings where discovery may prove burdensome by way of cost or delay to the parties.[24]

The ALRC also recommends that judicial training programs concerning discovery consider the circumstances in which a judge might choose to direct a registrar to hear a discovery application.[25] A registrar who is highly trained and experienced in the management of discovery issues—in particular, the use of electronic technologies—might provide valuable support for judges dealing with complex discovery matters. Therefore, judicial education and training might alert judges to the potential for such registrars to determine, for example, complex discovery matters that may require discovery of very large quantities of electronically-stored information.

Building on the existing model that allows the appointment of a referee in the *Federal Court of Australia Act*, the ALRC also recommends that the Act be amended to provide clearly that the Court may refer discovery questions to a referee.[26] The ALRC suggests that referees should only be used when neither the docket judge nor a trained registrar is able to hear the discovery application and spend the necessary time to ensure discovery is properly managed.

Though registrars and referees may provide support in some matters, the ALRC considers that the docket judge should remain primarily responsible for managing discovery.

Costs

The ALRC considers, in Chapter 9, how the targeted use of costs orders in the Federal Court might help control discovery.

The chapter first considers costs between the parties, including when the Court might disallow costs that have been improperly, unreasonably or negligently incurred, and how the Court might take into account the failure of parties to conduct proceedings in a manner consistent with the overarching purpose of civil practice and procedure in s 37M of the *Federal Court of Australia Act*. Judicial training and education should reinforce for judges the need to consider these matters when awarding costs. However, the ALRC also recommends that Federal Court practice notes provide that the Court will expect practitioners to address compliance with s 37M.

Secondly, the ALRC recommends that the *Federal Court of Australia Act* be amended to provide that, without limiting the discretion of the Court or a judge in relation to costs, the Court or judge may make an order that: some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery; a party requesting discovery give security for the payment of the cost of discovery; or, specifies the maximum cost that may be recovered for giving discovery or taking inspection.[27] The ALRC considers that such orders may be useful tools for robust case management,

---

24 Rec 8–1.
25 Rec 8–2.
26 Rec 8–3.
27 Rec 9–2.

serving to focus the scope of discovery and maintain proportionality to the issues in dispute. An order for advance payment, for example, may be a useful order to make when a party requests the discovery of data stored on backup tapes that have been kept for disaster recovery, rather than archival purposes.

Thirdly, the ALRC recommends that Federal Court practice notes should provide that practitioners are expected to address whether such orders should be made, including an outline of relevant circumstances, such as: the parties' financial resources; the likely cost of retrieving relevant documents; the proportionality of the likely cost to the importance and complexity of the matters in dispute; and the potential for the order to focus the scope of discovery.[28]

Finally, the ALRC notes that it is open to the Federal Court to disallow discovery costs between lawyers and their clients on the grounds that the discovery costs were incurred without sufficient regard to the need to resolve disputes quickly, inexpensively and efficiently and at a cost proportionate to the importance and complexity of the matters in dispute. Accordingly, the ALRC recommends that Federal Court practice notes should provide that the Court expects practitioners to ensure that they have complied with their duty to assist the parties to give discovery and inspect in accordance with the overarching purpose in s 37M of the *Federal Court of Australia Act*. The practice notes should also outline how the Court, when awarding costs, may take into account a failure to comply with the duty.[29]

Pre-trial oral examinations

Another tool in the toolkit that may be useful in limited cases, is pre-trial oral examinations for discovery. Pre-trial oral examinations may assist the discovery process by facilitating the discovery of evidence and the identity of documents, and by promoting settlement and the narrowing of issues in dispute. At present there is uncertainty as to whether the Federal Court has the power to order pre-trial oral examination in respect of discovery. In Chapter 10, the ALRC recommends that the *Federal Court of Australia Act* be amended to provide expressly that the Court or a judge may order pre-trial oral examination about discovery.[30] The ALRC considers that a necessary safeguard for the use of pre-trial oral examinations about discovery is that they only be allowed with leave of the Court. Accordingly, the ALRC recommends amendment to the *Federal Court Rules* to provide expressly the limited circumstances in which the Court or a judge may order pre-trial oral examination about discovery—for example to identify the existence and location of potentially discoverable documents; assess the reasonableness and proportionality of a discovery plan; and resolve any disputes about discovery.[31] The ALRC is not advocating the use of pre-trial oral examinations at large, nor in all discovery matters. The ALRC acknowledges that any proposal to adopt oral depositions in the broad way that they are used in the United States would be a significant change to Australian legal practice.

---

28 Rec 9–3.
29 Rec 9–4.
30 Rec 10–1.
31 Rec 10–2.

Professional and ethical discovery

Chapter 12 focuses on practitioners and considers way to foster professional and ethical discovery practices. The ALRC recommends the development of discovery-specific commentary to professional conduct rules—to explain the application of the rules to discovery, including electronic discovery and outsourced discovery, and to provide practical examples.[32]

The chapter also suggests that law firms work to build and reinforce work cultures that actively encourage and promote ethical and responsible discovery practices. By regularly and actively engaging with the professional conduct rules, and considering how they apply to every stage of litigation, law firms can work to temper the aggressive adversarialism that has often been blamed for costly discovery practices.

Finally, the ALRC recommends that providers of continuing legal education and in-house training provide training to legal practitioners on the law, practice and ethics of discovery.[33] Continuing education is vital to ensure that lawyers are reminded of their ethical obligations and are able to consider and apply these in practice. Education also plays a key role in shaping legal culture. Practitioners will benefit from training directed at their role in facilitating a well-managed, efficient and proportionate discovery process. In particular, and in addition to the broader professional and ethical obligations, practitioners will benefit from practically-focused training on the technologies and practices used to discover electronically-stored information and the preparation of discovery plans.

Data collection

The ALRC acknowledges the need for accurate and meaningful data on the costs associated with discovery in federal court proceedings—as well as the need to evaluate the utility of discovered documents in the context of the litigation—in order to assess concerns about disproportionate discovery costs and to guide future reform in this area. In this regard, the ALRC recommends that the Australian Government should work with the Federal Court and other stakeholders to identify, where possible, relevant data sets, measures and indicators and the means of capturing and reporting relevant data so that an empirical basis is developed in relation to civil litigation costs.[34] Such information should include data on the proportionality of costs associated with the discovery of documents, 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.

Family Court and Federal Magistrates Court

The Family Court works on the basis of 'disclosure'—that parties must give full and frank disclosure in a timely manner to the Court and to the other party of all information relevant to the case. The jurisdiction conferred on the Federal Magistrates

---

32 Rec 12–1.
33 Rec 12–2.
34 Rec 3–1.

Court overlaps with that of the Family Court, but discovery in relation to proceedings in the Federal Magistrates Court is not allowed unless the Court or a Federal Magistrate declares that it is appropriate, in the interests of the administration of justice, to allow it. To resolve the tension between the differing scope of access to disclosure in the Family Court and the Federal Magistrates Court in respect of similar types of family law matters, the ALRC recommends reform to promote parties' right to disclosure of documents in the Federal Magistrates Court's family law jurisdiction. Such reform will ensure that access to disclosable documents in family law cases before the Federal Magistrates Court is consistent with the Family Court, so that disclosure of documents is not contingent upon any action of the Federal Magistrates Court.[35]

Net effect of recommendations

The net effect of the recommendations will be that:

- judicial officers are encouraged and supported in their role as robust case managers;
- parties and practitioners will have a clearer understanding of what is expected of them in relation to discovery obligations;
- the scope of discovery will be defined more clearly and in the context of an understanding of how information is stored and can be accessed; and
- the clarity of expectations and certainty in obligations will help to maintain proportionality in discovery costs.

35 Rec 5–3.

1. Introduction to the Inquiry

Contents

Introduction

1.1 On 10 May 2010 the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to explore options to improve the practical operation and effectiveness of discovery of documents in proceedings in federal courts.

1.2 The Inquiry was initiated following a recommendation in the report of the Australian Government Attorney-General's Department's Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (*Strategic Framework*).[1] The underlying premise for this Inquiry was that the costs of discovery, which can be very high, may inhibit access to justice and generate, in addition, an undue public cost. As noted in a submission to this Inquiry:

> The cost of litigation is borne not by those who choose to litigate but by the broader community, and may impede access to justice.[2]

---

1 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Rec 8.2.

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

1.3 The specific objective of this Inquiry was to identify law reform options to improve the practical operation and effectiveness of discovery of documents in federal courts.[3]

1.4 This chapter provides an outline of the background to the Inquiry and an analysis of its scope as defined by the Terms of Reference. It also describes the development of the evidence base to support the law reform response as reflected in the recommendations. The chapter concludes with an overview of the Report. The framework for reform, including the conceptual background and the principles for reform, are considered in Chapter 2.

Background

1.5 The work of the Access to Justice Taskforce, together with the prior work of the ALRC in its major inquiry into the federal civil justice system in the 1990s culminating in the report, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (2000) (*Managing Justice*) and a number of significant international reviews, are all of key relevance to the background to this Inquiry.

Access to Justice Taskforce

1.6 The *Strategic Framework* developed by the Access to Justice Taskforce included the following 'Access to Justice Principles': accessibility; appropriateness; equity; efficiency; and effectiveness.[4] A key objective was 'ensuring that the cost of and method of resolving disputes is proportionate to the issues':

> Cost can be a significant barrier to justice. The cost to disputants and the cost to Government of resolving disputes should be proportionate to the issue in dispute.
>
> Adequate information about costs is essential in assessing proportionality. The provision of greater information regarding the costs of the justice system allows better identification of the most appropriate pathway to resolution and, in particular, whether litigation is the most appropriate course.[5]

1.7 Case management was identified as critical in addressing proportionality of costs: '[c]ase management of litigation will help to ensure that costs incurred are directed to resolving the dispute, and limit costs from collateral actions'.[6]

Managing Justice

1.8 In *Managing Justice*, the ALRC noted that:

> In almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control.[7]

---

3 See the Terms of Reference for this Inquiry, set out at the front of this Report.

4 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 62–63.

5 Ibid, 64.

6 Ibid.

7 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.67].

1.9 While noting that discovery was 'an essential litigation tool', enabling parties to obtain information relevant to their own and the other party's cases and to request other parties to produce relevant documents,[8] the ALRC considered that discovery had proved problematic in practice, leading to consequential increases in costs:

> Problems with discovery result from party responses to discovery requests. Parties may obstruct or subvert disclosure, refusing to provide or destroy or conceal relevant documentation which might have assisted the other side. In some circumstances the party requesting discovery is 'fishing'—seeking disclosure of significant numbers of documents, perhaps with the intention of creating sufficient aggravation or embarrassment to encourage settlement, or hoping to uncover material which will remedy a weak case or lead to new causes of action. In other instances, parties volunteer vast numbers of documents, not to be helpful and cooperative but as a mechanism to hide a single incriminating document which might now be lost in the detail. The discovery process is used strategically by parties. Such tactics can result in significant costs, involve repeated interlocutory hearings and be very time consuming.[9]

1.10 One law firm contributing to the *Managing Justice* inquiry submitted that '[i]n large scale commercial litigation, it is our experience that there is no interlocutory process more in need of reform than discovery'.[10]

Other inquiries and reports

1.11 Other inquiries that have been of relevance to the ALRC in this Inquiry include: the review of the rules and principles governing the costs of civil litigation in England and Wales conducted by Lord Justice Jackson in 2008–09;[11] the report of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 2009, including consideration of the greater use of alternative dispute resolution (ADR) as an alternative to civil proceedings and during the court or tribunal process;[12] the review of the civil justice system in Victoria by the Victorian Law Reform Commission (VLRC) in 2006–08;[13] the report of the British Columbia Civil Justice Reform Working Group in 2006;[14] the report for the Chief Justice of Hong Kong in relation to reforms to civil proceedings of the High Court and the District Court of Hong Kong in 2004;[15] and the review and consolidation of civil procedure in England and Wales conducted by Lord Woolf in 1994–96.[16]

---

8 Ibid, [6.67].
9 Ibid, [6.68].
10 Ibid, [6.68], citing Arthur Robinson & Hedderwicks, *Submission 189*.
11 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009).
12 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).
13 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008).
14 British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006).
15 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004).
16 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).

1.12 The key principles for reform considered in these inquiries are summarised below. The similarities of core ideas throughout these inquiries assist in the development of the framework of reform for this Inquiry that is set out in Chapter 2 of this Report.

Review of Civil Litigation Costs

1.13 In November 2008, the then Master of the Rolls, Sir Anthony Clarke, appointed Lord Justice Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations in order to promote access to justice at proportionate cost.

1.14 Lord Jackson's preliminary report was published on 8 May 2009, identifying relevant issues for consideration during consultations.[17] As described in the press release accompanying the release of the report, topics discussed included:

- the basic facts—how much civil litigation there is, and what lawyers earn
- research and consultation concerning costs—academic studies, views of court users and stakeholders, and statistical data
- how civil litigation is or could be funded—legal aid, before or after-the-event insurance, third party funding, conditional fee agreements (no-win, no fee), contingency fees
- fixed costs—assessing the present regime
- personal injuries litigation
- other specific types of litigation, such as consumer claims, housing claims, environmental claims, collective actions and defamation proceedings
- controlling the costs of litigation—case management, cost capping, recoverability of success fees
- regimes where there is no cost shifting—small claims, employment tribunals
- the assessment of costs by the court
- review of costs systems in other countries.[18]

1.15 The final report was published on 21 December 2009 and sets out a coherent package of interlocking reforms, designed to reduce litigation costs and to promote access to justice.[19] The report's key findings and recommendations include:

- Proportionality—the costs system should be based on legal expenses that reflect the nature/complexity of the case (Chpt 3);

---

17 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009).

18 Judicial Communications Office, Judiciary of England and Wales, 'Lord Justice Jackson Publishes Preliminary Findings of His Civil Litigation Cost Review' (Press Release, 8 May 2009). The topics are considered in pts 3–11 respectively of R Jackson, *Review of Civil Litigation Costs: Final Report* (2009).

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

- Success fees and after the event insurance premiums to be irrecoverable in no win, no fee cases (CFAs—Conditional Fee Agreements), as these are the greatest contributors to disproportionate costs (Chpts 9 &10);
- To offset the effects of this for claimants, general damages awards for personal injuries and other civil wrongs should be increased by 10% (Chpt 10);
- Referral fees should be scrapped—these are fees paid by lawyers to organisations that 'sell' damages claims but offer no real value to the process (Chpt 20);
- Qualified 'one way costs shifting'—claimants will only make a small contribution to defendant costs if a claim is unsuccessful (as long as they have behaved reasonably), removing the need for after the event insurance (Chpts 9 & 19);
- Fixed costs to be set for 'fast track' cases (those with a claim up to £25,000) to provide certainty of legal costs (Chpt 16);
- Establishing a Costs Council to review fixed costs and lawyers' hourly rates annually, to ensure that they are fair to both lawyers and clients (Chpt 6);
- Allowing lawyers to enter into Contingency Fee Agreements, where lawyers are only paid if a claim is successful, normally receiving a percentage of actual damages won (Chpt 12); and
- Promotion of 'before the event' legal insurance, encouraging people to take out legal expenses insurance eg as part of household insurance (Chpt 8).[20]

1.16 The driving principle in Lord Jackson's inquiry was proportionality. His brief was to find ways of making costs more proportionate in relation to the sum or other remedy at stake in civil actions, whilst promoting access to justice.[21] The recommendations in the report are framed by the principle that the costs system should be based on legal expenses that reflect the nature and complexity of the case.[22]

The Resolve to Resolve (NADRAC)

1.17 On 13 June 2008, the Australian Government Attorney-General requested NADRAC to inquire into and identify strategies to remove barriers to justice and to provide incentives for greater use of ADR as an alternative to civil proceedings and during the court or tribunal process. NADRAC was asked to advise on strategies for litigants, the legal profession, tribunals and courts, as well as initiatives the Government might take, including legislative action.[23] In particular, NADRAC was asked to consider:

- whether mandatory requirements to use ADR should be introduced;

---

20 Judicial Communications Office, Judiciary of England and Wales, 'Jackson Review Calls for a Package of Reforms to Rein in the Costs of Civil Justice' (Press Release, 14 January 2010).

21 Lovells (UK), *Lord Justice Jackson's Final Report on Civil Litigation Costs: An Overview* (2010), 1.

22 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), chs 3, 35.

23 National Alternative Dispute Resolution Advisory Council, *ADR in the Civil Justice System: Issues Paper* (2009), [1.3].

- changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process;
- the potential for greater use of ADR processes and techniques by courts and tribunals, including by judicial officers; and
- whether there should be greater use of private and community-based ADR services and how to ensure that such services meet appropriate standards.[24]

1.18 The report, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, was presented to the Attorney-General in September 2009. It identified strategies to remove barriers to justice and to provide incentives for greater use of ADR in the federal civil justice system.[25]

1.19 NADRAC developed the following principles to guide its consideration of the matters under review:

- except where ADR processes are inappropriate, judicial determination of disputes should be regarded as a last resort
- people involved in civil disputes should be encouraged to first attempt to resolve their own disputes using facilitated 'interest-based' dispute resolution processes
- litigants and their lawyers should be encouraged to use ADR processes to resolve, limit or manage their disputes, at all stages of the litigation process, and
- barriers or disincentives in the civil justice system to the voluntary use of ADR should be removed.[26]

Civil Justice Review (VLRC)

1.20 In May 2004, the Victorian Attorney-General, the Hon Rob Hulls MP, issued a 'Justice Statement' outlining directions for reform of Victoria's justice system. One objective was the reform of the rules of civil procedure in order to streamline litigation processes, reduce costs and court delays, and achieve greater uniformity between different courts.

1.21 On 4 September 2006, the Attorney-General asked the VLRC to provide broad-ranging advice about civil justice reform. The Terms of Reference asked the VLRC to identify, among other things, 'the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation'.

---

24 Ibid, [1.4].

25 On 23 March 2011 the Australian Government enacted the *Civil Dispute Resolution Act 2011* (Cth), pursuant to the NADRAC report.

26 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), 1.

1.22 The report, *Civil Justice Review*, VLRC Report 14 (2008), suggested areas for law reform and identified changes which will reduce the cost, complexity and length of civil trials in Victoria.

1.23 In framing the recommendations for reform the VLRC identified goals for the civil justice system, both 'desirable'—aspirations for the civil justice system; and 'fundamental'—essential prerequisites to the proper administration of justice:

> Desirable goals of the civil justice system include:
>
> - accessibility
> - affordability
> - equality of arms
> - proportionality
> - timeliness
> - getting to the truth
> - consistency and predictability.
>
> Fundamental goals of the civil justice system include:
>
> - fairness
> - openness
> - transparency
> - proper application of the substantive law
> - independence
> - impartiality
> - accountability.[27]

Effective and Affordable Civil Justice (British Columbia Civil Justice Reform Working Group)

1.24 In November 2006, the British Columbia Civil Justice Reform Working Group produced the report, *Effective and Affordable Civil Justice*. The Working Group was formed to 'explore fundamental change to British Columbia's civil justice system from the time a legal problem develops through the entire Supreme Court litigation process'.[28]

---

27 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 9.

28 British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006), Executive Summary.

1.25 The report provided three key recommendations.[29] The first recommendation was for the establishment of a 'central hub' to provide information, advice, guidance and other services required to assist people in solving their own legal problems.

1.26 The second recommendation was that parties personally attend a case planning conference before they actively engaged the civil justice system beyond initiating or responding to a claim. The case planning conference would seek to address settlement possibilities and processes, and also seek to narrow the issues and determine procedural steps and deadlines for the conduct of litigation in the event that settlement is not possible.

1.27 The third recommendation had eight components and proposed a complete rewriting of the Supreme Court Rules. The Working Group recommended that the proposed rules:

- create an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality;
- abolish the current pleading process and instead adopt a new case initiation and defence process that requires the parties to accurately and succinctly state the facts and the issues in dispute and to provide a plan for conducting the case and achieving a resolution;
- limit discovery, while requiring early disclosure of key information;
- limit the parameters of expert evidence;
- streamline motion practice;
- provide the judiciary with power to make orders to streamline the trial process;
- consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules; and
- provide opportunities for litigants to quickly resolve issues that create an impasse.[30]

1.28 Following the Working Party's report, new rules were introduced, commencing on 1 July 2010.[31]

Civil Justice Reform (Hong Kong Chief Justice's Working Party)

1.29 In February 2000, a Working Party was appointed by the Chief Justice of Hong Kong to review the civil rules and procedures of the High Court and 'to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed'.[32]

---

29 Ibid, viii.
30 Ibid, vi.
31 *Supreme Court Civil Rules* (British Columbia).
32 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), [1].

1.30 After publication of an interim report and consultation paper in November 2001, a final report, *Civil Justice Reform*, was released on 3 March 2004.[33] It set out 150 recommendations in respect of reforms to be introduced to civil proceedings of the High Court and the District Court of Hong Kong. The underlying objectives of these reforms, which came into effect on 2 April 2009, were:

(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to civil proceedings before the Court;

(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;

(c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;

(d) to ensure fairness between the parties;

(e) to facilitate the settlement of disputes; and

(f) to ensure that the resources of the Court are distributed fairly.[34]

Access to Justice (Lord Woolf's report)

1.31 In 1994, the Lord Chancellor of Great Britain instructed the Master of the Rolls, Lord Woolf, to report on options to consolidate the existing rules of civil procedure in England and Wales. On 26 July 1996, Lord Woolf published his report, *Access to Justice*, identifying a number of principles which the civil justice system should meet in order to ensure access to justice. According to Lord Woolf's report, the system should:

(a) be *just* in the results it delivers;

(b) be *fair* in the way it treats litigants;

(c) offer appropriate procedures at a reasonable *cost*;

(d) deal with cases with reasonable *speed*;

(e) be *understandable* to those who use it;

(f) be *responsive* to the needs of those who use it;

(g) provide as much *certainty* as the nature of particular cases allows; and

(h) be *effective*: adequately resourced and organised.[35]

1.32 The report was accompanied by draft rules of practice designed to implement Lord Woolf's principles by:

- setting out a detailed fast track procedure for cases up to £10,000, with a maximum timetable of 30 weeks;
- recommending guideline maximum legal costs at the top of the fast track of £2,500, excluding disbursements;

---

33 Ibid.

34 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: An Overview—Judiciary* (2009), [2].

35 Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].

- proposing the use of pre-action protocols to encourage a more cooperative approach to dispute resolution and promote fair settlements, avoiding litigation wherever possible; and
- making detailed proposals to increase access to justice in key areas of litigation (medical negligence, housing, multi-party actions and judicial review).[36]

Scope of the Inquiry

Terms of Reference

1.33 The Terms of Reference are reproduced at the front of this Report. The ALRC is directed to consider four main issues:

- the law, practice and management of the discovery of documents in litigation before federal courts;
- ensuring that cost and time required for discovery of documents is proportionate to the matters in dispute;
- to limit the overuse of discovery, reduce the expense of discovery and ensure key documents relevant to the real issues in dispute are identified as early as possible; and
- the impact of technology on the discovery of documents.

1.34 In identifying law reform options to improve the practical operation and effectiveness of discovery of documents, the ALRC was to have regard to:

- alternatives to discovery;
- the role of courts in managing discovery, including the courts' case management;
- powers and mechanisms to enable courts to better exercise those powers in the context of discovery;
- implications of the cost of discovery on the conduct of litigation, including means to limit the extent to which discovery gives rise to satellite litigation and the use of discovery for strategic purposes;
- costs issues, for example cost capping, security for discovery costs, and upfront payment; and
- the sufficiency, clarity and enforceability of obligations on practitioners and parties to identify relevant material as early as possible.

---

36 Lord Chancellor's Department (UK), 'Access to Justice—Lord Woolf's Final Report' (Press Release, June 1996).

Matters outside the Inquiry

1.35 The term 'discovery' is often used in the context of civil court procedure to refer to the various ways in which one party to litigation is able to obtain information and documents held by other parties. It can encompass processes by which parties disclose relevant documents to other parties and make those documents available for inspection. It may also encompass processes enabling one party to ask the other a series of questions, known as 'interrogatories', which the party under interrogation is required to answer, usually on oath or affirmation. The questions are designed to obtain admissions and again to apprise the interrogating party of the case to be met at trial.

1.36 In some jurisdictions, discovery may extend to documents in the possession of third parties. For example, under O 15A r 8 of the *Federal Court Rules* (Cth), the court may order that a person who is not a party, and appears to be in possession of any document which relates to any question in the proceeding, disclose the document to the party seeking discovery.

1.37 It is possible for an applicant to use discovery to assist in identifying potential respondents to a proceeding. In this context, discovery is preliminary in the sense that it is obtained before a proceeding for substantive relief is commenced, and is intended to facilitate the commencement of such a proceeding. For example, O 15A r 3 of the *Federal Court Rules* provides specific procedures for persons to attend court for oral examination or to produce documents, for the purposes of identifying the proper respondent.

1.38 Moreover, there are several other procedures available under court rules which, although not strictly encompassed by the term 'discovery', further assist in defining the issues in dispute and obtaining evidence for trial. These include:

- procedures for the inspection and testing of property;[37]
- rules which facilitate the obtaining and tendering of expert evidence;[38]
- procedures which assist a party to obtain admissions from an opposing party prior to trial;[39] and
- the use of the subpoena process to compel the attendance of persons to give evidence at the trial or to produce documents either before or at the trial.[40]

1.39 The Terms of Reference limit this Inquiry to the discovery of documents in litigation before federal courts. The ALRC is therefore primarily concerned with the disclosure of documents for inspection by one party to another party in proceedings for substantive relief conducted in a federal court. Other discovery procedures—such as interrogatories, preliminary discovery, discovery from non-parties or other means of

37 *Federal Court Rules* (Cth) O 17 r 1.
38 Ibid O 10 r 1(xv).
39 Ibid O 18 r 2.
40 Ibid O 27A r 2.

obtaining information relevant to a proceeding—are not the central focus of this Inquiry.

1.40 However, consideration of options to improve the practical operation and effectiveness of discovery of documents in substantive proceedings may prompt discussion of discovery in its broader sense.

Evidence-based reform

The need for an evidence base

1.41 Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base. As the ALRC commented in the *Managing Justice* report:

> Deprecation of the legal system and failed efforts at reform often proceed on the basis of anecdote and assumption. This can include both untested and unfounded criticism of some current practices, procedures and institutions, as well as uncritical acceptance of alternatives.[41]

1.42 Cases like *Seven Network Limited v News Limited* (C7),[42] and other examples of so-called 'mega-litigation',[43] may distort an assessment of discovery and the development of reform recommendations in consequence. In a submission to this Inquiry, the Litigation Law and Practice Committee of the Law Society of New South Wales included the following caution:

> While complex, multiparty, document-intensive litigation, such as the 'C7' case, highlight the problems posed by the increasing quantity of electronic information generated in contemporary trade and commerce and the growing capacity of electronic document storage and management systems, the Committee warns against establishing matters of policy underlying discovery based on anecdotal evidence or particular case examples. While some case examples are useful ... to identify potential issues or perceived problems, they need to be supported on a wider basis in order to inform policy development.[44]

1.43 The Queensland Law Society also advised caution

> against adopting any significant reforms without further studies of the issues arising in discovery, the underlying causes of those issues, a detailed process of consultation with all relevant stakeholders, and consideration of the potential for unintended consequences.[45]

---

41 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [1.36]. Another example, from the family law field, is Professor Reg Graycar's article on the danger of relying on anecdotes: R Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millenium' (2000) 24 *Melbourne University Law Review* 737. The title refers to an anecdote of throwing of a 'frozen chook' and suggests it is not a sound basis for law reform recommendations.

42 *Seven Network Limited v News Limited* [2007] FCA 1062.

43 R Sackville, 'Mega-Lit: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.

44 Law Society of NSW, *Submission DR 22*, 28 January 2011.

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

1.44 In another submission, Michael Legg of the University of New South Wales similarly warned that

> anecdotal evidence must be treated with great care as there is no way to ensure its reliability. People suffer from bounded rationality leading to the use of heuristics, or rules of thumb, that can produce unreliable results. For example, individuals tend to make predictions by extrapolating from highly salient and memorable events even when those events are statistically aberrational. In the current context legal practitioners may assess the operation of discovery based on their most salient memories, which might be a particular negative experience.[46]

1.45 In the Consultation Paper, the ALRC put forward a proposal for data collection on the costs associated with the discovery of documents and the proportionality of a discovery process.[47] Legg submitted that this might be considered 'the most significant suggestion' in the Consultation Paper, 'as it would allow reform in the Federal Courts to be driven by fact rather than fashion'.[48] The proposal in relation to data collection is considered in Chapter 2.

ALRC processes

1.46 The process of building the evidence base in each ALRC inquiry depends on two principal variables: the nature and scope of the inquiry, and the timeframe in which it is to be discharged. The timeframe may put limits on the methodologies that may be used to answer the research questions in a particular inquiry, limiting the development of the evidence base. In such cases, the reform recommendations have to be modified accordingly.

1.47 If the timeframe and resources permit, the evidence base may include empirical work. An assertion that the costs of discovery are often high and disproportionate is amenable to such empirical investigation. Without such investigation, the available data is limited. As the Law Council of Australia (Law Council) commented:

> The general proposition emerges from literature research and anecdotally that in Australia:
>
> - discovery is generally unproblematic; and
> - cost blow-outs, delay, and discovery abuse (to the extent that it occurs) are largely confined to cases involving larger complex litigations.
>
> 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.[49]

1.48 In the landmark *Managing Justice* report—the outcome of an inquiry extending over four years—the ALRC was able to undertake significant empirical work in

---

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

47 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 3–7.

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

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

relation to costs. This was described as 'the largest and most comprehensive empirical study of case files and case cost information from the Federal and Family Courts and the [Administrative Appeals Tribunal]'.[50] Such an evidence base provided a substantial foundation for the law reform recommendations in that report. In this Inquiry—due to time and resource constraints—only a limited form of data collection was undertaken through a questionnaire, noted below. In addition, reference was made to the work of other inquiries. As it turned out, only two responses were received to the questionnaire.

1.49 In this Inquiry the ALRC identifies many areas of concern, in relation to which further evidence would be needed to support specific reforms. As noted by the Law Council of 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.[51]

1.50 Reform in relation to the discovery of documents must be placed in the context of ongoing review of Federal Court procedures. Moreover, to provide a foundation for the consideration and testing of reforms, data collection needs to be undertaken on an ongoing basis, as discussed in Chapter 3.

1.51 However, there are other critical ways of building an evidence base. In the evaluation of the evidence and the formulation of the direction of reform in each inquiry, the ALRC undertakes community consultation and is assisted by the establishment of a panel of experts as an Advisory Committee and the appointment of part-time Commissioners, as described further below.

Community consultation and participation

1.52 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.[52] Under the terms of its constituting Act, the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of a reference.[53] The nature and extent of this engagement is normally determined by the subject matter of the reference—and the timeframe in which the inquiry must be completed under its Terms of Reference.

1.53 A multi-pronged strategy of seeking community comments was adopted during this Inquiry. First, internet communication tools—an e-newsletter and blog—were used to provide information and obtain comment; secondly, a Consultation Paper was released and submissions sought in response; thirdly, a round of consultation meetings,

---

50 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), 7.

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

52 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 202.

53 *Australian Law Reform Commission Act 1996* (Cth) s 38.

roundtables and seminars was conducted; and, fourthly, a questionnaire was used to obtain information about practitioners' experiences of the costs of discovery.

Online tools

1.54 Regular e-newsletters provided a way to keep interested people informed about progress in the Inquiry on a regular basis. E-newsletters included a calendar of consultations or other key events in the upcoming month, a summary of consultations and other work in the past month, and links to relevant media releases, publications and other materials—such as the report of the Access to Justice Taskforce. Each e-newsletter also linked to the Inquiry blog, offering insight into particular issues the ALRC was considering during the review, and facilitated public discussion of those issues.

Consultations

1.55 Consultations for this Inquiry were held with a number of government agencies, academics, judges, members of the legal profession, litigation funders, community legal centres and public interest advocates. The ALRC is based in Sydney but, in recognition of the national character of the Commission, consultations are conducted around Australia during inquiries, dependent on the nature of the matter under consideration and budget. In this Inquiry 47 consultations were conducted as listed in Appendix 2.

1.56 The ALRC also maintains an active program of direct consultation with interested parties, including regular briefings to key staff in the Australian Government Attorney-General's Department.

1.57 The Law Council commented favourably about the consultation process in this Inquiry:

> 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 consultations 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.[54]

Consultation Paper

1.58 The ALRC released a Consultation Paper in November 2010 seeking submissions to the Inquiry in response to 53 questions and 15 proposals, or for interested parties to provide comment on the background material and analysis provided, in order to advance the reform process in the Inquiry. One submission commended the Consultation Paper as providing 'a thorough overview of the existing

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

procedures as well as raising many sensible proposals for dealing with some of the practical problems regarding discovery'.[55]

1.59 The ALRC received 30 submissions in this Inquiry, a full list of which is included in Appendix 1. Submissions were received, for example, from the Family Court of Australia, Australian Government departments, professional bodies, law firms, individuals, public interest organisations, academics, community legal centres and firms specialising in document management.

1.60 The ALRC acknowledges the considerable amount of work involved in preparing submissions and the impact, particularly in organisations with limited funding, of committing staff resources to this task. It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries and the ALRC records its deep appreciation to all participants.

Questionnaire

1.61 In an attempt to broaden the evidence base in this Inquiry, the ALRC developed a questionnaire to gauge practitioners' impressions—based on practical experience—of the degrees to which discovery costs weigh against the overall expenses of litigation, the complexity of the issues in dispute, the stakes in the litigation and the value of the documents sought in the context of the litigation.[56] While the aim was to contextualise discovery costs in terms of the nature of the proceedings in which documents were sought and the value of the documents in the context of the litigation, only two responses were received.[57] The responses are considered in Chapter 3.

Seminars

1.62 The ALRC conducted two public seminars immediately on the release of the Consultation Paper—one in Melbourne on 17 November 2010 and one in Sydney on 18 November 2010. The Melbourne seminar, entitled 'Conduct of Lawyers in Discovery: Room for Improvement?', was jointly hosted by the ALRC and the Civil Justice Research Group of the Faculty of Law, University of Melbourne. The session was moderated by Professor Camille Cameron, Director, Civil Justice Research Group and Professor Christine Parker of Melbourne Law School. Panellists included: Professor Rosalind Croucher (President, ALRC); the Hon Justice Ray Finkelstein (Federal Court); Georgina Hayden (Chief Legal Officer, Australian Securities and Investments Commission); Sue Laver (General Counsel Corporate Strategy and Customer, Experience and General Counsel Dispute Resolution, Telstra); Bernard Murphy (Chair, Maurice Blackburn Pty Limited); and Stuart Clark (Partner and Chief Operating Officer, Clayton Utz).

1.63 The Sydney seminar comprised a panel discussion on the Inquiry and was held in the ceremonial court of the Federal Court. Moderated by ALRC President Professor

---

55 Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

56 The Questionnaire is included as Appendix 4.

57 Griffith Hack Lawyers, *Submission DR 18*, 21 January 2011; D Farrar, *Submission DR 06*, 17 January 2011.

Rosalind Croucher and introduced by Federal Court Chief Justice Patrick Keane, panel members included: the Hon Justice Peter Jacobson (Federal Court); Rebecca Gilsenan (Principal, Maurice Blackburn Lawyers); and Stuart Clark (Partner and Chief Operating Officer, Clayton Utz).

Appointed experts

1.64 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of its Advisory Committees and the appointment by the Attorney-General of part-time Commissioners. A full list of the Advisory Committee and Commissioners is set out at the front of this Report.

Advisory Committee

1.65 While the ultimate responsibility for the Report and recommendations remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, appropriate to the Terms of Reference, is an invaluable aspect of ALRC inquiries—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. In this Inquiry, the Advisory Committee included Federal Court judges, senior officers of Australian Government agencies, academics and senior lawyers.

Part-time Commissioners

1.66 In addition to the Advisory Committee, two part-time Commissioners, both Federal Court judges, were appointed to the ALRC by the Attorney-General specifically to contribute to this Inquiry: the Hon Justice Arthur Emmett and the Hon Justice Bruce Lander. The ALRC was also able to call upon the expertise and experience of its two standing part-time Commissioners, also judges of the Federal Court: the Hon Justice Susan Kenny and the Hon Justice Berna Collier.

Overview of this Report

Terminology

Disclosure

1.67 The term ‘disclosure’ was defined by Lord Woolf in his 1995 interim report on access to justice in England and Wales. Lord Woolf noted the traditional distinction between ‘discovery’ and ‘inspection’—whereby ‘discovery is the process of disclosing the existence of a document and inspection is the process by which a party who has been given discovery has produced to him the documents of which discovery has been given’.[58] Lord Woolf saw merit in referring to both stages in the process, discovery and inspection, as ‘disclosure’. In this Report, the term ‘disclosure’ is also used to refer to both the identification and production of documents. It is also used to describe a party’s

58 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), [10].

obligation to provide documents to another party that applies independently of any action by the other party and is not contingent on any orders or directions from the court. For example, the *Family Law Rules 2004* (Cth) impose a general duty of disclosure on the parties to a family law dispute, from the start of pre-action procedures for the case.[59] Outside of the family law context, in a number of other jurisdictions, parties may be obliged to disclose documents without any requirement for another party to request disclosure or the court to make such orders. For example, in Queensland, South Australia and the Northern Territory, parties are required to disclose documents within a certain number of days after the close of pleadings.[60] In this sense, the term 'disclosure' is distinct from 'discovery' obligations that are imposed by specific court orders, as discussed below.

Discovery

1.68 The term 'discovery' is used to describe the process by which a party may obtain, pursuant to court orders, information concerning the existence and contents of documents relating to the matters in question in a civil proceeding. The process of discovery may involve the party requiring discovery to obtain orders of the court to serve a notice of discovery. For example, in the Federal Court, the obligation of making discovery is triggered by the service of a notice, with leave of the Court, pursuant to O 15 r 1 of the *Federal Court Rules*.

E-discovery

1.69 The term 'e-discovery' is used as a shorthand expression to describe methods by which parties use electronic means to assist in finding, identifying, locating, retrieving, reviewing, cataloguing or exchanging documents to satisfy disclosure obligations. This encompasses discovery processes that employ electronic technology to varying degrees, including the use of hardcopy document management systems to provide indexed document data to the other parties, review and exchange of scanned versions of hardcopy documents, and discovery of documents from source to production exclusively in electronic format.

1.70 Electronic documents may include a wide range of mediums: emails, voicemails, instant messages, e-calendars, audio files, data on handheld devices, animation, metadata, graphics, photographs, spreadsheets, websites, drawings and other types of digital data, as well as including data that is not apparent from the face of the document, such as meta-data and hidden text. Discoverable documents may be stored on tapes, CDs, DVDs, internal or external hard drives, PDAs, mobile phones, USB drives, or any other electronic medium.

1.71 The majority of Australian courts have adopted Practice Guidelines, Notes or Directions, in relation to electronic litigation, such as the Federal Court's *Practice Note CM6—Electronic Technology in Litigation*, with accompanying 'document

---

59 *Family Law Rules 2004* (Cth) r 13.01.

60 *Uniform Civil Procedure Rules 1999* (Qld) ch 7; *Supreme Court Civil Rules 2006* (SA) ch 6 pt 3; *Rules of the Supreme Court of the Northern Territory of Australia* (NT) O 29.

management protocols', to be used where the volume of discoverable documents exceeds 200.

Lawyer

1.72 The term 'lawyer' is used for the purposes of this Inquiry to include—consistently with s 117 of the *Evidence Act 1995* (Cth)—barristers, solicitors and, unless specifically stated, lawyers with or without a current practising certificate.

Chapter structure

1.73 This Report concisely addresses the questions set out in the Terms of Reference. It is divided into 12 chapters. This chapter provides an outline of the background to the Inquiry and an analysis of the scope of the Inquiry as defined by the Terms of Reference. It also describes the development of the evidence base to support the law reform response as reflected in the recommendations.

1.74 Chapter 2, Framework for Reform, includes two parts: the first part provides a brief analysis of the conceptual landscape in which the doctrine of discovery operates; and the second part provides an outline of the key principles embodied in the recommendations for reform.

1.75 Chapter 3, Data Collection, discusses the need for accurate and meaningful data on the costs associated with discovery—and the extent to which discovered documents are used in litigation—in order to assess concerns about the dis-proportionality of discovery costs and to guide the direction of future reform in this area. The chapter also outlines responses to the ALRC's Discovery Costs Questionnaire, which provide practitioners' impressions—based on practical experience—of the proportionality of discovery costs.

1.76 Chapter 4, Overview of Discovery Laws, considers the obligation on a party to discover or disclose documents to another party and the range of documents discoverable in civil proceedings in federal courts. It includes an outline of civil practice and procedure for the discovery or disclosure of documents in proceedings before federal courts. It covers the courts' powers to make orders for discovery and to enforce those orders, and the processes by which parties are required to discover or disclose documents. Legislative provisions, court rules, practice notes and significant cases dealing with the discovery of documents are discussed.

1.77 Chapter 5, Access to Discovery and General Discovery, examines the right of parties to access discoverable documents and the ambit of general discovery or disclosure obligations on parties to proceedings before a federal court.

1.78 Chapter 6, Limited Discovery and Discovery Plans, looks at case management strategies employed in relation to discovery or disclosure processes in proceedings before a federal court.

1.79 Chapter 7, Judicial Case Management and Training, considers whether discovery might be controlled through greater judicial case management in the Federal Court and, if so, whether this might be encouraged through judicial training or the introduction in legislation of new case management powers. The chapter also considers

whether the court and parties should in large and complex cases use discovery specialists to help manage discovery.

1.80 Chapter 8, Registrars and Referees, considers whether the court and parties should in large and complex cases use discovery specialists to help manage discovery and prepare discovery plans.

1.81 Chapter 9, Costs Orders, considers a range of costs orders the Federal Court might make to help control discovery and encourage parties and their lawyers to keep the cost of discovery proportionate to the issues in dispute. The chapter also discusses whether professional conduct rules should provide that lawyers may only charge costs for discovery which are fair and reasonable.

1.82 Chapter 10, Pre-trial Oral Examinations, reviews the use of pre-trial oral examinations in other jurisdictions, particularly the US, and considers whether the Federal Court currently has sufficient power to order pre-trial oral examination to discover evidence about the identity of potentially discoverable documents and when there is a dispute as to the adequacy of discovery.

1.83 Chapter 11, Pre-action Protocols and Some Other Possible Alternatives to Discovery, considers some possible alternatives to discovery such as pre-action protocols—which have been adopted in a number of jurisdictions in response to civil justice reviews—and interim disclosure orders.

1.84 Chapter 12, Professional and Ethical Discovery, reviews the ethical implications of a selection of alleged discovery practices and considers a number of ways to foster high standards of professional and ethical discovery work in federal litigation.

2. Framework for Reform

Contents

Introduction—the reform challenge

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

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

1 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 64.

2 The Terms of Reference are set out at the front of this Report.

context, and not in isolation. In a submission to this Inquiry, the Australian Taxation Office emphasised that:

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

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

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

Policy landscape

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

Evaluating rationale

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

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

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

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

---

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

4 C Cameron and J Liberman, 'Destruction of Documents Before Proceedings Commence—What is a Court to Do?' (2003) 27 *Melbourne University Law Review* 273, 274.

5 E Bray, *The Principles and Practice of Discovery* (1885), 1.

2.8 Bray explained that a party was entitled to discovery for the following purposes:

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

2.9 The advantages of discovery are said to include:

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

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

History

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

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

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

---

6 Ibid, 1–2.

7 P Matthews and H Malek, *Disclosure* (2007), 4, [1.03].

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

9 W Holdsworth, *A History of English Law* (3rd ed, 1945), vol v, 281. William Blackstone identified such limitations as among the 'defects' of the common law, and specifically listed 'the want of a compulsive power for the production of books and papers belonging to the parties', and the significance of such evidence in 'mercantile transactions': W Blackstone, *Commentaries on the Laws of England* (1765), vol iii, 382–383.

10 W Holdsworth, *A History of English Law* (3rd ed, 1945), vol v, 332.

11 Ibid, vol i, 458.

12 *Common Law Procedure Act 1852*, 17, 18 Vict c 125; *Judicature Acts 1873, 1875*, 36, 37 Vict c 66; 38, 39 Vict c 77.

> [Discovery] was introduced as part of the simplification of the courts' processes. The Judicature Acts were passed in order to introduce a civil legal system which was understandable and which had procedures which would enable litigation to be conducted efficiently, expeditiously and reasonably inexpensively.[13]

Contemporary context

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

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

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

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

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

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

---

13 *Brookfield v Yevad Products* [2004] FCA 1164.

14 C Cameron and J Liberman, 'Destruction of Documents Before Proceedings Commence—What is a Court to Do?' (2003) 27 *Melbourne University Law Review* 273, 277–278.

15 *Davies v Eli Lilly & Co* [1987] 1 All ER 801, 804.

16 Law Society of NSW, *Submission DR 22*, 28 January 2011.

2.16 The Queensland Law Society submitted that discovery is an aspect of procedure that can lead to the settlement of disputes. It remarked, as 'a general observation', that:

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

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

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

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

> (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
>
> (a) according to law; and
>
> (b) as quickly, inexpensively and efficiently as possible.
>
> (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
>
> (a) the just determination of all proceedings before the Court;
>
> (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
>
> (c) the efficient disposal of the Court's overall caseload;
>
> (d) the disposal of all proceedings in a timely manner;
>
> (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.
>
> (3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.[19]

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

---

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

18 Australian Government Solicitor, *Submission DR 27*, 11 February 2011. See also: M Deakin, *Submission DR 30*, 18 March 2011.

19 *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).

Wales.[20] Section 37M of the *Federal Court of Australia Act* applies to all civil proceedings before the Federal Court, and applies to both the Court and parties to the proceedings, 'in recognition of the fact that it would not be possible for either the Court or the parties to achieve this objective without the assistance of the other'.[21] Section 37N(2) makes clear that this duty also applies to a party's lawyer—to act consistently with the overarching purpose and to assist the party to comply with that duty.

Adversarial context

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

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

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

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

---

20 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995); Lord Woolf, *Access to Justice: Final Report* (1996). The introduction of such 'overarching purpose' provisions in Australia is described in S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), [1.7.10]–[1.7.14]. Lord Woolf's report is described in Ch 1.

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

22 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997), [2.3]. Ch 2 of IP 20 analyses the notion of the adversarial system.

23 R Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 29 *American Bar Association Annual Report* 395, 404, 405. The lecture was a call to improve court administration and a preview of his theory of law. It has remained a classic statement on the need for efficient and equitable judicial administration.

2.22 However, as noted in the ALRC's Discussion Paper, *Review of the Federal Justice System*, Discussion Paper 62 (1999) (ALRC DP 62):

> The terms 'adversarial' and 'inquisitorial' have no precise or simple meaning and to a significant extent reflect particular historical developments rather than the practices of modern legal systems. No country now operates strictly within the prototype models of an adversarial or inquisitorial system.[24]

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

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

2.24 In this Inquiry, the ALRC was asked to 'have regard to the experiences of other jurisdictions, including jurisdictions outside Australia, provided there is sufficient commonality of approach that any recommendations can be applied in relation to the federal courts'. The Consultation Paper traversed a range of examples, including from the United States, the United Kingdom, New Zealand and in international arbitration. In the *Managing Justice* inquiry, the ALRC was given a more direct brief to consider civil litigation procedures in civil code jurisdictions.[26] In the course of that inquiry the ALRC analysed the differing models of common law and civil law jurisprudence.

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

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

---

24 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), [1.116].

25 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997), [2.4].

26 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [1.2].

27 See, eg, W Brazil, 'The Adversary Character of Civil Discovery: A Critique and Proposals for Change' (1978) 31 *Vanderbilt Law Review* 1295; M Nordenberg, 'The Supreme Court and Discovery Reform: The Continuing Need for an Umpire' (1980) 31 *Syracuse Law Journal* 543; and D Shapiro, 'Some Problems of Discovery in an Adversary System' (1978–79) 63 *Minnesota Law Review* 1055.

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

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

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

2.28 Another model or description of civil litigation was described—'managerial judging':

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

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

---

28 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997), [2.29]. See also Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [1.126]–[1.130].

29 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), [2.26].

30 A Marfording and A Eyland, *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany* (2010), 8.

31 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997), [5.1].

32 C Enright and S Lewis, *Submission DR 03*, 12 January 2011, including an extract of the booklet, 'Reforming Discovery in Litigation' (2011), 11.

33 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), [2.32].

34 Ibid, [2.32].

35 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997), [5.3].

while at the same time introducing greater clarity of expectations in relation to discovery. The principal vehicle chosen for this in this Report is through the mechanism of practice notes, issued by the Chief Justice, as being flexible and responsive tools for guiding practice in the Court and, through the greater certainty of expectation introduced, greater consistency of outcome may be achieved.

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

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

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

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

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

---

36 See Ch 8.

37 *Federal Court of Australia Act 1976* (Cth) s 37M.

38 *Practice Note CM 5: Discovery* (Federal Court of Australia); *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia); and *Practice Note CM 8: Fast Track* (Federal Court of Australia).

39 See, eg, <www.fedcourt.gov.au/litigants/mediation/mediation> at 7 February 2011.

40 J Spigelman, 'Measuring Court Performance' (Paper presented at AIJA Annual Conference, Adelaide, 2006).

41 *Brookfield v Yevad Products* [2004] FCA 1164, [364]–[366].

the function of discovery, leading towards the resolution of matters 'should not be overlooked'.[42]

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

> Documents are not simply obtained from a client for the purposes of discovery. The primary purpose of gathering documents from a client is to consider and advise on the client's position. Care must be taken to ensure that any reforms do not hamper the ability of a lawyer to properly advise the client.[43]

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

Identifying policy tensions

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

The lawyer's duties

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

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

The public cost

2.38 In a broader sense a tension also arises between the policy drive to reduce the public costs of justice, through a reduction in the time that litigation occupies the courts, and the right of litigants to pursue their rights to achieve justice under the law. Discovery can occupy a great deal of time and money and, as a consequence, 'is not very efficient'.[44] Counterbalanced against this inefficiency is that 'a party is entitled to

---

42 Queensland Law Society, *Submission DR 28*, 11 February 2011.
43 Ibid.
44 C Enright and S Lewis, *Submission DR 03*, 12 January 2011.

a reasonable opportunity to present their case'.[45] Chief Justice Spigelman has spoken publicly about the tensions between 'efficiency' and 'justice':

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

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

> In contemporary practice the Courts and commercial litigants have struggled from time to time to balance the competing interests of '*quick and cheap*' resolution of civil litigation, with the need to identify and discover electronically stored information most relevant to the issues in dispute, to ensure that the determination is also '*just*'.[47]

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

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

The information challenge

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

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

---

45 Ibid.

46 J Spigelman, *Judicial Accountability and Performance Indicators* (2001).

47 Law Society of NSW, *Submission DR 22*, 28 January 2011.

48 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 90, citing A Zuckerman, 'Court Adjudication of Civil Disputes: A Public Service That Needs to be Delivered with Proportionate Resources, Within a Reasonable Time and at a Reasonable Cost' (Paper presented at the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, 15–17 September 2006), 8.

49 e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011.

50 NSW Young Lawyers, *Submission DR 19*, 21 January 2011. In *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65 there were nearly 11.5 million emails for the relevant four-year period.

51 Law Society of NSW, *Submission DR 22*, 28 January 2011.

> The use of electronic communications, tools and related technology in modern business has meant that an enormous number of documents and communications are created, sent and stored electronically, in many different formats. Accordingly the discovery of electronic documents, and the problems and challenges that it raises, are key issues in any analysis of discovery practice and procedure. Even small and fairly focused disputes can raise issues requiring the examination of large numbers of electronic documents to identify relevant communications or documents. In light of this, and the fact that most relevant materials are stored and managed electronically by parties, for discovery processes to be effective and cost efficient, it is essential that technology be used proactively in those processes.[52]

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

> Perhaps the single greatest challenge in discovery is how to effectively and efficiently deal with the ever increasing volume of records being retained by organisations (noting that, due to email and social networking, many of the records retained may not relate directly to the business at all). Technology has facilitated the easy retention of all records coming into, leaving, or created in, organisations. Conversely, technology has also made it particularly difficult to destroy records that are no longer required. The appropriate destruction of records is made more complex by numerous legal considerations.
>
> Compounding the difficulties faced when dealing with these increasing number of records is the fact that many organisations do not have in place systems for managing records. Accordingly, when a lawyer wishes to undertake a review of records for the purpose of case preparation or discovery, the lawyer often encounters large numbers of disorganised records and is tasked with having to create a system for managing those records before any consideration can be given to commencing a review.[53]

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

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

---

52 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
53 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.
54 Law Society of NSW, *Submission DR 22*, 28 January 2011.

2.45 The arduous nature of the process due to so much information means that 'delay is itself a by-product',[55] particularly where the range of material sought is wide. As noted by the Civil Litigation Committee of NSW Young Lawyers:

> in general, more information is generated than is necessary for the just and efficient disposal of the litigation. The Committee is of the view that this is a product of both the increased level of electronic documents being generated in modern commerce and the considerable onus placed on practitioners and parties to discover all relevant documents in a party's possession.[56]

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

> extraordinary and disproportionate costs are frequently incurred by parties to litigation. Far too often the search for the illusory 'smoking gun' leads to squadrons of solicitors, paralegals and clerks compiling vast libraries of materials, much of which is of no significance to the issues in the proceedings. The problem has been compounded, not alleviated, by the exponential growth of electronic communications which can be tracked and often reconstructed after deletion.[57]

2.47 The sheer volume of data that must be managed in modern trade and commerce can blow out the cost of searching through electronic material for the purposes of discovery, resulting in costs disproportionate to the value of the documents discovered—in terms of their use in litigation. The increasing amount of information which contemporary litigants must deal with was highlighted in *Betfair v Racing New South Wales.*[58] In this case, one source of discoverable documents was 'an electronic data warehouse containing the electronic records of over 2.52 million customers and occupying some 21 terabytes of memory growing at 70 gigabytes per day'.[59]

2.48 The great mass of information available tests the rationale of discovery—to facilitate fact-finding, save time and reduce expense. Rather than assisting in narrowing issues, it can overwhelm the litigation and affect, in the Hon Chief Justice Spigelman's words, the 'quality of justice'.[60]

Access to justice

2.49 Many commentators have pointed to the often high costs of discovery. For example, in its *Final Report in Relation to Possible Innovations to Case Management*, the Law Council of Australia stated that discovery 'is often the most expensive, or at least one of the most expensive steps'.[61] The VLRC concluded that, given the cost of

---

55 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
56 Ibid.
57 R Sackville, 'Mega-Lit: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.
58 *Betfair v Racing New South Wales* [2010] FCA 603.
59 Ibid, [331]. A terabyte is 1 million megabytes.
60 J Spigelman, *Judicial Accountability and Performance Indicators* (2001).
61 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), [75].

discovery, 'the objectives of the process are either not being achieved or can only be achieved at great cost'.[62] In such circumstances, there are concerns that litigants are being priced out of the court system. Chief Justice Spigelman remarked that 'when senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often $2m, the position is not sustainable'.[63] The commercial realities of discovery of this order may represent a significant barrier to justice for many litigants, as the Commercial Litigation Association stated in its submission to Lord Jackson's *Review of Civil Litigation Costs* in England and Wales in 2009:

> Indeed the realisation must be if the situation is distilled in to the simple question 'justice or costs?' costs, commercially, must prevail.[64]

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

> Perhaps unsurprisingly there are differing views within AGS as to the scope of appropriate reform. This is reflective of differences within the broader profession about what is undoubtedly a difficult issue.[65]

Principles for reform

2.51 The principles for reform in this Inquiry include five principles proposed by the Access to Justice Taskforce—accessibility, appropriateness, equity, efficiency and effectiveness;[66] as well as three specific principles relevant to this Inquiry—proportionality, consistency and certainty. The Access to Justice Principles 'set out the objectives of the Australian civil justice system'[67] and provide a basis for policy-making. The referral of this Inquiry to the ALRC is an aspect of advancing policy-making with respect to a particular aspect of the civil justice system.[68]

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

---

62 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 434.

63 J Spigelman, 'Access to Justice and Access to Lawyers' (2007) 29 *Australian Bar Review* 136.

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

65 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

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

67 Ibid, 61.

68 The review was 'necessary and timely', according to Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

reform in relevant jurisdictions. There are considerable similarities of aspiration and principle, with slightly different emphasis and particularity, as well as overlap in ideas.

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

Accessibility

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

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

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

> Accessibility has a number of dimensions. Excessive cost, complexity or delay will undermine or prevent accessibility.
>
> Accessibility will also depend on awareness of legal rights and of available procedural mechanisms for the enforcement of such rights. In many instances 'injustice results from nothing more complicated than lack of knowledge'.[70]

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

- be 'understandable to those who use it';
- 'offer appropriate procedures at a reasonable cost'; and
- 'deal with cases with reasonable speed'.[71]

Appropriateness

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

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

---

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

70 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), [4.1.1].

71 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), Overview, [1].

> Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.[72]

2.58 In Lord Woolf's goals for the civil justice system the concept of appropriateness is expressed as offering 'appropriate procedures at a reasonable cost' and being 'responsive to the needs of those who use it'.[73]

Equity

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

> The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.[74]

2.60 The principle of 'equity' concerns both fairness and financial accessibility. Other expressions of reform principles include both ideas, but arrange them differently. For example, the VLRC expressly identifies 'affordability' as a desirable goal[75] and, as noted above, includes excessive cost as a barrier to 'accessibility'. Lord Woolf included cost in his goal of offering appropriate procedures 'at reasonable cost'. Both identify fairness as a specific goal.[76] For the VLRC, fairness was a fundamental requirement of civil justice:

> Justice requires not only 'fair' results but also outcomes arrived at by fair procedures. As Justice Gaudron has observed (albeit in the context of the criminal trial): 'The requirement of fairness is not only independent, it is intrinsic and inherent.'[77]

Efficiency

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

> The justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating.
>
> The costs of formal dispute resolution and legal assistance mechanisms—to Government and to the user—should be proportionate to the issues in dispute.[78]

---

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

73 Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].

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

75 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), [4.1.2].

76 Ibid, [4.2.1]; Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].

77 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), [4.2.1]. See also Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), 'to ensure fairness between the parties'; British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006), Executive Summary, vi ('that all proceedings are dealt with justly'), summarised in Ch 1.

78 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

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

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

Effectiveness

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

> The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis.
>
> All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.[83]

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

- cost-effectiveness;[84] and
- that the system should be effective: adequately resourced and organised.[85]

2.65 'Efficiency' and 'effectiveness' are principles that are expressly reflected in the overarching purpose provision of the *Federal Court of Australia Act*, set out above.[86]

Proportionality

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

---

79 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), [4.1.5].
80 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: An Overview—Judiciary* (2009), [2].
81 Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].
82 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: An Overview—Judiciary* (2009), [2]; Hong Kong Special Administrative Region Government, *Civil Justice Reform* (2009) <http://www.civiljustice.gov.hk/eng/home.html> at 5 November 2010.
83 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 62–63.
84 Hong Kong Special Administrative Region Government, *Civil Justice Reform* (2009) <http://www.civiljustice.gov.hk/eng/home.html> at 5 November 2010.
85 Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].
86 *Federal Court of Australia Act 1976* (Cth) s 37M.

requires'.[87] In the 2009 report of his review of civil litigation costs, one of Lord Jackson's key recommendations was that of proportionality—that the costs system should be based on legal expenses that reflect the nature and complexity of the case.[88] The VLRC also listed proportionality as one of the desirable goals of the civil justice system:

> It is increasingly accepted that the costs incurred by the parties and by the public in the provision of court resources should be 'proportional' to the matter in dispute. Relevant dimensions of the matter in dispute include the amount in issue or its importance. As one author has suggested, there is a widely-held belief that we must 'match the extensiveness of the procedure with the magnitude of the dispute'.[89]

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

> Although disputes of relatively low value or importance should clearly not require disproportionate private or public resources for their resolution, there is a vexed policy issue as to whether high value civil disputes should be permitted to consume substantial publicly funded court resources, particularly where the parties in dispute are commercial leviathans involved in a commercial dispute with purely financial dimensions and where such parties can readily afford the costs of mediation, arbitration or other 'private' methods of resolving their dispute.
>
> There is also an important question about whether the 'imposition' of 'proportionality' in certain contexts may favour certain litigants, including those with disproportionately greater resources.[90]

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

> in such cases, whether the likely legal costs are 'proportionate' to the importance and complexity of the issues in dispute will inevitably involve value judgments and subjectivity.[91]

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

---

87 Lord Woolf, *Access to Justice: Final Report* (1996), Ch 2, [17].

88 Lovells (UK), *Lord Justice Jackson's Final Report on Civil Litigation Costs: An Overview* (2010), Chs 3, 35.

89 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), [4.1.4]. See also: British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006), includes in its principle of dealing with proceedings justly, that they be dealt with 'pursuant to the principles of proportionality': vi.

90 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), [4.1.4].

91 Ibid, [4.1.4].

autonomy, where proportionality may be seen to be an 'effectiveness' measure at the sake of individual justice. Allens Arthur Robinson stated that:

> The principal function of the civil justice system is to resolve disputes between parties efficiently and justly according to law. When considering any reform to the civil justice system, great care should be taken to ensure that the reform is carefully planned, supported by evidence and that measures intended to promote efficiency do not undermine the goal of justice according to law.[92]

2.70 Rather than promoting proportionality as a specific principle, the review of civil justice in Hong Kong identified as an underlying objective the need 'to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings'.[93]

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

Consistency

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

> Inconsistency and unpredictability in the civil justice system are highly undesirable for a variety of obvious reasons. Conduct in the community generally, by individuals, entities and governments, is regulated according to perceptions of the applicable law and predictions about the likely outcome of litigation.[94]

2.73 While 'consistency' may be considered an element of 'equity' in the Access to Justice Principles—as an element of fairness at a broad level—it emerged as a matter of particular relevance in this Inquiry. Concerns were expressed, in particular, about inconsistency with respect to judicial case management practice. The ALRC considers, therefore, that it is a significant framing principle for law reform recommendations in relation to discovery of documents. Consistency also reflects the overall aim of all the Access to Justice Principles in 'delivering fair and appropriate outcomes, and maintaining and supporting the rule of law'.[95]

Certainty

2.74 Certainty is a complementary principle to consistency—in that issues of uncertainty may lead to inconsistency. Lord Woolf's report included the goal that the system should 'provide as much certainty as the nature of particular cases allows'.[96]

---

92 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

93 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: An Overview—Judiciary* (2009), [2].

94 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), [4.1.8].

95 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 62–63.

96 Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].

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

The use of reform principles

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

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

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

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

97 Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

3. Data Collection

Contents

Summary

3.1 This chapter discusses the need for accurate and meaningful data on the costs associated with discovery in federal court proceedings—as well as the need to evaluate the utility of discovered documents in the context of the litigation—in order to assess concerns about disproportionate discovery costs and to guide future reform in this area.

3.2 The types of data that may assist to evaluate and track the proportionality of discovery processes in court proceedings are also outlined in this chapter. In this regard, the ALRC recommends that relevant data sets, measures, indicators and the means of capturing and reporting relevant data should be identified so that an empirical basis is developed in relation to civil litigation costs, including data on the proportionality of discovery costs.

3.3 This chapter also examines responses to the Discovery Costs Questionnaire published as part of this Inquiry, which is included as Appendix 4 of this Report. These responses provide practitioners' impressions—based on practical experience—of the degree to which discovery costs weighed against: the overall expenses of litigation; the complexity of the issues in dispute; the stakes in the litigation; and the value of the documents sought in the context of the litigation.

Data collection

The need for data

3.4 Accurate and up-to-date data on the costs associated with discovery in Federal Court proceedings, and the extent to which discovered documents are used in the resolution of those proceedings, would provide a sound basis upon which to respond to concerns about the high costs of the discovery process in some matters and a sense that these costs are in some cases 'disproportionate'—as noted in the opening paragraph of the Terms of Reference in this Inquiry.

3.5 It is not just the amount of money spent on discovery that has raised concern. Rather, it is the 'low value for money' that prompts criticism of the discovery process—in terms of the cost of discovery relative to the utility of discovered documents in the context of the litigation.

3.6 Statistical data on discovery costs in Australia—and research measuring the extent to which discovered documents are used in the disposal of litigation before Australian courts—has not been collected or recorded in a systematic or ongoing manner. As a consequence, accurate and up-to-date information to inform an assessment of the proportionality of discovery processes in federal courts is not readily available.

3.7 With a lack of accurate data there may be a distorting effect of perceptions as to cost, created by cases such as *Seven Network Limited v News Limited* (C7).[1] In a submission to this Inquiry, Michael Legg remarked that:

> Responses to the questions posed by the ALRC's Discussion Paper may also be influenced by a view that the experience in the C7 litigation or that the New South Wales Supreme Court Chief Justice Spigelman's anecdote of the flag-fall for discovery in a significant commercial dispute being often $2m, are the norm. We currently have no reliable evidence as to whether these examples are representative or are anomalies.[2]

3.8 The collection of such data may provide an informative measure of the concerns associated with discovery in Federal Court proceedings. Such information may help to guide the direction of future reform in this area of civil litigation. It may also enable a basis for comparison to measure the effectiveness of the recommendations for reform in this Report, should they be implemented. Reliable statistics would be helpful to assess accurately whether these proposed procedures were successful in achieving the objective of reducing litigation expenses overall and achieve a greater level of certainty in the conduct of a discovery process—in terms of planning in advance the types of searches that are 'reasonable'. For example, data which allowed a comparison of estimated discovery costs with the actual costs of discovery may indicate the level of certainty in a discovery process.

---

1 *Seven Network Limited v News Limited* [2007] FCA 1062, [8].
2 M Legg, *Submission DR 07*, 17 January 2011.

Existing findings

3.9 An extensive survey of the cost of litigation in the Federal Court conducted during the ALRC's inquiry, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (2000) (*Managing Justice*), asked solicitors to estimate the total legal costs of discovery for cases in the Federal Court. The results showed that the costs of discovery varied according to the complexity of the issues involved. For example, the range of costs for obtaining discovery from another party was $500–$750,000 for applicants and $200–$311,000 for respondents, while the range of costs for complying with discovery requests was $200–$400,000 for applicants and $300–$120,000 for respondents.[3]

3.10 Since the *Managing Justice* report, the range of material potentially to be discovered has increased exponentially through advancing computer technologies, as noted above, with a significant increase in discovery costs. Electronic communications can be inherently expensive to discover, in part due to the cost of specialist service providers with expertise in computer technologies. For example, Lord Jackson's *Review of Civil Litigation Costs* reported that typical service charges for e-discovery include: electronic document processing (extracting metadata, text, attachments etc, for use on a document review system) £250–£1,000 per gigabyte of data, document hosting on a review system at £20–£150 per gigabyte per month and a user access fee between £10–£100 per user.[4]

3.11 Electronic discovery costs can also include expensive computer software and hardware. For example, the discovery of information stored on old backup tapes can require the reconstruction of outmoded hardware at great expense in order to read the tapes only to discover completely irrelevant information.

3.12 Another relevant study, of discovery practices in the United States in 1997, looked at the cost of discovery relative to the information needs of the case. This research found that most attorneys surveyed (69%) thought that the discovery generated by the parties was about the right amount needed for the fair resolution of the case.[5]

What is measured and for what purpose?

3.13 Key questions in any data collection exercise are precisely what is to be captured, how is the data to be collected, for what purpose, and how is the data to be used for policy development and law reform. A further issue relates to any evaluative cycle or reflective phase of the process of data collection itself.

3.14 The collection of data on the proportionality of discovery costs would be continuous and incremental, rather than a one-off study over a finite period. Such data

---

3 T Matruglio, *The Costs of Litigation in the Federal Court of Australia* (1999), prepared for the Australian Law Reform Commission.

4 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 40, [6.3].

5 T Willging and others, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases* (1997).

would be most meaningful when its collection is built into the justice system as a small but regular collation of relevant and relatable information. In this way, the evidence base of discovery data would become richer over time and the costs associated with its collection would be distributed over time and between all persons involved with civil litigation—such as: the parties, their lawyers, litigation service providers and the courts.

3.15 A range of data collection points would include, for example, information about: the anticipated costs of discovery; the actual costs of discovery; the damages, if any, awarded in the relevant litigation; whether the action was settled and, if so, whether it settled before or after discovery; the number of documents involved in discovery and the number of documents considered relevant to the actual resolution of the dispute; and so on.

3.16 An assessment of 'proportionality' could be considered from a number of perspectives with such information available. A driving concern in relation to discovery is the proportionality of discovery costs—particularly in terms of the extent to which discovered documents are used to facilitate the just disposal of litigation. Such a concern was taken up by the Access to Justice Taskforce which stated that:

> The cost of discovery continues to be very high, and often disproportionate to the role played by discovered documents in resolving disputes.[6]

3.17 The idea of proportionality, as outlined above, is a key reform principle in this Inquiry, as embodied in Federal Court objectives in the expression of the 'overarching purpose' provision, s 37M of the *Federal Court of Australia Act*, considered above. However, the collection of accurate and meaningful data on the proportionality of discovery processes is likely to present significant challenges. It will require the cooperation and input of all those involved in a civil proceeding, including the court, the parties, their lawyers, any litigation support service providers and financiers such as insurers or litigation funders. Establishing a central point for the collection of data from every participant in a civil proceeding, with respect to discovery costs, may present logistical issues including, for example, the protection of confidential information.

3.18 Quantifying the utility of discovered documents may also raise a particular challenge in the collection of this data. Recording the number of discovered documents tendered in evidence or relied upon at hearing may misrepresent the utility of discovery—since the objectives of discovery extend to clarifying the issues in dispute and testing the strength of each party's case. Discovered documents, therefore, may have value in facilitating settlement of the proceeding or shortening the length of the trial by encouraging parties to agree on certain issues. On the one hand, this may suggest that measuring the extent to which discovered documents are actually used in the disposal of litigation would depend on the impressions of the parties or their lawyers, rather than exact numerical or monetary terms. On the other hand, empirical data as to when settlement occurred in proceedings, for example, could support an

---

6 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Rec 8.2.

interpretation as to the value of discovery. Where data shows that proceedings settled after discovery, this might support further enquiry as to whether discovered documents were influential in the settlement of those cases. Alternatively, where data identifies proceedings that settled before discovery was given, this might support enquires as to the reasons for settlement in the absence of relevant documents.

3.19 The type of data that may assist to evaluate and track the proportionality of discovery processes in the Federal Court may include:

- the total litigation costs and the amount of costs associated with discovery, as well as the items of expenditure on discovery, for example, legal fees and court filing fees for discovery applications, the cost of time spent at trial considering discovered documents, the cost of litigation support services in the discovery process and the cost to the parties of employees engaged in a discovery process—this may indicate where costs are incurred in discovery, and those aspects which are most costly, in the context of litigation costs overall;
- the value of what is at stake for the parties in the litigation, for example, the amount of damages awarded in judgement, the sum of compensation paid by way of settlement, or the approximate value of non-pecuniary relief such as a declaration or injunction—this may provide context to discovery costs, as a proportion of the value of the case;
- the number of discovered documents that are tendered in evidence, and the number of documents relied upon at trial, as well as the judge's impression of the extent to which discovered documents were crucial in determining the proceeding;
- whether settlement was achieved after discovery, and the parties'—and their lawyers'—impression of the extent to which discovered documents were crucial in resolving the dispute;
- whether certain issues in dispute were narrowed or agreed upon after discovery, and the parties'—and their lawyers'—impression of the extent to which discovered documents were crucial in clarifying or resolving those issues.

3.20 What all of this suggests is that an aspiration, or 'overarching purpose' of proportionality, while a useful guide or principle, is difficult to measure, and that there are dangers in relying upon assertions or anecdotes of disproportionate costs as a basis of propelling major shifts in practice—and law reform recommendations.

Data collection initiatives

3.21 The Australian Government Attorney-General's Department's Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice*

System (*Strategic Framework*)[7] identified the problem that 'insufficient statistical data is available to make comprehensive decisions about access to justice':[8]

> Statistics are inconsistently collected and reported, and significant gaps remain ... Data is necessary not only to the institution to identify and act on problem issues, but also to inform analysis and understanding (undertaken by agencies, academics, the public) regarding the performance of the justice system generally.[9]

3.22 In order to establish the appropriate framework for data collection, the Taskforce recommended that:

> the Attorney-General's Department should work with the federal courts, tribunals, and other justice services to develop an overarching data collection template to inform the necessary collection of data on a comprehensive, consistent basis.[10]

3.23 The data collection template was to be based on the outcomes of a review of the efficiency of the courts and tribunals in the context of the civil justice system in Australia. The scope of the review would be 'identification of relevant measures and data requirements necessary for ongoing monitoring of the justice system'.[11]

Submissions and consultations

3.24 In the Consultation Paper, the ALRC proposed that 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.[12]

3.25 The ALRC suggested that the Federal Court would be best placed to collect such data. However, the participation of the parties, their lawyers and others involved in the proceeding would be required to gather this data effectively. The ALRC also acknowledged that the Court may require additional funding to establish and maintain data collection facilities to measure the proportionality of discovery processes. Proportionality in this sense may be difficult to measure. The ALRC also noted that participants at a discovery seminar convened by the Australian Institute of Judicial Administration (AIJA) in 2007 suggested that the AIJA should undertake a research project to track how many discovered documents are in fact used in litigation.[13] However, the ALRC understands that such research has not yet been undertaken.

---

7 Ibid, Rec 8.2.
8 Ibid, 72.
9 Ibid, 72.
10 Ibid, Rec 5.1.
11 Ibid, Rec 5.1.
12 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 3–7.
13 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <http://www.aija.org.au/Discovery/Discovery%20Notes.pdf> at 8 November 2010.

3.26 All submissions that addressed this proposal supported it,[14] and expressed considerable support—at the general level—for the proposal for data collection as a basis for supporting law reform, and not just in the field of discovery. However there were also comments about the difficulty of a data collection exercise of this kind.

3.27 The Litigation Law and Practice Committee of the Law Society of New South Wales, for example, considered that 'the collection of empirical data is essential to the accurate assessment of the discovery process'.[15] As noted in Chapter 1, Michael Legg, of the University of New South Wales, submitted that

> In many ways proposal 3–7 is the most significant suggestion in the Discussion Paper as it would allow reform in the Federal Courts to be driven by fact rather than fashion.[16]

3.28 Legg also commented that 'many of the questions and issues ... lend themselves to empirical study and would benefit from data collection facilities'.[17]

3.29 The Law Council of Australia (Law Council) and the Australian Corporate Lawyers Association (ACLA) both expressed support in general terms for a careful analysis of the costs associated with discovery in the Federal Court,[18] but added riders to their comments. The Law Council cautioned 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.[19]

3.30 The difficulties that the exercise of data collection might involve were also singled out by ACLA:

> it would be virtually impossible to obtain a sufficiently accurate data sample to make any worthwhile conclusions. Given that a significant majority of matters settle, it is unlikely that a meaningful sampling exercise could be undertaken without significant input from litigants.[20]

---

14 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

15 Law Society of NSW, *Submission DR 22*, 28 January 2011.

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

17 Ibid.

18 Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.

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

20 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.

3.31 Although the data collection project would be a challenging one, NSW Young Lawyers submitted that 'the collection of empirical data is essential to the accurate assessment of the substantive impact of any scheme, and is a useful process in its own right':

> a data collection process could, at the very least, provide useful information on average discovery costs per document reviewed or reviewable. This information could lead to a degree of predictability and cross-comparability in large discoveries. Further, it may be difficult to predict in advance what uses new data may be put to, and it would be imprudent to miss the chance to collect such information.[21]

3.32 As to what would be measured and for what purpose, the Public Interest Advocacy Centre (PIAC), argued that any such exercise should not just be about discovery:

> PIAC is of the view that data collection about the discovery process in the Federal Court should be part of a comprehensive and ongoing review of the federal civil justice system as it is important that questions about the cost of discovery be weighed against issues such as equity and perception of justice.
>
> In this respect, PIAC notes the [Access to Justice] Taskforce Report's recommendation about the monitoring and review of the federal civil justice system was significantly broader: it recommended that the Productivity Commission undertake a review of the efficiency of the courts and tribunals and based on this review, the Attorney-General's Department should work with the federal courts, tribunals, and other justice services to develop an overarching data collection template to inform the necessary collection of data on a comprehensive, consistent basis.[22]

ALRC's views

3.33 Developing the appropriate data collection process that would lead to meaningful conclusions about matters such as the cost of discovery in the context of the civil justice system and, for example, whether it is 'proportionate' or not, is a complex problem. The ALRC acknowledges that significant initiatives are in train in the field of data collection, in particular in consequence of the release of the *Strategic Framework*. There is considerable work to be done in terms of developing the proposed template for data collection, to secure agreement as to a common data set or dictionary of indicators, measures, terms and the kinds of matters that can be measured.

3.34 The ALRC considers that such initiatives will provide the appropriate basis for the development of data to inform future reform and to evaluate the existing practice in the federal courts. Data collection needs to be undertaken in such a coordinated and informed way—and properly resourced—and the ALRC commends the development of a data collection template to inform the necessary collection of data on a comprehensive, consistent basis, as recommended by the Access to Justice Taskforce.

3.35 Once the template is developed and the data collection project can commence on an informed basis, the ALRC understands that the data collection itself may impose an ongoing burden, for example on the Federal Court, and the matter of providing

---

21 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
22 Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

appropriate resources so that this can be undertaken systematically will need to be considered by the Australian Government at that time. However, the data collection template may be constructed in a way that builds on existing features of the justice system and distributes the cost across participants, thereby minimising the burden on individual contributors.

Recommendation 3–1 The Australian Government should work with the Federal Court of Australia and other stakeholders to identify, where possible, relevant data sets, measures and indicators and the means of capturing and reporting relevant data so that an empirical basis is developed in relation to civil litigation costs.

This should include data on the proportionality of costs associated with the discovery of documents—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.

Discovery Costs Questionnaire

3.36 In the course of this Inquiry, the ALRC published a questionnaire which sought to gauge practitioners' impressions—based on practical experience—of the degrees to which discovery costs weighed against: the overall expenses of litigation; the complexity of the issues in dispute; the stakes in the litigation; and the value of the documents sought in the context of the litigation. The questionnaire is included in Appendix 4 of this Report.

3.37 This was not intended to be an empirical method of data collection. The purpose of the questionnaire was to serve as an exploratory or qualitative resource—rather than quantitative or empirical research—to contextualise discovery costs in terms of the nature of the proceedings in which documents are sought and the value of the documents in the context of the litigation.

3.38 The questionnaire expressed an interest in a wide range of cases involving discovery in the federal courts—irrespective of the size or complexity of the proceedings or what is potentially at stake for the litigants. While noting that concerns about disproportionate discovery costs may be most evident in large and complex proceedings, the questionnaire was not limited to such cases or to practitioners acting only in these matters.

3.39 However, the ALRC received only two responses to its questionnaire on discovery costs. The first was from Mr Denis Farrar, a family law practitioner with experience of discovery in financial cases—particularly property settlement matters—in the Canberra registries of the Family Court of Australia and the Federal Magistrates Court of Australia.[23] The second was from Griffith Hack Lawyers, a firm experienced

23 D Farrar, *Submission DR 06*, 17 January 2011.

in discovery in intellectual property cases in the Federal Court of Australia—including the Court's Fast Track List—as well as the Federal Magistrates Court and the Supreme Courts of Victoria and New South Wales.[24] These responses are discussed further below.

3.40 The ALRC appreciates the assistance of those who responded to the questionnaire and considers that the lack of further responses may be attributed, in part, to the difficulties involved in making qualitative assessments of the proportionality of discovery costs in litigation. The ALRC also notes that it sought information about discovery costs from a litigation funder but was unable to obtain usable information due to the considerable difficulties that arise in the provision of accurate and meaningful data on discovery costs.

Discovery costs in proportion to litigation costs

3.41 Griffith Hack Lawyers responded that discovery costs are 'routinely in the order of 10–20 per cent of the total cost of the litigation'.[25] The firm gave an example of litigation in the Federal Court, in which it received and reviewed discovered documents, where discovery costs were approximately $375,000—comprising of $274,000 professional fees and $101,000 disbursements, mostly counsels' fees—and the total cost of the litigation was approximately $2.7 million. In another example, where the firm provided discovered documents to the other side, discovery costs were approximately $180,000 and the total litigation expense was approximately $1.7 million.

3.42 Denis Farrar responded that, in general, discovery costs are not substantial in family law matters.[26] However, he distinguished between formal discovery of documents and the informal provision of information or documents pursuant to the general duty of disclosure in Family Court proceedings.

Discovery costs in proportion to the issues in dispute

3.43 Farrar noted that, in family law matters:

> Where the property pool involves business assets or complex company/trust structures, discovery plays an important role ... [and] the cost of inspection, collation and interpretation of disclosed documents can be substantial, often involving reference to experienced and expensive accountants or other experts.[27]

3.44 On the other hand, Griffith Hack Lawyers responded that, in intellectual property cases, 'the cost of discovery is generally not affected by the range and/or complexity of issues in dispute'.[28] The firm observed that documents are often discovered 'en masse' with little correlation between the volume of documents and the critical points of dispute. However, the firm gave an example of a matter with a large

---

24 Griffith Hack Lawyers, *Submission DR 18*, 21 January 2011.
25 Ibid.
26 D Farrar, *Submission DR 06*, 17 January 2011.
27 Ibid.
28 Griffith Hack Lawyers, *Submission DR 18*, 21 January 2011.

range of issues in dispute concerning the validity of a patent where the cost of discovery was high, with over one million pages discovered by the patentee.

Discovery costs in proportion to the stakes in litigation

3.45 Griffith Hack Lawyers responded that '[d]iscovery is usually more vast/expensive when the stakes are high as distinct from being a fair barometer of the complexity of the issues in play'.[29] The firm gave an example of a case in which the size of the market protected by a patentee's monopoly was in excess of $100 million annually, and the cost of discovery was high.

3.46 Denis Farrar noted that, in property disputes—which might be complex even when the asset pool is small—discovery can be an important issue to drive settlement:

> In all litigation the cost of the proceeding, including the cost of discovery, is balanced against the likely outcome and practitioner's advise clients as to the cost of and benefit in what they are hoping to achieve.[30]

Discovered documents used to narrow the issues in dispute

3.47 Responses were that discovery is often a valuable means of clarifying the issues in dispute between the parties to litigation. In the experience of Griffith Hack Lawyers, '[d]iscovery rarely resolves issues entirely between the parties [but] it may crystallise some parameters of the dispute or refine the emphasis of a party's case'.[31]

3.48 In Denis Farrar's experience, 'the issues in dispute are almost always narrowed through the discovery process'.[32] Farrar acknowledged that 'many documents are produced on discovery which do not aid the other party in working out the nature of the assets in the property pool, and what is a reasonable outcome' but argued that a variety of documents dating back a number of years are often necessary to understand the assets and their value.[33]

3.49 Similarly, Griffith Hack Lawyers observed that, usually, 'critical documents number less than 10 regardless of the number of documents discovered'.[34] The firm gave an example of a case in which '[o]ne key issue was clarified, relying on approximately 5 (out of over 200,000) documents discovered'.[35]

Discovered documents used to settle disputes

3.50 In the experience of Griffith Hack Lawyers, discovered documents have been found to assist in mediation—however, in general, matters did not often settle due essentially to discovery.[36]

---

29 Ibid.
30 D Farrar, *Submission DR 06*, 17 January 2011.
31 Griffith Hack Lawyers, *Submission DR 18*, 21 January 2011.
32 D Farrar, *Submission DR 06*, 17 January 2011.
33 Ibid.
34 Griffith Hack Lawyers, *Submission DR 18*, 21 January 2011.
35 Ibid.
36 Ibid.

3.51 Denis Farrar suggested that, in family law matters, clarifying issues concerning the assets, liabilities and financial structures of the parties through disclosure of documents enables the parties to understand those issues at an early stage—thereby enhancing the prospects of settlement.[37]

Discovered documents used to determine disputes

3.52 Responses to this question expressed the view that only a small proportion of discovered documents are ever admitted into evidence at trial but a larger volume of documents is often used to inform the background of the matters determined by way of judgement. For example, Farrar submitted that:

> Whilst there is no doubt that very few discovered documents are tendered into evidence, inspection of discovered documents enhances an understanding of the value of the pool, and other matters relevant to the Court's determination of the dispute ... Discovery can serve to alleviate lines of argument or enquiry which would be fruitless, as well as illuminate those which have merit.[38]

3.53 Griffith Hack Lawyers gave an example of a case in which around 50—out of 200,000—of the discovered documents were admitted into evidence and referred to in the judgement by way of background, but were not determinative in the Court's decision.[39]

ALRC's views

3.54 The anecdotal evidence of practitioners' experiences of discovered documents being utilised in litigation—and practitioners' impressions of the proportionality of discovery costs—are important measures of the concerns associated with discovery in federal courts. Such qualitative assessment should be supported by empirical data.[40] However, a 'facilitative' justice system—one that is not comprised entirely of matters capable of precise measurement but also involves values-based decision-making—should be evaluated, in part, against the legal profession's views. In addition, assessments of the proportionality of discovery costs should also take into account the views of litigants, the judiciary and others involved in civil litigation.

3.55 Within the limits of this Inquiry, the ALRC has not been able to obtain a sufficiently broad range of experience from legal practitioners to be able to draw conclusions about the proportionality of discovery costs—in terms of the value of discovered documents in the context of the litigation, in federal court proceedings. Nevertheless, the ALRC understands, based on comments made in response to its questionnaire and in various consultations, that discovery in Federal Court proceedings generally represents approximately 20% of total litigation costs. The ALRC also understands, based on the views generally expressed in various submissions and consultations, that the number and probative value of documents discovered in Federal

---

37 D Farrar, *Submission DR 06*, 17 January 2011.
38 Ibid.
39 Griffith Hack Lawyers, *Submission DR 18*, 21 January 2011.
40 See Rec 3–1.

Court proceedings that are admitted into evidence at trial is an unfair representation of the utility of the discovery process in litigation.

3.56 These issues and others concerning the proportionality of discovery costs may be explored further through qualitative assessments, as part of the collection of data recommended in Recommendation 3–1.

4. Overview of Discovery Laws

Contents

Summary

4.1 This chapter considers the obligation on a party to discover or disclose documents to another party and the range of documents discoverable in civil proceedings in federal courts. It includes an outline of relevant civil practice and procedure for the discovery or disclosure of documents, and covers the powers of federal courts to make orders for discovery and to enforce those orders. Legislative provisions, court rules, practice notes and significant cases dealing with the discovery and disclosure of documents are also discussed.

High Court of Australia

Obligation to discover documents

4.2 There are no specific provisions in the *High Court Rules 2004* (Cth) imposing an obligation on parties to discover relevant documents. Should circumstances arise in

proceedings before the High Court that necessitate the discovery of documents, a party may apply to the Court for directions.[1]

Range of discoverable documents

4.3 In the absence of specific provisions or directions to the contrary, the 'train of inquiry' test, as propounded in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co*[2] (*Peruvian Guano*) and adopted in Australia,[3] remains the test of general application for discovery in the High Court. In the *Peruvian Guano* case, Brett LJ stated:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidenced upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.[4]

Process of discovery

4.4 There are no provisions in the *High Court Rules* setting out a process for the discovery of documents. Where discovery is necessary in High Court proceedings, the Court or a judge determines what procedure is to be adopted and may give directions.[5]

Federal Court of Australia

Obligation to discover documents

4.5 The obligation to discover documents in Federal Court proceedings is fettered by provisions in the *Federal Court Rules 1979* (Cth). The Rules require that, in all cases, a party must have the leave of the Court to file and serve a notice for discovery.[6] The Court must interpret and apply civil practice and procedure provisions, such as the requirement for leave of the Court for discovery, in the way that best promotes the overarching purpose of civil practice and procedure—the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible.[7]

4.6 In addition, the *Federal Court Rules* state that the Court shall not make an order for the filing or service of any list of documents, or for the production of any document, unless it is necessary at the time the order is made.[8] The word 'necessary' in

---

1 *High Court Rules 2004* (Cth) r 6.01.
2 *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.
3 *Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Mulley v Manifold* (1959) 103 CLR 341, 345.
4 *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.
5 *High Court Rules 2004* (Cth) r 6.01.
6 *Federal Court Rules* (Cth) O 15 r 1.
7 *Federal Court of Australia Act 1976* (Cth) s 37M—set out in Ch 2.
8 *Federal Court Rules* (Cth) O 15 r 15.

this context has been interpreted as meaning 'reasonably necessary in the interests of a fair trial and of the fair disposition of the case'.[9]

4.7 In determining whether to make orders for the discovery of documents, *Practice Note CM 5* states that the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.[10] *Practice Note CM 5* also provides guidance by setting out the types of questions that a judge would expect to be answered by a party seeking leave for discovery—such as, is discovery necessary at all and, if so, for what purpose?[11]

4.8 Where leave for discovery is granted—and a notice for discovery is served—the party required to give discovery must do so within the time specified in the notice, not being less than 14 days after service, or within such time as the Court directs.[12] Unless the Court otherwise orders, the party must give discovery by serving a list of documents required to be disclosed and an affidavit verifying that list.[13]

4.9 Where orders for discovery are made by the Court, the party's discovery obligation is ongoing in the sense that the party must continue to discover any documents not previously disclosed which would be necessary to comply with the order.[14]

Proposed rules

4.10 On 24 December 2010, the Federal Court released a consultation draft of the Federal Court Rules 2010 (Cth). The proposed Rules would not require parties to obtain leave of the Court to file and serve a notice of discovery. Instead, the proposed rules would prohibit a party from giving discovery unless the Court has made an order that the party give discovery.[15] In addition, the proposed Rules would impose a cost sanction on parties who give discovery without being ordered to do so by the Court—in these circumstances, the party would not be entitled to any costs or disbursements for the discovery.[16] The draft rules provide that a party may apply to the Court for a discovery order, only if it is necessary for the just determination of issues in the proceeding.[17]

Range of discoverable documents

4.11 In the Federal Court, the *Peruvian Guano* test of relevance has been replaced with broad categories of documents 'required to be disclosed', pursuant to O 15 r 2(3) of the *Federal Court Rules*. The documents required to be disclosed in the Federal

---

9 *University of Western Australia v Gray (No 8)* [2007] FCA 89, [18]; *Gray v Associated Book Publishers (Aust) Pty Ltd* [2002] FCA 1045, [9].
10 *Practice Note CM 5: Discovery* (Federal Court of Australia), [2].
11 Ibid, [1(c)].
12 *Federal Court Rules* (Cth) O 15 r 2(1).
13 Ibid O 15 r 2(2).
14 Ibid O 15 r 7A.
15 Federal Court Rules (Cth) [Draft 2010] r 20.12(1).
16 Ibid r 20.12(2).
17 Ibid r 20.11.

Court are any of the following documents of which the party giving discovery is, after reasonable search, aware at the time discovery is given:

(a) documents on which the party relies;

(b) documents that adversely affect the party's own case;

(c) documents that adversely affect another party's case; and

(d) documents that support another party's case.[18]

4.12 A number of matters are specified by O 15 r 2(5) as matters which may be taken into account by a party in making a 'reasonable search', namely:

(a) the nature and complexity of the proceedings;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document likely to be found; and

(e) any other relevant matter.

4.13 Order 15 r 3 subsequently provides that the Court may limit discovery orders to specific documents or classes of documents, or in relation to specific matters in question in the proceeding, to prevent unnecessary discovery.

4.14 Orders for discovery of documents as contemplated in O 15 r 2 are referred to as orders for 'general discovery'.[19] The rules do not expressly prohibit orders for broader discovery of documents outside these general categories, for example, orders for discovery of all relevant documents within the *Peruvian Guano* test.[20] However, the Court has held that, not only should discovery be constrained by the general categories in O 15 r 2,[21] in the normal course of events discovery should be limited to the specific documents or classes of documents contemplated in r 3. In *Racing New South Wales v Betfair Pty Ltd*, Buchanan, Jagot and Foster JJ stated that:

> as apparent from Order 15 r 2(3) of the *Federal Court Rules*, discovery ordinarily should be limited to the documents on which the party relies and the documents that adversely affect or support that party's case or the case of another party. Moreover, Order 15 rr 3(1) and (2) indicate that, if anything, discovery by order should be restricted rather than expanded.[22]

---

18 *Federal Court Rules* (Cth) O 15 r 2(3).

19 Ibid O 15 r 5; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 2)* [2006] FCA 1001, [153].

20 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), [12.1.21].

21 *University of Sydney v ResMed Ltd* [2008] FCA 1020; *Australian Competition & Consumer Commission v Advanced Medical Institute Pty Ltd* [2005] FCA 366; *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415.

22 *Racing New South Wales v Betfair Pty Ltd* [2009] FCAFC 119, [19].

4.15 If the party does not search for a category or class of document, the rules require that party to include in their list of discoverable documents a statement of the category or class of document not searched for, and the reason why.[23]

4.16 A party is required by the *Federal Court Rules* to discover documents which are or have been in that party's possession, custody or power.[24] For the purposes of discovery, 'possession' means physical or corporal holding of a document pursuant to the legal right to deal with it; 'custody' means the mere actual physical or corporal holding of a document, regardless of the right to its possession; and 'power' means an enforceable right to inspect or obtain possession or control of the document from the person who ordinarily has it in fact.[25]

4.17 It is not necessary to disclose a document if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given.[26]

4.18 The *Federal Court Rules* also exclude from the ambit of discovery additional copies of documents, which are not discoverable purely because the original or any other copy is discoverable.[27]

4.19 While the Rules require a party giving discovery to identify in their list of discoverable documents any document which they claim is privileged,[28] the party can rely on a privilege claim to refuse production of the document for inspection.[29]

Proposed rules

4.20 The proposed amendments to the *Federal Court Rules* would prescribe a range of discoverable documents in substantially similar terms to the existing provisions. Draft r 20.14(1) restricts the ambit of 'standard discovery' to those documents:

(a) that are directly relevant to the issues raised by the pleadings or in the affidavits; and

(b) of which, after a reasonable search, the party is aware; and

(c) that are, or have been, in the party's control.

4.21 The test of 'direct relevance' is particularised in draft r 20.14(2), which specifies in identical terms those documents 'required to be disclosed' under current O 15 r 2(3). The proposed rules also replicate the list of matters that may be taken into account by a party in making a 'reasonable search'.[30] Further, the word 'control' is defined in the Dictionary as 'possession, custody or power'—as currently provided in O 15 r 6.

---

23 *Federal Court Rules* (Cth) 15 r 2(6).
24 Ibid O 15 r 6.
25 *Halsbury's Laws of England*, 4th ed, vol 13, [39].
26 Federal Court Rules (Cth) [Draft 2010] O 15 r 2(4).
27 *Federal Court Rules* (Cth) O 15 r 6A.
28 Ibid O 15 r 6.
29 Ibid O 15 r 11.
30 Federal Court Rules (Cth) [Draft 2010] r 20.14(3).

4.22 The draft Rules do not, however, include an equivalent provision to current O 15 r 2(4), which excludes from discovery obligations those documents reasonably believed to be in the possession, custody or control of the party to whom discovery is given.

4.23 Current provisions for 'limited discovery' under O 15 r 3—which allow the Court to limit discovery to specific documents or classes of documents, or in relation to specific matters in question in the proceeding—are not replicated in the proposed Rules. Instead, draft r 20.15 would apply where a party seeks 'non-standard discovery' or 'more extensive discovery' than is required by a reasonable search for the standard categories of documents.

4.24 A party seeking 'non-standard discovery' under the proposed rules would be required to identify what criteria should apply instead of standard discovery. A party seeking 'more extensive discovery' under proposed r 20.15 would be required to provide an affidavit stating why the order should be made.

Process of discovery

4.25 The following section of this chapter describes the procedures through which orders for discovery are sought, made and carried out—as specified in *Federal Court Rules* and practice notes.

Pre-discovery practice

4.26 *Practice Note CM 5* implies that, before approaching the Court for orders, practitioners are expected to consider carefully any application for discovery, with a view to narrowing the scope of discovery. *Practice Note CM 5* expressly states that the Court will expect practitioners to be in a position to answer the following questions when applying for orders, designed to eliminate or reduce the burden of discovery:

(i) is discovery necessary at all, and if so for what purposes?

(ii) can those purposes be achieved:

- by a means less expensive than discovery?
- by discovery only in relation to particular issues?
- by discovery (at least in the first instance—see (iii)) only of defined categories of documents?

(iii) particularly in cases where there are many documents, should discovery be given in stages, e.g. initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?

(iv) should discovery be given in the list of documents by general description rather than by identification of individual documents?[31]

31 *Practice Note CM 5: Discovery* (Federal Court of Australia), [1(c)].

Application for discovery

4.27 A party may file and serve a notice for discovery, with leave of the Court, after a directions hearing under O 10 of the *Federal Court Rules* and within any period fixed by the Court for this purpose.[32] In practice, the Court may expect the parties to indicate at the first directions hearing or case management conference whether leave for discovery will be sought.[33]

4.28 The Rules do not explicitly prohibit the giving of a discovery notice before the close of pleadings. However discovery will not be enforced prior to the close of pleadings, except where the party seeking discovery can show that it is impossible to plead without it.[34]

Orders for discovery

4.29 *Practice Note CM 5* states that the Court will not order general discovery as a matter of course, even where the parties have consented to it, and that the Court will fashion any order for discovery to suit the issues in a particular case.[35] In this context, general discovery refers to the broad categories of documents required to be disclosed under *Federal Court Rules* O 15 r 2(3).[36] However, r 3 provides that the Court may limit discovery orders to specific documents or classes of documents or in relation to specific matters in question in the proceeding—to prevent unnecessary discovery.[37] *Practice Note CM 5* suggests that, in the normal course of events, the Court will only make orders for limited discovery under r 3 and not general discovery under r 2. The Court has confirmed that the basis of ordering discovery in the Federal Court is that, as a general rule, the Court will not allow general discovery.[38] In *Pasini v Vanstone*, Finn J stated that:

> As *Practice Note 14* [now *Practice Note CM 5*] makes plain, general discovery will not be ordered as of course, discovery commonly being ordered only in relation to particular issues or defined categories of documents.[39]

4.30 When making orders for discovery, the Court must have regard to the overarching purpose provision of the *Federal Court of Australia Act 1976* (Cth)—to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.[40]

---

32 *Federal Court Rules* (Cth) O 10 r 1, O 15 r 1.
33 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [1.2].
34 *Latec Finance Pty Ltd v Jury* (1960) 77 WN (NSW) 674.
35 *Practice Note CM 5: Discovery* (Federal Court of Australia), [1(a)–(b)].
36 *Federal Court Rules* (Cth) O 15 r 5; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 2)* [2006] FCA 1001, [153].
37 *Federal Court Rules* (Cth) O 15 r 3.
38 *Kyocera Mita Australia Pty Ltd v Mitronics Corp Pty Ltd* [2005] FCA 242, [5].
39 *Pasini v Vanstone* [1999] FCA 1271, [30].
40 *Federal Court of Australia Act 1976* (Cth) s 37M.

Serving a list of documents

4.31 Order 15 r 2(2) of the *Federal Court Rules* requires parties to give discovery by serving a list of discoverable documents. The list of documents must be accompanied by an affidavit verifying the list.[41] This must be done within the time specified in the notice for discovery (not being less than 14 days after service), or within such time designated by the Court.[42]

4.32 The contents of the list must be in accordance with Form 22 prescribed under sch 1 of the Rules, and conform to the requirements of O 15 r 6 unless the Court otherwise orders. The list must describe each document or group of documents sufficiently to be identified, state the grounds for privilege claimed over any of the documents and, for documents no longer in the party's possession, custody or power, state when the party parted with the document and what has become of it.[43] If the party is represented by a solicitor, the solicitor must certify that the list and the statements in it are correct.[44]

Production of documents

4.33 Order 15 r 11 provides that the Court may, subject to any question of privilege, order a party to produce any document enumerated in their list of discoverable documents for inspection by any other party at a time and place specified in the order.[45] The party to whom a document is produced may make copies at their own expense.[46] The Court may also order the party giving discovery to file and serve on any other party a copy of the whole, or any part, of the document.[47]

4.34 Order 15 r 13 provides that the Court may, at any stage in a proceeding, order a party to produce to the Court for inspection any documents in its possession, custody or control relating to any matter in question, and the Court may deal with the document as it thinks fit.

4.35 In particular, where a question of privilege or any other objection to the production of discoverable documents between the parties arises, the Court may order that the document be produced to the Court for inspection to decide the validity of the privilege claim or objection.[48]

Discovery of electronically-stored information

4.36 Where a significant number of discoverable documents—in most cases, 200 or more—have been created or are stored in an electronic format, the Court may order that discovery be given of documents in an electronic format.[49] *Practice Note CM 6*

---

41 *Federal Court Rules* (Cth) O 15 r 2(2).
42 Ibid O 15 r 2(1).
43 Ibid O 15 r 6(3), (4), (6).
44 Ibid O 15 r 6(8).
45 Ibid O 15 r 11(1).
46 Ibid O 15 r 12.
47 Ibid O 15 r 11(1)(e).
48 Ibid O 15 r 14.
49 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [1.1].

states that, before the Court will make such orders, the parties are expected to have discussed and agreed upon a practical and cost-effective discovery plan, having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.[50]

4.37 Parties are also expected to reach an agreement on protocols for the management of electronic documents in litigation.[51] *Practice Note CM 6* provides a Default Document Management Protocol that addresses issues such as page number conventions, document descriptions, file format and media to be exchanged. An example of an Advanced Document Management Protocol is also provided.

4.38 The Court may order the parties to attend a case management conference—called a 'pre-discovery conference'—with a judge or registrar to facilitate or mediate the resolution of any areas of disagreement concerning their discovery plan or document management protocol.[52]

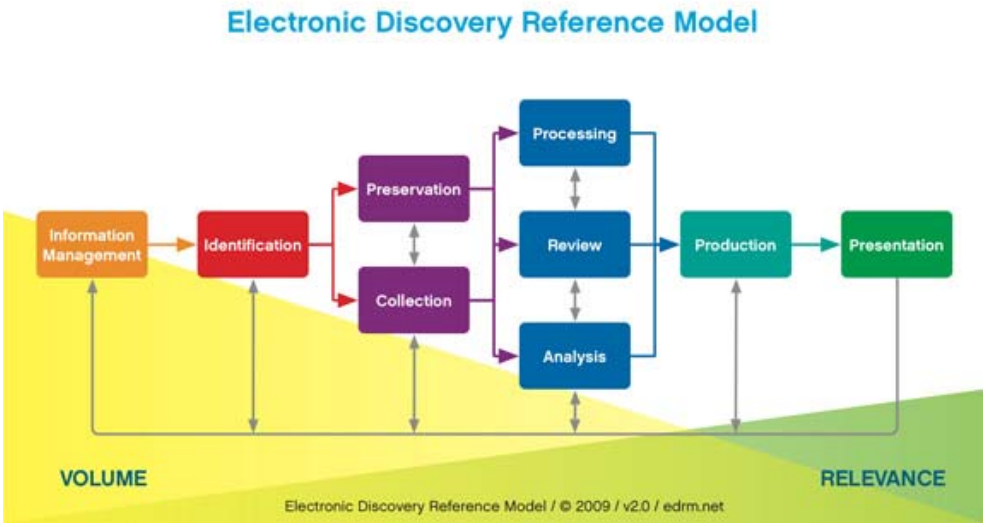
4.39 A checklist of the issues that parties are expected to address at a pre-discovery conference is annexed to the practice note. These issues include strategies for the identification, collection, processing, analysis, review and exchange of electronic documents, as well as a timetable and estimate of costs for discovery.[53]

4.40 If the Court requires a pre-discovery conference, *Practice Note CM 6* states that each party may have up to three representatives—including one representative to act as a single point of contact for the party in relation to the matters resolved at the conference, called the 'Discovery Liaison'. Parties' representatives at a pre-discovery conference are expected to have sufficient knowledge and access to information to address the discovery plan and document management protocol.[54] The parties or the Court may also engage an expert or adviser to attend a pre-discovery conference to facilitate or mediate resolution of any of these issues.[55]

4.41 The standard process of discovering electronic documents is set out in the diagram below, and was established by the Electronic Discovery Reference Model (EDRM) Project.[56]

---

50 Ibid, [6].
51 Ibid, [7].
52 *Federal Court Rules* (Cth) O 10 r 1(2)(i); *Practice Note CM 6: Pre-Discovery Conference Checklist (Federal Court of Australia)*, [9].
53 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia).
54 Ibid, [9.1].
55 Ibid, [9].
56 *EDRM: The Electronic Discovery Reference Model* (2010) <http://www.edrm.net> at 25 October 2010.



4.42 'Information management' is the way in which potential litigants organise their electronic information, so that documents can easily be found. 'Identification' involves identifying the places or locations to be searched, as well as the types of documents or information to be searched for. E-discovery might pinpoint certain sites such as a particular employee's computer terminal or cast a broader net, for example, over an organisation's entire email system. Broader still, backup tapes or disaster recovery systems may be identified as potential sites of relevant information. The types of electronic documents to be discovered may be identified by automated searches using keywords appearing in the document or by specifying fields such as author or recipient. Documents may also be identified by type of data, whether email, portable document format (PDF) or text file.

4.43 'Preservation' and 'Collection' comprise the processes of transferring information from its original location to a searchable database of potentially discoverable documents for review, in a way that does not compromise the integrity of the data. Specialist software and other forensic tools have been developed to collect electronic documents for discovery. A particular issue that may arise at this stage in the e-discovery process is the preservation of metadata. Metadata is information about an electronic record, such as how/when/by whom a document was created/amended/sent. These details can be altered when a document is accessed during the collection phase. Metadata can be relevant to the issues in dispute in some cases, for example, where the parties disagree as to which record is the final version of a document. In such cases, technological measures are available to ensure that the metadata is preserved in its original form.

4.44 'Processing' is the stage at which the collected documents are tidied up and culled. This may involve extracting individual files from containers, and converting files into a format that enables word searches. It may also involve the process of de-duplication, which can mean removing additional copies of the same document or omitting the many links in a chain of emails. 'Review' is when documents are perused

to assess their discoverability. This can involve coding each document according to the facts in issue to which the documents relate, and indicating each document's level of importance (whether it is relevant enough to tender in court, provide in a brief to counsel, disclose to an opposing party or not relevant enough to include in discovery). The review stage may also involve the redaction of privileged communications or tagging wholly privileged documents to be withheld. 'Analysis', in its simplest form, is the indexing of documents to enable keyword searching and the production of a contents list. This involves coding each document according to a list of fields (such as author, recipient or date).

4.45 'Production' is the act of disclosing documents to other parties to the proceeding. For example, electronic documents may be produced on a disk or hosted on a website. 'Presentation' is when documents are presented to the court. Documents may be presented on computer screens in electronic format in an e-courtroom, rather than producing hardcopies of documents from physical files.

Supplementary discovery

4.46 Orders for discovery impose an ongoing obligation on the party giving discovery. The *Federal Court Rules* require parties to discover any document not previously discovered that would otherwise be necessary to comply with court orders.[57]

Particular discovery

4.47 The *Federal Court Rules* state that the Court may order at any stage of the proceeding that a party give discovery of some document or class of documents relating to any matter in question in the proceeding that—as it appears from the evidence or from the nature or circumstances of the case or from any document filed in the proceedings—may be or may have been in the possession, custody or power of the party.[58]

Enforcement of discovery obligations

4.48 The Court has broad powers to address a party's non-compliance with orders for discovery. This includes the case management powers prescribed in s 37P of the *Federal Court of Australia Act*, such as the power to disallow or reject any evidence or dismiss the proceeding in whole or in part. The Federal Court, as a superior court of record,[59] also possesses such inherent power as is necessary to regulate processes such as discovery and to prevent abuse of process.[60]

4.49 The Federal Court's power to award costs may also be used to enforce orders for discovery. This includes the power to make an award of costs at any stage in a proceeding and to make different awards of costs in relation to different parts of the proceeding, such as discovery.[61]

---

57 *Federal Court Rules* (Cth) O 15 r 7A.
58 Ibid O 15 r 8.
59 *Federal Court of Australia Act 1976* (Cth) s 5(2).
60 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264.
61 *Federal Court of Australia Act 1976* (Cth) s 43(3)(a), (b).

Proposed rules

4.50 Procedures for discovery of documents under proposed Federal Court Rules 2010 are prescribed in pt 20 and closely follow the current provisions outlined above. Parties would give discovery by serving a list of documents, together with an affidavit verifying the list.[62] The Court may order a party to produce for inspection any document mentioned in the party's list of documents, and parties would be under a continuing obligation to discover documents in compliance with court orders.[63]

Family Court of Australia

Obligation to disclose documents

4.51 In the Family Court the duty of disclosure is 'absolute',[64] relating to the nature of the Court's jurisdiction. As noted in *Briese and Briese*, 'the need for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance'.[65] The *Family Law Rules 2004* (Cth) impose a general duty of disclosure on a party to a family law dispute, whether financial or parenting, independently of any action of the Family Court or another party.

4.52 The duty is imposed from the start of pre-action procedures for a case and runs until the case is finalised.[66] These pre-action procedures require parties to attempt to resolve the dispute out of court, and, in financial cases, involve an exchange by the parties of details of assets, income and liabilities, and disclosure using a list of documents.[67] A party must continue to make disclosures as circumstances change and as documents are created or come into the party's possession or control.[68]

4.53 The main purpose of the Family Law Rules is to facilitate the prompt, affordable administration of justice.[69] To this end, the rules direct the Court to identify key issues early in the case, ensure parties comply with the Rules, practice directions and procedural orders, and where possible, reduce the need for court attendance by relying on documents.[70] Parties are required to comply with their duty of disclosure in a timely manner.[71] A failure to provide prompt and adequate disclosure, whether in the proceeding or during pre-action procedures, may have costs ramifications.[72]

---

62 Federal Court Rules (Cth) [Draft 2010] r 20.16.
63 Ibid rr 20.20, 20.32.
64 *In the Marriage of Kannis* (2003) 30 Fam LR 83.
65 *Briese and Briese* (1986) FLC ¶91.713.
66 *Family Law Rules 2004* (Cth) rr 13.01, 1.05, 1.08(1)(b).
67 Ibid sch 1, cl 4(2).
68 Family Court of Australia, *Duty of Disclosure* <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/> at 27 October 2010.
69 *Family Law Rules 2004* (Cth) r 1.04.
70 Ibid r 1.06(c), (f), (i).
71 Ibid r 13.01.
72 Ibid r 117(2A)(c), sch 1, cl 1(3).

Scope of disclosure obligations

4.54 The general duty of disclosure under the *Family Law Rules* requires each party to a case to give full and frank disclosure in a timely manner to the Court and to the other party of all information relevant to the case.[73] The duty applies to each document that is or has been in the possession, or under the control, of the party disclosing the document and is relevant to an issue in the case.[74]

4.55 The parties to a financial case must make full and frank disclosure of their financial circumstances.[75] This involves filing and serving a financial statement with the application or response.[76] In all cases this includes disclosure of relevant documents in the parties' possession or under their control.[77]

4.56 The parties to a property case have an additional obligation to exchange documents before the first court date and before a conciliation conference.[78] At least two days before the first court date, parties are required to exchange copies of their three most recent taxation returns, superannuation documents, statements of business activity in the last year, and a valuation of all property the value of which has not been agreed, as well as details of any corporations, partnerships or trusts in which a party has an interest.[79] If they have not already exchanged these documents before a case assessment conference, they must be given to the other party, along with any other documents ordered to be exchanged, within 28 days after the conference.[80]

4.57 The parties to a parenting case must disclose any expert reports obtained to the other party at least two days before the case starts.[81] If a report is obtained during the case, it must be disclosed within seven days.[82] Parties must also disclose any amendments or supplements to the report.[83]

4.58 A party to proceedings before the Family Court must give an undertaking to the Court stating that the party has read pts 13.1 and 13.2 of the *Family Law Rules* and is aware of the duty to give full and frank disclosure, and that to the best of his or her knowledge the party has complied with the duty of disclosure.[84] This undertaking must be filed at least 28 days prior to the first day before a judge.[85]

---

73 Ibid r 13.01.
74 Ibid r 13.07.
75 Ibid r 13.04.
76 Ibid r 13.05.
77 Ibid r 13.07. Family Court of Australia, *Duty of Disclosure* <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/> at 27 October 2010.
78 *Family Law Rules 2004* (Cth) rr 12.02, 12.05.
79 Ibid r 12.02.
80 Ibid r 12.02.
81 Ibid r 15.55(1)(a).
82 Ibid r 15.55(1)(b).
83 Ibid r 15.55(2).
84 Ibid r 13.15. This does not apply to an independent children's lawyer.
85 Ibid r 13.16.

Process of disclosure

4.59 After a case has been allocated a first day before a judge, a party may request another party to provide a list of documents to which the duty of disclosure applies.[86] The list must be provided within 21 days of the request and, subject to a claim of privilege, the party must produce those documents for inspection on request by another party.[87] The Court may make an order directing disclosure of documents by electronic communication.[88]

4.60 The Rules also impose a duty on parties to produce particular documents on the first court date for a maintenance application, on the first court date for a child support application or appeal, at a conference in a property case and at trial.[89] In financial cases there are specific rules about full and frank disclosure of the party's total direct and indirect financial circumstances.[90]

4.61 A party who breaches their disclosure obligations in the Family Court may be in contempt of court and liable to costs orders.[91] A costs order for breach of disclosure obligations would be a departure from the usual position that parties to proceedings before the Family Court bear their own costs.[92] A breach of disclosure obligations is also an offence if the party gave an undertaking in relation to disclosure that the party knew or ought to have known was false or misleading in a material particular.[93]

Federal Magistrates Court of Australia

4.62 The jurisdiction conferred on the Federal Magistrates Court overlaps with that of the Family Court and the Federal Court. This section of the chapter examines the obligations on parties to disclose information and documents in financial matters under the Court's family law jurisdiction. It also considers the rules which apply in all proceedings before the Federal Magistrates Court for the discovery of documents. Procedures for discovery of documents prescribed in the *Federal Magistrates Court Rules 2001* (Cth) are similar to the processes of the Federal Court. Similarly, procedures for disclosure in financial matters in the Federal Magistrates Court's family law jurisdiction are similar to those applicable in the Family Court.

Obligation to discover documents

4.63 Section 45 of the *Federal Magistrates Act 1999* (Cth) provides that discovery in relation to proceedings in the Federal Magistrates Court is not allowed unless the Court

---

86 Ibid r 13.20. This applies to all Initiating Applications (Family Law) except: an application for an order that a marriage is a nullity or a declaration as to the validity of a marriage, divorce or annulment; a maintenance application; a child support application or appeal; and an application seeking interim, procedural, ancillary or other incidental orders.

87 Ibid, r 13.20.

88 Ibid, r 13.24.

89 Ibid rr 4.15, 4.26, pt 12.2 and chs 15 and 16 respectively.

90 Ibid r 13.04.

91 *Family Law Act 1975* (Cth) ss 112AP, 117.

92 Ibid s 117(1).

93 *Family Law Rules 2004* (Cth) r 13.15.

or a Federal Magistrate declares that it is appropriate, in the interests of the administration of justice, to allow the discovery.

4.64 Section 45(2) of the Act requires the Court or a Federal Magistrate, in deciding whether to make a declaration for discovery of documents, to have regard to:

(a) whether allowing the discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and

(b) such other matters (if any) as the Federal Magistrates Court or the Federal Magistrate considers relevant.

Range of discoverable documents

4.65 If a declaration for discovery of documents is made under s 45 of the *Federal Magistrates Act*, the Court or Federal Magistrate may make an order for discovery:

(a) generally;

(b) in relation to particular classes of documents;

(c) in relation to particular issues; or

(d) by a specified date.[94]

4.66 The *Federal Magistrates Court Rules* provide that a party may be required to discover documents which are or have been in that party's possession, custody or control.[95] However, a party may refuse to produce for inspection privileged documents disclosed in their affidavit of discoverable documents.[96]

Process of discovery

4.67 Part 14 of the *Federal Magistrates Court Rules* prescribes procedures for the discovery of documents in all proceedings. Rule 14.02 provides that a declaration to allow discovery may be made on the application of a party or on the Court's own motion.[97] If a declaration is made, the Court may order discovery generally or look to fashion orders for discovery in relation to particular classes of documents or issues in the proceeding.[98]

4.68 The Rules require the party ordered to give discovery to file an affidavit of documents.[99] The Court may order the party to produce discoverable documents to the Court or to any other party for inspection, subject to any claim of privilege.[100]

94 *Federal Magistrates Court Rules 2001* (Cth) r 14.02.
95 Ibid r 14.04.
96 Ibid r 14.05.
97 Ibid, r 14.02(1).
98 Ibid, r 14.02(2).
99 Ibid, r 14.03.
100 Ibid, r 14.05.

4.69 Rule 14.09 provides that a party who does not discover documents so ordered by the Court is not entitled to put the document in evidence or give evidence of the contents of the document, unless the Court gives leave.[101]

Obligation to disclose documents in family law matters

4.70 Part 24 of the *Federal Magistrates Court Rules* imposes a duty of disclosure on parties to financial matters in the Court's family law jurisdiction. This includes a requirement for the applicant and respondent to file and serve a financial statement, giving full and frank disclosure of financial circumstances, together with the application or response.[102]

4.71 The Rules also impose an obligation on the respondent, in proceedings for maintenance, to disclose certain categories of documents—outlined below.[103] In other financial matters, both the applicant and the respondent must file and serve on each other certain categories of documents—as discussed below.[104]

Scope of disclosure obligations in family law matters

4.72 A financial statement filed and served pursuant to part 24 of the *Federal Magistrates Court Rules* must give full and frank disclosure of the party's total direct and indirect financial circumstances, including details of any interest in property, income from all sources and other financial resources.[105]

4.73 In proceedings for maintenance, the categories of documents that a respondent must bring to court include a taxation assessment and taxation return for the most recent financial year, bank records for the 12 months before the application was filed and the respondent's most recent pay slip.[106]

4.74 In other financial matters, the categories of documents that the parties must file and serve on each other include the parties' three most recent taxation assessments and taxation returns, copies of the last four business activity statements (if a party has an Australian Business Number) and details of any superannuation plan.[107]

Process of disclosure in family law matters

4.75 Rule 24.02 of the *Federal Magistrates Court Rules* provides that an applicant or respondent must file and serve a financial statement with their application or response at the commencement of proceedings.[108]

---

101 Ibid r 14.09.
102 Ibid rr 24.02, 24.03.
103 Ibid r 24.05.
104 Ibid r 24.04.
105 Ibid r 24.03.
106 Ibid r 24.05.
107 Ibid r 24.04.
108 Ibid r 24.02.

4.76 In proceedings for maintenance, the respondent must bring the required categories of documents to the Court on the first court date.[109] In other financial matters, unless the Court orders otherwise, the parties must serve the required categories of documents on each other within 14 days of the first court date.[110]

109 Ibid r 24.05.
110 Ibid r 24.04.

5. Access to Discovery and General Discovery

Contents

Summary

5.1 This chapter examines issues about parties' right to discovery and the scope of general disclosure obligations in proceedings before the federal courts. Parties' right to discovery in the Federal Court of Australia (Federal Court) is regulated by the requirement for leave of the Court.[1] The ALRC understands that this rule is not always applied in a formal and consistent manner. The ALRC supports the introduction of proposed new Federal Court Rules 2010 (Cth), which restrict discovery to cases where it is necessary for the just determination of issues in the proceedings.[2] This reform promotes the principles of appropriateness and consistency, by ensuring conscious and consistent decision making by parties and judges about the appropriate use of discovery in resolving disputes.

5.2 The Consultation Paper considered the introduction of a new right to inspect key documents, prior to discovery, in Federal Court proceedings.[3] While the ALRC does not support such a rule of general application, it recommends that similar reforms implemented in Victoria should be monitored by the Federal Court. The ALRC's preferred approach is for inspection of such documents to occur prior to discovery on a

1 *Federal Court Rules* (Cth) O 15 r 1.
2 Federal Court Rules (Cth) [Draft 2010] r 20.11.
3 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–6.

case-by-case basis under existing procedures. The ALRC recommends changes to practice notes to highlight the possibilities for inspection of critical documents prior to discovery in appropriate cases.

5.3 The scope of general discovery obligations in the Federal Court includes standard criteria for documents of 'direct relevance' and those which are or have been in a party's 'possession, custody or power'.[4] The ALRC does not support the introduction of arbitrary limits to narrow the parameters of general discovery in all cases, but considers that the better approach is for judges to tailor discovery obligations in each case. Notwithstanding this conclusion, as part of consultations on the proposed new Rules, the ALRC supports consideration of a new rule of general application to exclude from discovery any documents, to which legal professional privilege applies, that wholly came into existence after the commencement of proceedings in the Federal Court.

5.4 The duty to disclose documents in family law matters before the Federal Magistrates Court of Australia (Federal Magistrates Court) is limited in scope—compared to proceedings in the Family Court of Australia (Family Court). The ALRC does not support changes to increase the scope of disclosure in the Federal Magistrates Court. However, the ALRC recommends reform to promote parties' right to disclosure of documents in the Federal Magistrates Court's family law jurisdiction—to be consistent with the Family Court, so that disclosure of documents is not contingent upon any action of the Court.

5.5 The ALRC makes no recommendation for reform in relation to High Court of Australia (High Court) or Family Court proceedings, as the ALRC understands that the disclosure of documents does not present any significant issues in these jurisdictions.

Federal Court of Australia

Introduction

5.6 This section of the chapter examines the existing requirement to obtain leave of the Court to serve a notice for discovery in Federal Court proceedings, as a means of regulating parties' access to discovery mechanisms. Here the ALRC puts forward its views, within the context of the principles for reform outlined in Chapter 2, on establishing a new threshold test by which litigants would be required to justify, and the Court would be required to scrutinise, the need for discovery in each case.

5.7 This section also considers the efficiency and effectiveness of a right to inspect key documents prior to discovery in proceedings before the Federal Court, while maintaining the Court's control over broader discovery of additional documents.

5.8 The range of documents generally discoverable under the *Federal Court Rules* (Cth) is also examined. In this regard, the ALRC provides its views on the need to limit the scope of general discovery allowed under existing Rules.

---

4 *Federal Court Rules* (Cth) O 15 rr 2, 6.

Regulating access to discovery by leave of the Court

5.9 Discovery is an important part of the litigation process as it provides access to information required to resolve or determine the issues in dispute.[5] However, in some cases, the costs associated with discovery can present a distinct barrier to justice. Therefore, any restrictions on parties' access to discovery—to avoid the costs, but also foregoing the information that discovery provides—need to be responsive to the interests of the administration of justice in each case. This point was made in the ALRC's report on the civil justice system in Australia, *Managing Justice: A Review of the Civil Justice System* (2000) (ALRC Report 89) (*Managing Justice*):

> The process needs supervision and control but, in setting such controls courts should note that discovery is an essential part of the process. The information obtainable through discovery is required to facilitate settlement as well as to present at trial.[6]

5.10 In its report, *Civil Justice Review*, the Victorian Law Reform Commission (VLRC) also formed the view that 'discovery plays a vital role in the administration of justice'.[7] Moreover, notwithstanding many submissions that the discovery process should be viewed as a privilege and maintained for appropriate cases by leave of the Court,[8] the VLRC concluded that discovery in Victorian courts should continue to be available to the parties as of right.[9] Consequently, the *Supreme Court (Chapter 1 Amendments No 18) Rules 2010* (Vic), which implemented some of the VLRC's recommendations, made no changes to limit the availability of discovery—so that parties may continue to serve notice on another party requiring discovery of documents, without leave of the Court.[10]

5.11 By way of contrast, in line with the commentary in *Managing Justice* about the need for court supervision and control over the use of discovery,[11] the Federal Court amended the *Federal Court Rules* in 2002 to introduce the requirement for leave of the Court to serve a notice for discovery.[12]

5.12 Doubts have emerged, however, as to whether the leave requirement is working as an effective control on the availability of discovery. In a March 2008 conference paper, the Hon Justice Ray Finkelstein observed that:

> Although leave is nominally required and general discovery is frowned upon, the reality is that the leave requirement is a formality rather than a substantive limitation on a party's ability to obtain discovery. That is to say, there is no general practice of

---

5 See Ch 2.
6 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.73].
7 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.
8 Ibid, 458.
9 Ibid, 426.
10 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 29.02.
11 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.73], [7.190].
12 *Federal Court Amendment Rules (No 3) 2002* (Cth).

> requiring a party to justify a request for leave to obtain discovery by showing need or cause.[13]

5.13 Justice Finkelstein took into account comments from practitioners in the Law Council's *Final Report in Relation to Possible Innovations in Case Management*, which called for judges to take a much stronger role control discovery.[14] He noted that '[t]he concern, particularly with respect to large and complex cases, is that the Court has abdicated responsibility, resulting in excessive costs for very little return'.[15]

5.14 Similar concerns were raised with the ALRC during this Inquiry. In some cases, parties might seek discovery as a matter of course, or just to 'shake the tree trunk', rather than out of necessity or with any real prospects of discovering significantly relevant documents.[16] At the same time, the extent to which the Court will scrutinise the need for discovery orders sought by a party in a proceeding may vary between different judges and different court registries—leading to inconsistent practice and uncertainty for practitioners and litigants.

5.15 Some judges hearing matters in the Federal Court's 'Fast Track List' have promoted an activist approach to judicial scrutiny of requests for discovery. The Fast Track List aims to reduce the costs and time of commercial litigation conducted in that list. By limiting discovery, introducing scheduled pre-trial conferences and resolving most interlocutory disputes on the papers, the Fast Track List is an attempt to respond to commercial disputes in a more timely and cost-effective manner.[17] The attitude which a Fast Track List judge should adopt when considering discovery applications was described by the Hon Justice Michelle Gordon at a conference in November 2009:

> The general presumption is not just that discovery will be limited, but that there will be no discovery unless a party can identify with specificity particular documents or materials (not simply categories) that they require, the reasons that they require those documents, and why no alternative, cheaper means of obtaining the information is available (such as inspection, a summary created pursuant to s 50 of the *Evidence Act 1995* (Cth), a letter or admission from the other side, or an affidavit from a witness with the relevant knowledge).[18]

Submissions and consultations

5.16 In the Consultation Paper, the ALRC asked whether the requirement to obtain leave of the Court to serve a notice for discovery effectively regulates the use of

---

13 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [4].

14 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006).

15 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [6].

16 T Howe, *Consultation*, Canberra, 21 July 2010.

17 See Ch 6 for discussion of the court procedures applying to matters in the Fast Track List.

18 M Gordon, 'The Fast Track Experience in Victoria: Changing and Evolving the Way in Which We Administer Justice' (Paper presented at International Commercial Litigation and Dispute Resolution Conference, Sydney, 2010).

discovery in Federal Court proceedings, and whether the law is sufficiently clear on when the Court should grant leave for discovery of documents.[19]

5.17 A number of submissions expressed the view that, while current law was sufficiently clear on when the Court should grant leave for discovery, the Court did not necessarily apply this law in a formal and consistent manner.[20] Some suggested that judges rarely gave serious consideration to the specific factors set out in the relevant lines of authority.[21] Others noted that parties often prepare consent orders for discovery to be filed at a directions hearing and that such orders are usually made by the Court without argument or scrutiny.[22]

5.18 In contrast, the Commissioner of Taxation for the Commonwealth of Australia (Tax Commissioner) submitted that:

> In the Commissioner's experience, the requirement for leave of the Court does effectively regulate the use of discovery. The Court actively engages with the parties in determining what, if any, discovery orders are appropriate and carefully examines the categories of documents to be discovered.[23]

5.19 The Tax Commissioner noted, however, that his observations in respect of discovery in tax appeal proceedings were linked with the case management protocols spelled out in the applicable practice note.[24]

5.20 One submission suggested that greater and more consistent judicial consideration of existing leave requirements for discovery may eventuate following the introduction of the overarching purpose provision, s 37M of the *Federal Court of Australia Act 1976* (Cth).[25] This requires the Court to apply civil procedure provisions in a manner that best promotes the overarching purpose of civil practice and procedure—namely, the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible.[26] This provision 'may make the discussion

---

19 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Questions 2–2, 2–3.

20 Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.

21 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011. Legg referred to: *Australian Broadcasting Commission v Parish* (1981) 41 FLR 292, [295]; *Index Group of Companies Pty Ltd v Nolan* [2002] FCA 608, [6]–[7]; *Parkin v O'Sullivan* [2006] FCA 1413, [9]–[20]; *United Salvage Pty Limited v Louis Dreyfus Amateurs SNC* (2006) FCA 116, [3].

22 Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

24 Ibid.

25 M Legg, *Submission DR 07*, 17 January 2011. Section 37M is set out in Ch 2.

26 *Federal Court of Australia Act 1976* (Cth) s 37M.

about discovery at direction hearings more fulsome or more searching but that provision has only been in place for a relatively short time'.[27]

ALRC's views

5.21 The different experiences of litigants outlined in submissions echoes the views put forward during consultations in this Inquiry. The ALRC was advised that there is a degree of inconsistency across the Federal Court as to how thoroughly judges scrutinise the need for discovery in proceedings, and require parties seeking discovery to justify such requests.

5.22 The close judicial scrutiny of discovery applications in the Federal Court's Tax List, as experienced by the Tax Commissioner, is consistent with the approach taken in the Court's Fast Track List—as described by Justice Gordon above.[28] This reflects the fact that similar case management protocols are prescribed in both *Practice Note Tax 1—Tax List* and *Practice Note CM 8—Fast Track*. However, every judge across the Federal Court might not be as stringent in testing a party's need for discovery in each case.

5.23 In the ALRC's view, the existing requirement in O 15 r 1 of the *Federal Court Rules*, to obtain leave of the Court to serve a notice for discovery, is an important control over the use of discovery in Federal Court proceedings. This rule reflects the gatekeeper role of the Court to ensure that discovery obligations are not imposed on litigants unnecessarily. The rule promotes the principle of consistency in the types of cases for which discovery mechanisms are reserved. There is ample guidance in current *Practice Note CM 5* and relevant case law for judges considering whether discovery is necessary or appropriate in proceedings. This guidance also promotes the principle of consistency—in the way judges determine applications for leave to serve a notice of discovery.

5.24 The Court will continue to play this gatekeeper role under the proposed new Rules, which provide that a party may give discovery only after the Court has so ordered.[29] The proposed rules would also impose a costs sanction if parties give discovery without being ordered to do so by the Court.[30] However, the effectiveness of court rules will be undermined if some judges grant leave or make discovery orders as a matter of course—without specific consideration of whether discovery is necessary. Such inconsistency in the way judges determine applications for discovery orders would lead to inconsistencies between the types of cases where discovery mechanisms are used, which in turn would create uncertainty for litigants as to whether discovery is appropriate in their case.

---

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

28 M Gordon, 'The Fast Track Experience in Victoria: Changing and Evolving the Way in Which We Administer Justice' (Paper presented at International Commercial Litigation and Dispute Resolution Conference, Sydney, 2010).

29 Federal Court Rules (Cth) [Draft 2010] r 20.12(1).

30 Ibid r 20.12(2).

5.25 The potential for reform to facilitate greater consideration by the Court and the parties, on a more consistent basis, as to whether discovery is necessary in proceedings is discussed below.

A new threshold test to regulate access to discovery

5.26 The Consultation Paper discussed the possibility of prescribing a specific threshold test for the granting of leave for discovery in Federal Court proceedings.[31] This would be one way to ensure that judges scrutinise more thoroughly and consistently whether discovery is necessary in proceedings. The Consultation Paper outlined two precedents where stricter controls are placed over the use of discovery mechanisms in litigation:

- *Federal Magistrates Act 1999* (Cth) s 45, which provides that discovery is not allowed unless the Court declares that it is appropriate, in the interests of the administration of justice; and
- *Federal Rules of Civil Procedure 2009* (US) r 26(b)(2)(C), which requires the court to limit the frequency or extent of discovery if it determines that the burden or expense of the discovery outweighs its likely benefit.

5.27 The latter option was proposed for adoption in the Federal Court by Justice Finkelstein, who suggested that 'good cause'—based on a cost-benefit analysis—should be 'a bedrock principle and condition precedent' for the granting of any leave for discovery.[32] Justice Finkelstein noted that:

> it seems 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.[33]

Submissions and consultations

5.28 The Consultation Paper asked whether s 45 of the *Federal Magistrates Act* should be adopted in the Federal Court—so that discovery would not be allowed unless the Court declared it was appropriate in the interests of the administration of justice—or whether another threshold test should be adopted, and what that should be.[34]

5.29 A number of submissions expressed 'in principle' support for the idea of a specific threshold test to regulate the use of discovery in the Federal Court—on the grounds that it would ensure the Court made a positive decision on whether discovery was necessary and, if so, for what purpose.[35] However, submissions expressed

---

31 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Ch 2.

32 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [20].

33 Ibid, [10].

34 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 2–4.

35 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.

differing views as to what would be an appropriate threshold test. Some suggested that—if any threshold test were to be introduced at all—'the interests of justice' should be the benchmark for scrutinising discovery applications, along the lines of s 45 of the *Federal Magistrates Act*.[36] Others supported Justice Finkelstein's proposal for the introduction of a 'good cause' standard including, in particular, a cost/benefit analysis of the proposed discovery.[37]

5.30 The Commercial Bar Association of Victoria submitted that, while there would be additional cost incurred in meeting a threshold test for discovery, 'avoiding the need for discovery in some cases and significantly limiting it in others would substantially outweigh any added expense'.[38]

5.31 On the other hand, some expressed the view that discovery is a vital part of civil litigation in the Federal Court and, as such, additional restrictions on access to discovery would impede the just determination of disputes.[39] Others argued that leave for discovery is already appropriately limited by the requirements of s 37M of the *Federal Court of Australia Act,* effective from 1 January 2010.[40]

ALRC's views

5.32 Consistent with s 37M of the *Federal Court of Australia Act*, the proposed r 20.11 of the Federal Court Rules 2010 provides that 'a party may apply for discovery only if it is necessary for the just determination of the issues in the proceeding'.[41] The ALRC supports the introduction of this proposed rule.

5.33 In the ALRC's view, this provision would impose a clear obligation on litigants to justify an application for discovery orders—even when those orders are sought by consent of the parties—by explaining to the Court why discovery is necessary for the just determination of issues in the proceedings. In turn, this provision would ensure that the Court scrutinises the need for discovery and makes a conscious decision as to whether discovery is necessary in each case.

---

36 Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

37 Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.

38 The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.

39 Queensland Law Society, *Submission DR 28*, 11 February 2011; Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Just Leadership Program, *Submission DR 01*, 7 October 2010.

40 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

41 Federal Court Rules (Cth) [Draft 2010] r 20.11.

5.34 Such reform would not further restrict litigants' access to discovery procedures, any more than the requirements of s 37M of the *Federal Court of Australia Act* already limit leave for discovery. The ALRC considers that the inclusive definition of the overarching purpose of civil practice and procedure in s 37M of the Act is reflected in the proposed r 20.11, and will inform judges' consideration of parties' applications for discovery orders under the proposed Rules.

5.35 In particular, the legislative intent for the Court to resolve disputes 'at a cost that is proportionate to the importance and complexity of the matters in dispute',[42] should be taken into account when the Court considers the requirements of the proposed r 20.11. The Explanatory Memorandum to the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, which introduced s 37M, provides that:

> This provision is intended to be a reminder to litigants that costs should be proportionate to the matter in dispute. It is not only the cost to the parties that is relevant. The efficient use of the Court's resources needs to be taken into account. However, at the same time, due process will be observed so that justice may be done in the individual case. These objectives will support the intention that both the Court's and the litigant's resources are spent efficiently.[43]

5.36 Any additional resources required of the parties and the Court, in complying with and enforcing the requirements of the proposed r 20.11, would be proportionate to the importance and complexity of each application for discovery orders. For example, where discovery orders are clearly necessary for the determination of issues in proceedings and the orders sought are fashioned to suit the issues in dispute, the amount of time and money invested by the parties and the Court in addressing the requirements of proposed r 20.11 would reflect these circumstances. Equally, where a party seeks orders for discovery that may be considered unnecessary or overly burdensome, greater effort would be required of the party to justify the need for such orders and more detailed consideration would be required of the Court before making such orders. In dealing with the requirements of the proposed r 20.11, the new *Federal Court Rules* would provide that:

> (1) The Court may in making any order in the proceeding have regard to the nature and complexity of the proceeding;
>
> (2) The Court may deal with the proceeding in a manner that is proportionate to the nature and complexity of that proceeding.[44]

5.37 In any event, the proposed r 20.11 would require all applications for discovery orders specifically to address the need for the orders sought and require the Court in all cases to make a determination as to whether discovery was necessary. In this way, imposing discovery obligations in Federal Court proceedings should be the result of conscious judicial decision making.

---

42 *Federal Court of Australia Act 1976* (Cth) s 37M(2)(e).

43 *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), Explanatory Memorandum, [18].

44 Federal Court Rules (Cth) [Draft 2010] r 1.31.

5.38 Restricting the use of discovery to cases where it is necessary for the just determination of issues is consistent with the principle of appropriateness—that the justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.[45] The proposed r 20.11 of the *Federal Court Rules* intends that parties who may litigate their case in the Federal Court appropriately without the use of discovery mechanisms do not apply for discovery orders. This rule should draw attention to cases where discovery obligations could be minimised or avoided all together, by requiring the parties and the Court to consider whether discovery is necessary in each case.

A right to inspect critical documents prior to discovery

5.39 General discovery in state and territory courts, except New South Wales, is available to the parties as of right in most matters—usually by a party serving notice on another party—without leave or a court order.[46]

5.40 While discovery in Federal Court proceedings is restricted by the requirement to obtain leave of the Court,[47] there are provisions in the *Federal Court Rules* that give parties the right to inspect any document referred to in pleadings or affidavits filed in proceedings.[48] In addition, O 15 r 13 allows the Court to order production of any document in a party's possession, custody or power relating to any issue in the proceedings—at any stage of proceedings, including before discovery.[49]

5.41 A number of commentators have suggested that parties to Federal Court proceedings should have a broader right to inspect their opponent's 'critical' documents in the early stages of proceedings—prior to discovery of additional documents. In other words, parties should be required to produce the documents of core relevance to their case, without being ordered to do so by the Court.

5.42 For example, Peter Gordon of the law firm Slater and Gordon has suggested that '[t]here should be processes to identify and exchange the critical documents at an early date, which might spare much of the other discovery'.[50] Similarly, the Hon Chief Justice Patrick Keane of the Federal Court has suggested that judges should make an

---

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

46 *Uniform Civil Procedure Rules 1999* (Qld) ch 7; *Supreme Court Civil Rules 2006* (SA) ch 7 pt 3; *Supreme Court Rules 2000* (Tas) pt 13; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 29.02; *Rules of the Supreme Court 1971* (WA) O 26; *Court Procedures Rules 2006* (ACT) ch 2 pt 2.8; *Rules of the Supreme Court of the Northern Territory of Australia* (NT) O 29. In Tasmania, plaintiffs in motor vehicle accident litigation who seek discovery from defendants require a court order: *Supreme Court Rules 2000* (Tas) r 383(4)(c). Part 21 div 2 of the *Uniform Civil Procedure Rules 2005* (NSW) substitutes, for the right of general discovery upon service of a notice on another party, a more limited right to require production of specific documents: see S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), [12.1.10].

47 *Federal Court Rules* (Cth) O 15 r 1.

48 Ibid O 15 r 10.

49 Ibid O 15 r 13.

50 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <http://www.aija.org.au/Discovery/Discovery%20Notes.pdf> at 8 November 2010.

order at an initial directions hearing 'that before discovery, the plaintiff and defendant file the 10 documents they each consider most important to their case'.[51]

5.43 In the context of Federal Court proceedings, this commentary suggests a hybrid system of discovery, whereby parties would have a right to discovery of critical documents early on in proceedings, but would require leave of the Court for further discovery of additional documents. A similar process is prescribed by the International Bar Association (IBA) in the *Rules on the Taking of Evidence in International Arbitration 2010*, which require each party to submit to the Arbitral Tribunal and to each other party all documents available to it on which it relies—before any party may make a request for the production of documents.[52]

5.44 Similar procedures have been adopted in Fast Track proceedings in the Federal Court. While there is no express requirement in *Practice Note CM 7* for the parties to produce key documents at a scheduling conference prior to discovery, Justice Gordon has said that this practice is often adopted or required in the Fast Track as a matter of course:

> core documents relevant to the case are provided to the trial judge at this point. If the dispute is about the proper construction of a contract, a copy of the contract is provided to the judge. No more decisions on interlocutory issues in a vacuum.[53]

5.45 A distinction between disclosure of critical documents and broader discovery of documents has also been adopted in Victorian courts. Without limiting or affecting a party's discovery obligations, litigants in Victoria have an overarching obligation to disclose the existence of all documents that are or have been in the party's possession, custody or control, of which the party is aware and considers or ought reasonably to consider critical to the resolution of the dispute.[54] This disclosure must occur at the earliest reasonable time after the party becomes aware of the existence of the document.[55] The test for 'critical' documents is discussed in the Explanatory Memorandum to the Civil Procedure Bill 2010 (Vic):

> The term 'critical documents' is intended to capture a class of documents considerably narrower than those required to be discovered ... The test is meant to capture those documents that a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings, as well as documents that the party knows will adversely affect the party's case.

5.46 In recommending the introduction of this obligation in its *Civil Justice Review*,[56] the VLRC commented that it would 'accelerate disclosure of such information, provide

---

51 J Eyers, 'Chief Justice Keen to Get to the Point', *Australian Financial Review* (Sydney), 19 February 2010, 20.

52 International Bar Association, *IBA Rules on Taking Evidence in International Arbitration* (2010), art 3.

53 M Gordon, 'The Fast Track Experience in Victoria: Changing and Evolving the Way in Which We Administer Justice' (Paper presented at International Commercial Litigation and Dispute Resolution Conference, Sydney, 2010).

54 *Civil Procedure Act 2010* (Vic) s 26.

55 Ibid s 26(2), (3).

56 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), Rec 16.3.

the parties with an early opportunity to consider the strength of the other party's position and help to facilitate settlement'.[57]

5.47 From July 2010, the 'Supervised Case List' of the Queensland Supreme Court has been encouraging parties to seek directions that provide for the early exchange of 'critical documents', being a limited number of documents that are likely to be tendered at any trial and are likely to have a decisive effect on the resolution of the matter.[58] In support of this process, the Hon Justice Peter Applegarth, in his work for the Queensland Supreme Court's Better Resolution of Litigation Group, has argued that the early exchange of critical documents between the parties enhances the delivery of justice:

> By the time litigation is commenced, usually after pre-action disputes in which parties have consulted lawyers and obtained advice, most parties should know the critical documents upon which they intend to rely at any trial, and also know some, if not most, of the documents upon which the other party intends to rely and which are adverse to the first party's case. If the critical documents are identified and exchanged in a suitable format at a relatively early stage in litigation then this should facilitate the early resolution of cases which are capable of settlement, and the supervision of those that do not settle and which require case management.[59]

5.48 Other countries are also considering reform to ensure the disclosure of key documents early in proceedings. In New Zealand, proposed amendments to the *High Court Rules* (NZ) would require parties to give 'initial disclosure' when filing a pleading by serving copies of documents referred to in that pleading, as well as any additional principal documents in the party's control on which it intends to rely at trial.[60] Parties need not comply with this requirement, when filing pleadings, if it would be impossible or impracticable.[61] However, in that case, parties must file and serve a certificate signed by counsel for the party setting out the reasons why compliance is impossible or impractical[62]—and, in any event, serve the required documents within 10 working days from filing the pleading or within any extended period the Court may allow.[63]

5.49 In the United States, a joint project on discovery conducted by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System recommended that:

> Shortly after the commencement of litigation, each party should produce all reasonably available non-privileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defences.[64]

---

57 Ibid, 190.
58 Supreme Court of Queensland, *Note to the Profession: Supervised Case List* (2010).
59 P Applegarth, 'The Devil Is in the Documents' (2010) 40 *Hearsay* <http://www.hearsay.org.au/>.
60 *High Court Amendment Rules (No 1) 2011* (New Zealand) r 8.18(1).
61 Ibid r 8.18(2)(a).
62 Ibid r 8.18(2)(b).
63 Ibid r 8.18(3).
64 American College of Trial Lawyers and the Institute for the Advancement of the American Legal System, *Final Report* (2009), 7.

5.50 A number of practical and theoretical concerns, relating to the possible introduction of rules requiring early disclosure of key documents in proceedings, have been examined by Justice Finkelstein. In particular, he pointed to a tension with the nature of the adversarial system:

> it is hardly to be expected that ... parties will produce documents in such a distilled manner as to announce for practical purposes, 'Here is my case and here are the holes in it'.[65]

5.51 Justice Finkelstein expected that disputes would inevitably arise over whether such a rule has been properly complied with—for instance, what documents should be considered 'critical'.[66] In light of his concerns, Justice Finkelstein considered that 'there must be real doubt whether mandatory discovery, even of a theoretically limited nature, would reduce the burden on the Court or litigants'.[67]

Submissions and consultations

5.52 In the Consultation Paper, the ALRC asked whether parties to proceedings before the Federal Court should be required to discover key documents early in the proceedings.[68] The ALRC also asked whether existing procedures, under O 15 rr 10 and 13 of the *Federal Court Rules*, were adequate to obtain production of key documents to the Court or a party.[69]

5.53 Several submissions expressed support for the early disclosure of key documents in litigation—to facilitate the quick and efficient resolution of disputes.[70] For example, the Law Council submitted that:

> 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.[71]

5.54 The Queensland Law Society advised that, pursuant to Queensland Supreme Court practice notes, directions are routinely being sought and obtained in the Supervised Case List for the early exchange of 'critical' documents.[72] In support of introducing a similar process in the Federal Court, the Queensland Law Society submitted that:

> It is unlikely to be problematic or onerous for the producing party, given such documents would have been gathered for the purposes of preparing that party's case. It would assist the opposite party to plead in response. It may also facilitate earlier resolution. Finally, and more relevantly for present purposes, it may assist parties to

---

65 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [14].

66 Ibid, [16].

67 Ibid, [17].

68 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–6.

69 Ibid, Question 3–7.

70 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

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

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

> better identify the types of documents (and their custodians) required for further discovery (if any is required).[73]

5.55 However, most submissions that addressed this issue were opposed to a rule of general application requiring the early disclosure of key documents in every case.[74] The Law Council, for example, submitted that 'this may not be appropriate in all cases and may increase costs unnecessarily'.[75] One pointed out that such costs would be higher in larger cases, where the volume of key documents was also likely to be quite large.[76] A group of large law firms suggested that the additional expense would not come with any significant reward:

> A procedure that requires the exchange of key documents after pleadings and before discovery is, in our view, unlikely to significantly reduce applications for discovery orders. ... On balance we think, it will only add a further (and unnecessary) step to the litigation process with little or no practical benefit.[77]

5.56 A number of submissions expressed concern that enforcing a vague requirement to disclose 'key' or 'critical' documents would be unwieldy and lead to satellite litigation as to what constitutes such documents.[78] One suggested this issue could be avoided by focusing on documents relied upon to draft pleadings:

> a party must have ready access to those documents in any event and so there is not additional costs in terms of seeking to gather or find the documentation. Further, it would seem to be highly unlikely that a document could be regarded as 'key' and yet not be referred to in the process of preparing the pleadings.[79]

5.57 Many submissions also advised that existing provisions of the *Federal Court Rules* adequately provided the means to obtain documents of significant relevance to a proceeding, prior to discovery.[80] For example, a group of large law firms submitted that:

> Documents which are relevant to the proceeding should be referred to in the claim or at the very least particularised and production of them can be sought under the Rules.[81]

5.58 Others suggested, however, that current O 15 r 10 was deficient to the extent that it did not enable parties to obtain important documents the existence of which may

---

73 Ibid.

74 Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

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

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

78 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

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

80 Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011.

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

be implied, but are not actually mentioned, in the pleadings.[82] Michael Legg noted that O 15 r 10 required some 'direct allusion', and he suggested expanding this provision to capture any document relied upon to draft pleadings.[83] However, existing procedures may already provide a practical way to seek the production of documents indirectly referred to in pleadings, as a group of large law firms pointed out:

> To the extent that the particulars are inadequate and do not refer to relevant documents, this can be dealt with in the usual course by a request for further and better particulars.[84]

5.59 Legg pointed out that, while current O 15 r 13 of the *Federal Court Rules* was broad enough to enable the production of particularly important documents in proceedings—prior to discovery—it did not appear to have been used extensively.[85]

ALRC's views

5.60 The production of significantly probative documents for inspection by the parties in the early stages of proceedings is broadly consistent with the principle of efficiency—that litigation should resolve disputes in the most efficient way possible, which in many cases will involve early assistance and support to prevent disputes from escalating.[86] Mechanisms that enable parties to inspect documents directly relevant to the crucial facts in issue, as early as possible in proceedings, are likely to support early settlement or assist the parties to expedite the determination of their dispute.

5.61 In addition, in many cases parties are likely to have ready access to their own critical documents from an early stage in proceedings—as parties typically collect such documents early on, both for the purpose of drafting pleadings and to assess the likelihood of success should the matter proceed to trial. Therefore, a requirement for parties to produce these documents to other parties for inspection, early in proceedings, is unlikely to carry much additional expense.

5.62 However, imposing a uniform rule that requires litigants to disclose critical documents at an early stage would not be an effective way to achieve efficiencies in all cases before the Federal Court. Litigation is most efficient when its processes are tailored to suit the circumstances of each case. In some cases, it will be 'impossible or impractical' for parties to produce critical documents in the early stages of proceedings.[87] Such documents are defined in some jurisdictions to include those on

---

82 Queensland Law Society, *Submission DR 28*, 11 February 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

83 M Legg, *Submission DR 07*, 17 January 2011, citing *King v GIO Australia Holdings Ltd* [2001] FCA 1487, [10] and *Practice and Procedure High Court and Federal Court of Australia* (LexisNexis Online), [40,915.5].

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

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

86 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

87 Draft r 8.18(2) of the *High Court Amendment Rules (No 1) 2011* (New Zealand) provides that a party need not give 'initial disclosure' under subclause (1) when filing a pleading if the circumstances make it 'impossible or impractical' to do so—in which case the party must give initial disclosure within 10 working days from the filing of the pleading or within any extended period a judge may allow.

which the parties intend to rely at trial.[88] For some parties, the documents which they will eventually rely upon at trial might not be apparent until the later stages of proceedings, for example, after discovery has been given.

5.63 An efficient system of litigation should also avoid the cost of satellite litigation. A vague obligation to disclose 'critical' documents would be difficult to define with certainty. Those jurisdictions that have defined this term demonstrate a measure of subjectivity in its meaning. In Victoria, for example, 'critical' documents are those which the disclosing party 'knows will adversely affect the party's case'.[89] Similarly, in Queensland, 'critical' documents are those which 'are likely to have a decisive effect on the resolution of the matter'.[90]

5.64 Some parties may have differing views as to whether a document affects one party's case and what its effect is—for example, whether it is decisive. The decision that must be made, in relation to a document's status as 'critical', may lead to incidental disputes between the parties over this side issue and delay the determination of substantive matters in proceedings. This is the kind of satellite litigation that should be avoided.

5.65 The ALRC is unaware as to whether such satellite litigation has ensued in Victoria following the enactment of s 26 of the *Civil Procedure Act 2010* (Vic), which establishes an overarching obligation to disclose critical documents in proceedings. Concerns about the potential inefficiencies of this approach, in the context of Federal Court proceedings, might be borne out by experience in Victoria. However, the Victorian provision has not been in operation long enough for the ALRC to assess properly its suitability for introduction in the Federal Court. Therefore, the ALRC recommends that the Federal Court should monitor the impact of s 26 of the *Civil Procedure Act* to assess whether an overarching obligation on parties to disclose critical documents would be effective and efficient in Federal Court proceedings. This might involve, for example, ongoing discussions between the Federal Court and the Supreme Court of Victoria about the operation of s 26 of the *Civil Procedure Act* as part of the Supreme and Federal Court Judges' Conferences organised by the National Judicial College of Australia.

5.66 By comparison, the ALRC was advised that the approach taken in the Queensland Supreme Court Supervised Case List has been operating successfully.[91] Practice notes in this jurisdiction encourage parties to seek directions for the exchange of critical documents early in proceedings.[92] Importantly, this establishes judicial control over any obligation on parties to produce documents prior to discovery—as the Court will make and tailor such directions in the circumstances of each case—rather than impose uniform disclosure obligations on parties in all cases. This is the ALRC's

---

88 See for example: Ibid r 8.18(1); International Bar Association, *IBA Rules on Taking Evidence in International Arbitration* (2010) art 3; Supreme Court of Queensland, *Note to the Profession: Supervised Case List* (2010).

89 Civil Procedure Bill 2010 (Vic), Explanatory Memorandum.

90 Supreme Court of Queensland, *Note to the Profession: Supervised Case List* (2010).

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

92 Supreme Court of Queensland, *Note to the Profession: Supervised Case List* (2010).

preferred approach to achieving the early production of critical documents for inspection by the parties to litigation before the Federal Court. Consistent with the principle of effectiveness and the facilitative model described in Chapter 2, court-ordered production of critical documents involves active judicial case management which, in the ALRC's view, is essential to achieving the best outcome for parties to litigation.

5.67 Existing *Federal Court Rules* adequately enable the Court to make orders, such as those that parties are encouraged to seek in Queensland's Supervised Case List, for the exchange of critical documents in appropriate cases. This includes current O 15 r 13, which is expressed broadly enough for the Court to make orders, at any stage of proceedings, for the production of documents in another party's control that relate to the matters in question.[93]

5.68 Current O 15 r 10 also provides an appropriate mechanism for parties to access, early in proceedings, important documents held by another party. This rule gives a party the right, upon the service of notice on another party, to inspect documents referred to in that other party's pleadings or affidavits.[94] The issue of whether a document is referred to in pleadings or affidavits can be determined with relative certainty—compared to the issue of whether a document is 'critical'—which in turn makes transparent the issue of compliance with a duty to produce such documents. This measure of certainty and transparency promotes the principle of efficiency in litigation by avoiding the costs of satellite litigation arising in the face of uncertainty, for example, in relation to a document's 'critical' status.

5.69 For this reason, the ALRC does not support reform to expand O 15 r 10 beyond documents mentioned in pleadings—to include documents that were relied upon to draft pleadings but not directly referred to in them. In the ALRC's view, such reform would introduce elements of subjectivity and uncertainty into the operation of this Rule, which may in turn create potential for disputes between the parties over compliance with the requirement to produce these documents.

5.70 In addition, the ALRC does not support reform to require the production of documents referred to in pleadings in every case. Such documents would form part of the 'initial disclosure' in all cases under proposed amendments to the *High Court Rules* (NZ).[95] Similarly, in Victoria, 'critical' documents that must be disclosed in every case include those which 'a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings'.[96] However, in the ALRC's view, the production of documents referred to in pleadings should only be required at the request of a party—as currently provided in O 15 r 10. This helps to avoid an unnecessary burden on the party producing documents, by restricting this mechanism to cases where the requesting party considers the production of documents

93 *Federal Court Rules* (Cth) O 15 r 13(1).

94 This procedure will continue to be available under proposed new Federal Court Rules (Cth) [Draft 2010] r 20.31.

95 *High Court Amendment Rules (No 1) 2011* (New Zealand) r 8.18.

96 Civil Procedure Bill 2010 (Vic), Explanatory Memorandum.

to be appropriate. A blanket obligation to produce documents referred to in pleadings would carry a costs burden even in cases where the party to whom documents are produced does not require them.

5.71 The ALRC is concerned that existing provisions in the *Federal Court Rules* for the production and inspection of documents are under-utilised by parties and the Court, when such orders or requests for disclosure of documents prior to discovery might be an effective and efficient way to resolve some disputes. Therefore, the ALRC recommends that practice notes in the Federal Court should encourage parties to use existing rules and to seek appropriate orders for the production and inspection of documents, prior to discovery, in the early stages of appropriate cases. For example, *Practice Note CM 5* currently asks whether the purposes of discovery might be achieved by less expensive means.[97] This might expressly include orders for the production of documents under O 15 r 13 or requests to inspect documents under O 15 r 10.

5.72 The explicit recognition in practice notes of these available mechanisms would serve an educative function, by alerting parties to the potential benefits of utilising these procedures before discovery. The production and inspection of particularly important documents, in the early stages of appropriate cases, may help to mitigate the subsequent discovery of documents and minimise the costs involved. This guidance in practice notes is especially important if the disclosure of critical documents prior to discovery is not to be required under *Federal Court Rules* in all cases, as the benefits of such disclosure might only be realised if parties seek and judges make targeted orders in appropriate cases. Complementing the reform recommended below, Chapter 7 considers the need for judicial education and training in relation to case management of discovery issues.

Recommendation 5–1 The Federal Court of Australia should monitor the operation of the overarching obligation on parties to disclose critical documents in s 26 of the *Civil Procedure Act 2010* (Vic) to assess whether it would be an effective and efficient mechanism to introduce into all or any Federal Court proceedings.

Recommendation 5–2 Federal Court of Australia practice notes should highlight existing mechanisms that enable the production and inspection of documents prior to discovery in proceedings.

Limiting the scope of discovery by 'relevance'

The 'direct relevance' test

5.73 The 'train of inquiry' test, established in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co*[98] (*Peruvian Guano*), requires discovery of

97 *Practice Note CM 5: Discovery* (Federal Court of Australia), [1(c)].
98 *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

documents that either 'directly or indirectly' relate to the matters in question in an action.[99] However, in his 1996 review of access to justice in England and Wales, Lord Woolf recommended that discovery should normally be restricted to 'directly relevant' documents and 'indirectly relevant' documents should be disclosed only by court order.[100]

5.74 In the wake of Lord Woolf's recommendation, a number of jurisdictions have moved away from the *Peruvian Guano* 'train of inquiry' test for discovery to adopt a standard test of 'direct relevance'.[101] The Federal Court adopted this reform in O 15 of the *Federal Court Rules*, commencing in December 1999. The same changes took place in the Victorian Supreme Court on 1 January 2011, on the commencement of the *Supreme Court (General Civil Procedure) Rules 2010* (Vic).[102] The *High Court Amendment Rules (No 1) 2011* (NZ) also propose to adopt the 'direct relevance' test for standard discovery in the High Court of New Zealand.[103]

5.75 The ALRC described the objectives of the 'direct relevance' test in *Managing Justice* as follows:

> The move away from the *Peruvian Guano* test to the test of 'direct relevance' and discovery by categories of documents are attempts to streamline the process of discovery so that discovered documents are directly relevant to the issues in a case and the costs of discovery proportionate to the value of the claim.[104]

5.76 Lord Woolf's reform was an attempt to mitigate the overbroad discovery of irrelevant documents occurring under the *Peruvian Guano* test, which he said was 'disproportionate, especially in larger cases where large numbers of documents may have to be searched for and disclosed, though only a small number turn out to be relevant'.[105]

5.77 However, doubts have been expressed as to whether introducing a test of 'direct relevance' has achieved its objectives. Lord Jackson's 2009 *Review of Civil Litigation Costs* in England and Wales found that, 10 years after the Woolf reforms, there had been no difference in practice from the old *Peruvian Guano* test.[106] Lord Jackson reported that solicitors simply continued to disclose everything that might be in any way relevant:

> In other words, they continue to follow the old rules, thus saving costs (on their own side) but disclosing a greater quantity of documents than should be disclosed.[107]

---

99 Ibid. See Ch 3.

100 Lord Woolf, *Access to Justice: Final Report* (1996), Ch 12, 86–87.

101 This reform was implemented in r 31.6 of the *Civil Procedure Rules* (UK) which commenced in April 1999.

102 *Supreme Court (Chapter I Amendment No. 18) Rules 2010* (Vic) inserted r 29.01.1 into the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

103 *High Court Amendment Rules (No 1) 2011* (New Zealand) r 8.21.

104 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.179].

105 Lord Woolf, *Access to Justice: Final Report* (1996), ch 12, [37].

106 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), 368.

107 Ibid.

5.78 In Australia, the VLRC has acknowledged similarly that 'there is little evidence to support the contention that a narrower test will necessarily confine the scope of discovery, thereby saving costs and time'.[108] Nevertheless, the VLRC supported the intention behind a narrower test for discovery:

> Although narrowing the discovery test will not necessarily reduce the time and expense incurred in the review of potentially discoverable documents, it does reflect an important shift in the approach to discovery and litigation generally ... We believe that a narrower discovery test, combined with our other discovery recommendations, will encourage important cultural change and assist parties to focus their attention on the main purpose of discovery in the litigation process.[109]

5.79 Concerns about the excessive discovery of irrelevant documents often look to *Seven Network Limited v News Limited* (C7) as a prime example. In that case, Sackville J observed that:

> The outcome of the processes of discovery and production of documents in this case was an electronic database containing 85,653 documents, comprising 589,392 pages. Ultimately, 12,849 'documents', comprising 115,586 pages, were admitted into evidence.[110]

5.80 Justice Finkelstein has pointed out that, in the C7 case, only 15% of the millions of pages of documents that were searched and reviewed were put before the Court and only about 15% of those documents ultimately went into evidence. In other words, the overall yield of discovery (in terms of the admitted evidence produced) was well below 5% of the documents discovered.[111] Justice Sackville, reflecting on this extra-curially, commented that:

> far too often, the search for the illusory 'smoking gun' leads to squadrons of solicitors, paralegals and clerks compiling vast libraries of materials, most of which is of no significance to the issues in the proceeding.[112]

Refining the 'relevance' test

5.81 In the Consultation Paper, the ALRC compared a number of jurisdictions that impose a narrower test than 'direct relevance' for the discoverability of documents and considered examples of practice from within the Federal Court.[113] Refining the 'relevance' test might be one way to vet documents in discovery.

5.82 The Rules applicable to proceedings in the Fast Track List in the Federal Court limit discovery to the following documents of which the party is aware or discovers after a good faith proportionate search:

> (a) documents on which the party intends to rely, and

---

108 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.
109 Ibid.
110 *Seven Network Limited v News Limited* [2007] FCA 1062, [4].
111 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [7].
112 R Sackville, 'Mega-Lit: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.
113 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Ch 2.

(b) documents that have significant probative value adverse to a party's case.[114]

5.83 The phrase 'significant probative value' is also used in the *Evidence Act 1995* (Cth), which defines 'probative value' as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[115]

5.84 In the Federal Court's Tax List, the documents required to be disclosed must have a 'material' adverse effect on the party's own case or another party's case, or 'materially' support another party's case.[116] However, this scope of discovery may be expanded or limited by the Tax List Coordinating Judge or the judge to whose docket the case is allocated.[117]

5.85 The concept of 'materially' relevant documents is defined in *Practice Note Tax 1* as 'documents that would enable a judge to reach a sound, complete and just decision in the case'.[118]

5.86 By comparison, the requirement of 'materiality' may also be found in the IBA's *Rules on the Taking of Evidence in International Arbitration*, which limit discovery to documents that are 'relevant to the case and material to its outcome'.[119]

Submissions and consultations

5.87 In the Consultation Paper, the ALRC asked whether the categories of documents required to be disclosed under O 15 r 2 of the *Federal Court Rules* were too broad and, if so, where the parameters for general discovery should be set. In particular, the ALRC asked whether the test of 'direct relevance' should be narrowed by adopting the Fast Track criteria of 'significant probative value' in the *Federal Court Rules*.[120]

5.88 The majority of submissions that addressed this issue expressed the view that the scope of general discovery under O 15 r 2 was appropriate, and the 'direct relevance' test was conducive to a proportionate discovery process.[121] For example, Allens Arthur Robinson submitted that:

> The test strikes an appropriate balance between, on the one hand, the need for a functional and transparent system of disclosure and, on the other hand, the need to avoid imposing unrealistic expectations and disproportionate costs on commercial parties.[122]

---

114 *Practice Note CM 8: Fast Track (Federal Court of Australia)*, [7.1].
115 *Evidence Act 1995* (Cth) Dictionary.
116 *Practice Note Tax 1 Tax List* (Federal Court of Australia), [6.1].
117 Ibid.
118 Ibid, [6.2].
119 International Bar Association, *IBA Rules on Taking Evidence in International Arbitration* (2010) art 3.
120 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Questions 2–5, 2–6.
121 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011.
122 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

5.89 Others expressed the view that the current scope of general discovery was overbroad and supported a narrower test for 'relevance' in line with the Fast Track rules.[123] One suggested that the limited discovery provisions of the Fast Track system should not apply in all cases, as some litigation was conducted under an information imbalance between the parties and requires more expansive discovery.[124]

5.90 However, most submissions on this issue did not support reform to limit the scope of discovery obligations by reference to a new 'relevance' test.[125] Some pointed out that parties would still be required to conduct a full-scale document review to identify all documents of sufficient relevance and, as such, this reform would not be effective in reducing litigation costs.[126]

5.91 Those opposing such reform argued that, rather than narrow discovery obligations in a uniform manner, the better approach was for the Court to tailor discovery orders to suit the issues in each case.[127] However, some noted that this required a greater level of judicial involvement than was the current practice in determining what measure of limitation is appropriate.[128]

5.92 One submission also raised an issue about the application of the test for 'relevance' when the Court makes an order for discovery of specific types of documents pertinent to the issues in that case. This issue is explored further below.

ALRC's views

5.93 The percentage of discovered documents that are not subsequently relied upon at trial may create a misleading perception of the utility of discovery in litigation. In the context of certain proceedings, it is possible that a single discovered document may turn out to be crucial—while many more discovered documents are less relevant. However, pursuant to the 'overarching purpose' provision, the just resolution of disputes must be sought as quickly, inexpensively and efficiently as possible.[129] This objective might be compromised by the discovery of largely irrelevant documents—even if a so-called 'smoking gun' were to lie amongst them.

---

123 NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Just Leadership Program, *Submission DR 01*, 7 October 2010.

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

125 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

126 Queensland Law Society, *Submission DR 28*, 11 February 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

127 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

129 *Federal Court of Australia Act 1976* (Cth) s 37M.

5.94 However, the ALRC considers that reforms to narrow the test of 'direct relevance' for standard discovery in the Federal Court would not be consistent with the principle of effectiveness—that an effective justice system should be directed towards the resolution of disputes and delivering fair outcomes.[130] Changes to narrow the test of 'relevance' for discovery in all cases may impede the judicial determination of some issues and increase the costs of litigation in some proceedings.

5.95 Concepts such as 'materiality' or 'significant probative value' in the test for discoverability of documents might not be straightforward for legal practitioners to interpret, since there is little judicial guidance. This undermines the principle of certainty—that the expectations, both of parties and of the Court, should be made clear. Uncertainty in the extent of a party's discovery obligations may lead to incidental litigation between the parties over compliance with discovery orders. For example, a party might assume their opponent unfairly withheld relevant documents on the basis that the documents lacked the requisite 'probative value'.

5.96 These kinds of arguments and concerns about satellite litigation were also current when the present test of 'direct relevance' was introduced in the Federal Court. In *Managing Justice*, the ALRC reported with respect to O 15 that practitioners felt 'the real temptation when documents adverse to the case are found, to seek to rationalise that the documents are outside the discoverable categories and therefore not required to be disclosed to the other side'.[131]

5.97 In some cases, non-disclosure may occur even where the discovering party acts genuinely and in good faith. The parties might differ as to how 'material' or 'probative' a document is to one side's case, and parties are not always in agreement about the significance of a particular point.

5.98 In the ALRC's view, tightening the 'direct relevance' test would not be an effective means of controlling the cost of discovery. The ALRC doubts that such reform would minimise the expense of discovery in practice, since litigants may still be required to review the same volume of documents to identify those of sufficient relevance for discovery.

5.99 Imposing a stricter 'relevance' test might result in parties incurring higher legal fees in some cases. Such concerns are borne out by findings in Lord Jackson's *Review of Civil Litigation Costs*, which found that parties who strictly complied with the test of 'direct relevance' would disclose fewer documents, but incur higher costs, as it required lawyers to evaluate the relevance of discoverable documents in any given case.[132] Lord Jackson pointed out that, 'because of the continuing obligation [of

130 See the Access to Justice Principles: Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

131 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.179].

132 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 37, [3.1].

discovery], the exercise may have to be repeated if the pleadings are amended' and additional costs would be incurred.[133]

5.100 For these reasons, the ALRC supports the approach taken in the proposed Federal Court Rules 2010 that would not change the ambit of general discovery.[134] Instead, if a different test of 'relevance' were appropriate in any case, the new rules suggest that parties should expressly identify what criteria should apply instead of 'direct relevance'.[135] This means that the Court may tailor any specific requirements for 'relevance' in discovery to suit the circumstances of each case.

5.101 The potential for reform to court practice and procedure, to facilitate careful consideration by the Court and parties of the precise terms of discovery obligations in each case, is explored in Chapter 6. The ALRC considers that reforms recommended in that chapter will, for example, enhance the effectiveness of discovery obligations by facilitating court orders that tailor a 'relevance' test to suit the issues in dispute, and enhance efficiency and certainty in the discovery process by facilitating court orders that specify in precise terms the applicable test of 'relevance' in discovery.

5.102 In particular, Chapter 6 considers the need for best-practice guidelines for the parties and the Court to refer to in relation to discovery issues. This guidance would be especially important for judges if the parameters of general discovery were to remain as broad as the *Federal Court Rules* currently provide, as the benefits of tailoring standard discovery criteria to suit the issues in dispute might only be realised if judges made targeted orders in appropriate cases.

Clarifying the application of 'relevance' in discovery

5.103 In the Consultation Paper, the ALRC asked how lawyers decided whether to discover documents that were relevant but potentially fell outside the scope of discovery orders.[136] A group of large law firms submitted that this issue arose in part due to ambiguity in the *Federal Court Rules* themselves.[137] The submission suggested that the law was uncertain as to whether the test of 'direct relevance' in O 15 r 2(3) applied when the Court orders discovery of particular categories of documents pursuant to O 15 r 3:

> It is not clear whether an order for discovery of specific documents or categories of documents requires the party giving discovery simply to produce all documents falling within the description of documents or categories of documents, or whether the party must also test each document against paragraphs (a)–(d) of rule 2(3).[138]

133 Ibid, ch 37, [3.1].
134 The categories of documents captured by 'standard discovery' obligations under proposed new r 20.14 would be substantially the same as those documents 'required to be disclosed' under current O 15 r 2.
135 Federal Court Rules (Cth) [Draft 2010] r 20.15.
136 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–2.
137 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
138 Ibid.

5.104 The submission cited *Australian Competition and Consumer Commission v Advanced Medical Institute Pty Ltd* (*ACCC v AMI*)[139] as authority for the view that, when discovery is ordered to be given by reference to categories, all of the documents falling within the categories must be discovered, regardless of whether those documents are relevant or whether they fall within the classes of documents set out in O 15 r 2(3). In that case, the parties agreed to discovery of specific categories of documents—which the Court ordered by consent. Justice Lindgren observed that:

> it is the Court's order of the kind made here, coupled with the undisputed descriptions of the categories, that define the discovery régime and obligations in the particular proceeding, rather than O 15 r 2(3).[140]

5.105 The submission also noted that this approach—where categories displace relevance—is supported by decisions in the Supreme Court of New South Wales.[141] In that jurisdiction, the *Uniform Civil Procedure Rules 2005* provide that '[a]n order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue'.[142] In *Owen v Barclays Bank Plc*, Hislop J held that, by consenting to an order for discovery by categories, the parties had accepted that the documents falling within the identified categories were relevant to facts in issue.[143] Justice Hislop concluded that it was wrong for the defendant to apply a 'dual test' in determining whether to discover particular documents—namely: does the document fall within a category; and is it relevant to an issue.[144]

5.106 However, the approach adopted by Lindgren J in ACCC v AMI was further considered in *Aveling v UBS Capital Markets Australia Holdings Ltd* (*Aveling*)[145] and *University of Sydney v ResMed Ltd*.[146] In *Aveling*, Lindgren J held that:

> It may be appropriate for parties to describe categories in terms which do not expressly incorporate the language of O 15 r 2(3), but that subrule should nonetheless govern the formulation of the categories. Alternatively, of course, the categories may be defined so as to incorporate expressly the terms of the subrule. Whatever approach is taken, it is important to understand that when, as happened in the present case, the Court orders discovery by categories to be notified by one party to another, the Court does not intend that the notifying party be at liberty to widen the discovery obligation beyond the four classes of documents referred to in O 15 r 2(3).[147]

---

139 *Australian Competition & Consumer Commission v Advanced Medical Institute Pty Ltd* [2005] FCA 366, [22].

140 Ibid.

141 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011, citing: *Telstra Corp v Australis Media Holdings Pty Ltd* (Unreported, Supreme Court of New South Wales, McLelland CJ, 10 February 1997); *Falk v Finlay* [1999] NSWSC 1284, [43]; *Priest v New South Wales* [2006] NSWSC 12, [136]; *Owen v Barclays Bank Plc* [2010] NSWSC 1225, [20]–[21].

142 *Uniform Civil Procedure Rules 2005* (NSW) r 21.2.

143 *Owen v Barclays Bank Plc* [2010] NSWSC 1225, [24].

144 Ibid, [20].

145 *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415.

146 *University of Sydney v ResMed Ltd* [2008] FCA 1020.

147 *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415, [11].

5.107 Similarly, in *The University of Sydney v ResMed Ltd*, Lindgren J held that:

> Any description of categories of documents to be discovered should be arrived at, whether by the Court or by the parties, in the light of the standard laid down in the rules set out above [O 15 r 2(3), (4), (5) and (6)]. It is not clear to me that the parties have approached the question in this way. The question for me on the present motion is whether the disputed categories satisfy the rules.[148]

5.108 These decisions suggest that the Court should not make orders for discovery of specific categories of documents, unless the documents that would fall within those categories are 'directly relevant' for the purposes of O 15 r 2(3). However, once the Court has made orders for discovery of specific categories of documents, it is not clear whether the 'direct relevance' test has any further application.

5.109 A group of large law firms noted that, where discovery is carried out in strict accordance with identified categories of documents, regardless of whether those documents are relevant, discovery can be unnecessarily voluminous and burdensome:

> If categories are not carefully considered, or where the existence of certain types of documents was not necessarily contemplated when the categories were formulated and approved by the Court, this often leads to the discovery of irrelevant documents or types of documents, sometimes in substantial numbers. No legitimate criticism can be made of the parties (or their lawyers) for producing such documents, given that (as noted above) current authority indicates that where discovery categories are used, the parties are obliged to produce all documents falling within the categories, regardless of relevance. This increases the burden and cost of discovery, with no significant benefit to the parties or the Court.[149]

5.110 The group suggested that reform is necessary to clarify that a 'dual test' applies to discovery by categories—so that discoverable documents would have to fall within an identified category, and also be 'directly relevant' to the issues in dispute—to reduce the burden of discovery by vetting documents.

ALRC's views

5.111 The ALRC notes that the proposed amendments to the *Federal Court Rules* would clarify whether a test of 'relevance' applies when the Court orders discovery by categories of documents. Proposed r 20.14 would establish the criterion that applies when the Court orders 'standard discovery'. This would include a requirement for documents to be 'directly relevant' to the issues in dispute.[150]

5.112 A party may seek 'non-standard discovery' under proposed r 20.15, in which case the party must identify what 'standard' criteria should not apply and any other criteria that should apply. If any 'non-standard' criteria would be more extensive than 'standard discovery', the party must explain to the Court why the order should be made.[151]

---

148 *University of Sydney v ResMed Ltd* [2008] FCA 1020, [41].
149 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
150 Federal Court Rules (Cth) [Draft 2010] r 20.14(1)(a).
151 Ibid r 20.15(2).

5.113 Under the proposed Rules, the parameters of 'standard discovery'—including the criterion of 'direct relevance'—would apply generally in all proceedings pursuant to the *Federal Court Rules*, unless expressly displaced by court orders. For example, discovery orders might specify a narrow criterion of relevance, such as 'significant probative value'.[152] Conversely, discovery orders might specify a broad test of relevance, such as the *Peruvian Guano* 'train of inquiry' test. Equally, discovery orders could expressly exclude any test of relevance—so that any document falling within an identified category is discoverable regardless of its relevance. However, unless 'standard' criteria are displaced in this way, they would continue to apply to discovery orders under proposed new *Federal Court Rules*.

5.114 This clarification to discovery laws under the proposed Federal Court Rules 2010 is consistent with the principles of accessibility and certainty—that underpin the objective that justice initiatives should reduce the net complexity of the justice system.[153] Uncertainty in current discovery laws, as to whether a test of 'relevance' applies when the Court orders discovery by categories, creates complexity and inconsistency in legal practice. Clarifying this aspect of the law will create a more accessible discovery process and enhance certainty in discovery obligations in Federal Court proceedings.

Limiting the scope of discovery by 'possession, custody or power'

5.115 In the Consultation Paper, the ALRC asked whether the parameters of general discovery were too broad.[154] In response, two submissions raised concerns about the existing obligation on parties to discover documents that have been—but are no longer—in their possession, custody or power.[155] Currently, a party must enumerate such documents in a list of discoverable documents, state when they parted with the documents and what has become of them.[156]

5.116 Allens Arthur Robinson suggested that documents no longer in a party's possession, custody or power should generally be excluded from discovery obligations, unless the Court ordered otherwise.[157] A group of large law firms submitted that the preferable approach was that taken in New South Wales,[158] where a party was only required to enumerate documents that are not, but that within the last six months prior to the commencement of the proceedings have been, in the possession, custody or power of the party.[159]

---

152 See *Practice Note CM 8: Fast Track* (Federal Court of Australia), pt 7.

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

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

155 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

156 *Federal Court Rules* (Cth) O 15 r 6(2).

157 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

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

159 *Uniform Civil Procedure Rules 2005* (NSW) r 21.3(2)(a)(ii).

5.117 Allens Arthur Robinson submitted that the obligation to discover documents no longer in a party's possession, custody or power, imposed a significant administrative burden and was adhered to inconsistently in practice.[160] Likewise, a group of large law firms submitted that:

> It is unrealistic for a party to account for documents that ceased to be in its possession, custody or power for an indefinite period prior to the commencement of the proceedings.[161]

5.118 At the same time, Allens Arthur Robinson acknowledged that an alternative approach might be to clarify the obligation to conduct a 'reasonable search'—so that parties need not take positive steps to search for relevant documents no longer in their possession, custody or power.[162]

5.119 The group of large law firms also proposed that any document which wholly came into existence after the commencement of proceedings should be excluded from discovery obligations.[163] This is the approach taken in r 21.1 of the *Uniform Civil Procedure Rules 2005* (NSW). In support of adopting this rule in Federal Court proceedings, the group submitted that:

> Many (if not most) of these documents would be the subject of legal professional privilege, and it is arguable that the probative value of the remainder would be negligible.[164]

5.120 The group acknowledged the importance of an ongoing obligation to discover pre-existing documents as they came to a party's attention, but argued that discovery of documents that came into existence after proceedings have commenced created confusion and uncertainty in the discovery process, increased litigation costs and delayed preparation for trial.[165]

ALRC's views

5.121 The ALRC notes that the proposed Federal Court Rules 2010 would maintain the current obligation to discover documents that are, or have been, in a party's possession, custody or power.[166] However, a party may be relieved of this obligation, or it may be modified in any way by court orders for 'non-standard discovery', under the proposed r 20.15. For example, a party may seek an order that documents only be discovered if they were last in the party's control within the six months prior to the commencement of proceedings—in line with r 21.3 of the *Uniform Civil Procedure Rules* (NSW).

5.122 This is the ALRC's preferred approach to dealing with discovery of documents that have been, but are no longer, in a party's control. The ALRC does not support the

---

160 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
161 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
162 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
163 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
164 Ibid.
165 Ibid.
166 Federal Court Rules (Cth) [Draft 2010] r 20.14.

introduction of a rule of general application to limit discovery of such documents in all cases. Such reform would be inconsistent with the principle of effectiveness. In some cases, litigation might be resolved effectively without discovery of documents that have been outside a party's control for more than six months.[167] However, in other cases, the fact that a party had control of a document at one time may itself be an important issue. Excluding classes of documents from discovery in a uniform and arbitrary manner might not be effective in all cases. The Court's tailoring of discovery obligations on a case-by-case basis is, in the ALRC's view, a more effective system.

5.123 The potential for reform to court practice and procedure, to facilitate careful consideration by the Court and parties as to whether documents no longer in a party's control should be discovered, is explored in Chapter 6. The ALRC considers that the reforms recommended in that chapter will enhance the effectiveness of discovery obligations—for example, by facilitating court orders that tailor any discovery of documents no longer in a party's control, to suit the issues in dispute.

5.124 Chapter 6 also examines the need for best-practice guidelines in Federal Court practice notes to inform the parties when considering the scope and process of any discovery. In particular, Chapter 6 discusses the potential for guidelines to direct the parties to identify any documents or repositories of documents that should be excluded from the conduct of a reasonable search for discoverable documents. This might, for example, encourage parties and the Court to exclude from discovery, in appropriate cases, any documents that have not been in the parties' control for more than six months prior to the commencement of proceedings. This guidance would be especially important if the *Federal Court Rules* maintained the obligation on parties to discover documents no longer in their control, as the inefficiencies of complying with this obligation might only be avoided if parties sought and judges made targeted orders in appropriate cases. Complementing the guidelines discussed in Chapter 6, Chapter 7 considers the need for judicial education and training in relation to case management of discovery issues.

5.125 Subject to the comments made below, the ALRC does not support the introduction of a rule of general application to exclude from discovery in the Federal Court any documents that wholly came into existence after the commencement of proceedings. A blanket exclusion of such documents in discovery would be inconsistent with the principle of effectiveness. In some cases, the probative value of documents created after the commencement of proceedings might be negligible—and in these cases litigation might be conducted effectively without regard to such documents. In other cases, however, documents created after the commencement of proceedings could be significantly relevant to issues in dispute—including, for example, issues about the quantum of damages. If such documents were not privileged or otherwise exempt from an order for production, their discovery may be an important and effective step towards the conclusion of the proceeding.

---

167 See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 21.3(2)(a)(ii).

5.126 However, the ALRC considers that further consideration is warranted in relation to discovery of documents which wholly came into existence after the commencement of the proceeding—where the documents are protected by the litigation limb of legal professional privilege arising in the proceedings before the Court. In most cases, communications between a party and a lawyer in the course of litigation—for the dominant purpose of providing legal services in those proceedings—are likely to generate a certain volume of privileged documents. These documents may be privileged from production to another party, but privileged documents must still be enumerated in the discovering party's list of documents.[168] Since discovery is a continuing obligation,[169] the party would have to discover such documents every time it communicates with its lawyer.

5.127 Excluding these documents from discovery in the Federal Court might promote the principle of efficiency in litigation—that the costs of dispute resolution should be proportionate to the issues in dispute.[170] Importantly, the party giving discovery would avoid the cost of discovering these privileged documents throughout the course of the proceedings. In addition, the exclusion of these documents from discovery would not necessarily harm the interests of justice, as the party to whom discovery is given cannot compel the production of the documents in any event.

5.128 On the other hand, excluding privileged documents from discovery obligations might open the way for some parties to frustrate the administration of justice by making unmeritorious claims for privilege over otherwise discoverable documents. If these documents were not discovered then the party seeking discovery might not know of the existence of the documents or the fact that privilege was claimed in respect of them. This might mean that the party seeking discovery is denied the opportunity to test the claim for privilege and to assert a right to discovery of the documents.

5.129 The ALRC does not make any recommendation for reform in relation to the discovery of privileged documents that wholly came into existence after the commencement of proceedings. This issue was not raised in the Consultation Paper and so any recommendation would not be supported by the evidence base in response. The ALRC expects that current consultations on proposed amendments to the *Federal Court Rules* may consider the possibility of a new rule to exclude from discovery any documents to which litigation privilege applies in the course of proceedings before the Court, which wholly came into existence after the commencement of proceedings.

Discovery of documents already in another party's control

5.130 The proposed Federal Court Rules 2010 do not include provisions equivalent to O 15 r 2(4) of the current Rules, which provides that a party giving discovery is not required to disclose a document that is reasonably believed to be already in the possession, custody or control of the party to whom discovery is given. This Rule is

168 *Federal Court Rules* (Cth) O 15 rr 6(4), 11.
169 Ibid O 15 r 7A.
170 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

intended to reduce the burden of discovery and, as such, its omission may appear to broaden the scope of discovery obligations—by requiring discovery of documents already in another party's control.

5.131 However, in practice, current O 15 r 2(4) may generate the incursion of costs in a number of ways. First, this Rule requires the party giving discovery to make an assessment as to whether another party already has control of a particular document. Secondly, the application of the Rule can lead to satellite litigation over whether it was reasonable for the party giving discovery to believe that another party already had control of the document. Thirdly, O 15 r 2(4) may be open to abuse by a party who seeks to avoid discovering a document, when found to have withheld it, by falsely claiming that the party believed the document was already in the other party's control.

ALRC's views

5.132 The ALRC considers that the omission of current O 15 r 2(4) from the *Federal Court Rules* would promote the principle of effectiveness. Discovery of documents that might already be in each party's control is managed most effectively by the Court on a case-by-case basis—rather than a blanket rule applicable in all cases. For example, in cases where a party's state of knowledge is an issue, discovery of documents that each party already possesses may facilitate a determination of whether the discovering party had the requisite knowledge.

5.133 The ALRC also considers that omitting current O 15 r 2(4) would be consistent with the principle of efficiency. Rather than making discovery obligations more onerous in general, the omission of these provisions may help to avoid incidental disputes and associated costs which can be incurred in the current operation of this rule. In some cases, discovering documents already in another party's control, such as invoices, might be unnecessarily duplicative and inefficient. However, in these circumstances, a party may seek court orders to be relieved of the obligation to discover such documents.

5.134 The potential for reform to court practice and procedure, to facilitate careful consideration by the Court and parties of the precise terms of discovery obligations in each case, is explored in Chapter 6. The ALRC considers that the reforms recommended in that chapter will, for example, enhance the efficiency and effectiveness of discovery of documents already in each party's control, by facilitating court orders that tailor discovery obligations to suit the issues in each case.

5.135 Chapter 6 also examines the need for best-practice guidelines in Federal Court practice notes to inform the parties when considering the scope and process of any discovery. In particular, the potential for guidelines to direct the parties to identify any documents or repositories of documents that should be excluded from the conduct of a reasonable search for discoverable documents is discussed. This might, for example, encourage parties and the Court to exclude from discovery in appropriate cases any documents that are already in the control of the party to whom discovery is given. This guidance would be especially important if current O 15 r 2(4) is to be omitted from the *Federal Court Rules*, as the inefficiencies of discovering documents already in another party's control might only be avoided if parties sought and judges made targeted orders

in appropriate cases. Complementing the guidelines discussed in Chapter 6, Chapter 7 considers the need for judicial education and training in relation to case management of discovery issues.

Other federal courts

High Court of Australia

5.136 In the Consultation Paper, the ALRC asked about the application of the *Peruvian Guano* case to discovery in the High Court.[171] In his review of the civil justice system in England and Wales, Lord Woolf observed that the result of the *Peruvian Guano* decision

> was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.[172]

5.137 In this Inquiry submissions did not raise any concerns about the range of documents discoverable in proceedings before the High Court under the *Peruvian Guano* decision. The Law Council, for example, submitted that discovery rarely became an issue in High Court proceedings and that no changes were required.[173]

5.138 The need for discovery arises so rarely in High Court proceedings that the application of the *Peruvian Guano* case is unlikely to cause any real problems. The nature of the work undertaken in the High Court in its original jurisdiction is largely confined to constitutional work. Such cases tend not to raise any significant factual issues, which means discovery processes are generally not necessary. Cases commenced in the High Court, that would involve significant questions of fact, are generally remitted to another court under s 44 of the *Judiciary Act 1903* (Cth).

Family Court of Australia

5.139 As noted in Chapter 4, the duty of disclosure in Family Court proceedings is 'absolute'.[174] Each party is required to give full and frank disclosure of all information and documents relevant to the case.[175]

5.140 Despite the breadth of the duty to disclose, there has not been widespread concern about the overbroad disclosure of documents in Family Court proceedings. If there are ever any issues with disclosure in the Family Court, those concerns seem to be that there is too little disclosure, rather than too much.

---

171 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 2–1.

172 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), ch 21, [17].

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

174 *In the Marriage of Kannis* (2003) 30 Fam LR 83.

175 *Family Law Rules 2004* (Cth) rr 13.01, 13.07.

5.141 Instances of relevant information and documents being withheld in proceedings before the Family Court may, on the whole, be isolated. However, where there is non-compliance with disclosure obligations in the Family Court, the Court may deal with this issue in its judgment.

5.142 In property matters, for example, the Family Court may draw adverse inferences from non-disclosure and make adjustments to any property distribution between the parties. The Full Court commented, in the case of *In the Marriage of Kannis*, that:

> Whether the non-disclosure is wilful or accidental, is a result of misfeasance, or malfeasance or nonfeasance, is beside the point. The duty to disclose is absolute. Where the Court is satisfied the whole truth has not come out it might readily conclude the asset pool is greater than demonstrated. In those circumstances it may be appropriate to err on the side of generosity to the party who might be otherwise be seen to be disadvantaged by the lack of complete candour.[176]

Submissions and consultations

5.143 In the Consultation Paper, the ALRC asked whether the disclosure obligations on parties to Family Court proceedings were generally working well, and whether the court was adequately equipped to deal with instances of non-compliance with disclosure obligations.[177]

5.144 The Law Council and the Family Court both submitted that the disclosure obligations imposed by the *Family Law Rules* were working well.[178] The Law Council suggested that:

> 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.[179]

5.145 The Family Court submitted that the Court is well equipped to deal with parties who fail to comply with disclosure obligations, by making adjustments to any property distribution between the parties.[180] The Family Court advised that other options included staying or dismissing the 'recalcitrant' party's application, and making orders for costs against a party who has not complied with the obligation to disclose.[181] When considering making costs orders, the Family Court is specifically able to take into account the conduct of the parties to proceedings in relation to discovery, inspection, production of documents and similar matters.[182]

5.146 The Law Council agreed that the Family Court was adequately empowered to redress any non-compliance with disclosure obligations.[183] However, the Council

---

176 *In the Marriage of Kannis* (2003) 30 Fam LR 83.
177 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 2–7.
178 Law Council of Australia, *Submission DR 25*, 31 January 2011; Family Court of Australia, *Submission DR 23*, 31 January 2011.
179 Law Council of Australia, *Submission DR 25*, 31 January 2011.
180 Family Court of Australia, *Submission DR 23*, 31 January 2011.
181 Ibid, citing *Bonner & Bonner* [2010] FamCA 928, [29].
182 Ibid, citing *Family Law Act 1975* (Cth) s 117(2A)(c).
183 Law Council of Australia, *Submission DR 25*, 31 January 2011.

stated that there was a reluctance to enforce non-compliance by awarding costs. Each party to proceedings in the Family Court is prima facie obliged to pay their own costs.[184] In conclusion, the Council noted that 'this is a matter of discretion and a small complaint in the totality of the scheme'.[185]

ALRC's views

5.147 The ALRC does not consider there to be any need for reform of disclosure obligations in the Family Court, or any significant issues with the Court's ability to enforce the duty to disclose documents.

5.148 In the ALRC's view, the general success of the Family Court's disclosure regime is in part due to the transparent nature of the matters dealt with in this jurisdiction. In financial cases, for example, where property and assets are divided after the married parties separate, the parties are often familiar with each other's case and their respective financial circumstances. The facts in issue in these types of proceedings are often relatively contained and the kinds of documents required to determine those issues may be fairly apparent. This helps to confine the scope of disclosure to those documents that are directly relevant to the important issues.

5.149 The successful operation of disclosure obligations in Family Court proceedings is also aided by the Court's litigation process as a whole. The non-court based family dispute resolution procedures, engaged prior to the commencement of proceedings, draw out the main facts in issue, which helps to focus the scope of disclosure. The Court's 'first day' process—where, for example, parties to a property case must exchange certain documents two days before the first court date[186]—also has, as a central focus, the clarification of the issues in dispute.

5.150 In addition, the system of judicial case management established in the Court has contributed to an effective disclosure regime in Family Court proceedings. The impact of judicial case management in the context of disclosure in Family Court proceedings is discussed further in Chapter 6.

5.151 The ALRC considers that the disclosure process in most Family Court proceedings generally satisfies the law reform principles framing this Report, particularly those of efficiency and effectiveness. The disclosure of relevant documents is usually an important step towards the resolution of family law matters and the ALRC understands that this is typically achieved in the Family Court at a cost that is proportionate to the issues in dispute.

Federal Magistrates Court of Australia

5.152 The Federal Magistrates Court was established to provide a quicker, cheaper option for litigants dealing with matters of a less complex nature.[187] The *Federal*

184 Ibid, citing *Family Law Act 1975* (Cth) s 117(1).
185 Law Council of Australia, *Submission DR 25*, 31 January 2011.
186 *Family Law Rules 2004* (Cth) r 12.02.
187 *Federal Magistrates Act 1999* (Cth), Explanatory Memorandum.

Magistrates Act 1999 (Cth) directs the Court to operate under procedures that are as simple and efficient as possible, aimed at reducing delay and costs to litigants.[188]

5.153 In the family law jurisdiction of the Federal Magistrates Court, for example, disclosure obligations are limited in comparison to the general duty to disclose documents in Family Court proceedings.[189] For example, pt 24 of the *Federal Magistrates Court Rules 2001* (Cth) requires only the production of certain classes of documents.

5.154 The process of discovering documents, and the costs involved, may be seen as contrary to the ideals of simple, cheap and fast litigation in the Federal Magistrates Court. This view is enshrined in s 45 of the *Federal Magistrates Act*, which provides that discovery is not allowed in proceedings unless the Court declares that it is appropriate in the interests of the administration of justice.

5.155 However, the ALRC understands that some parties to family law matters have had difficulties accessing discovery mechanisms in the Federal Magistrates Court—even the limited amount of disclosure required under the Rules has been difficult for some parties to obtain.[190] Some parties, and also some magistrates, take the view that disclosure obligations under pt 24 of the Rules are contingent upon compliance with s 45 of the *Federal Magistrates Act*. In consequence, parties do not disclose the documents or information specified in the Rules unless the Court makes a declaration to allow discovery. As a result, some parties have incurred the cost of seeking the Court's declaration and, on occasion, have been denied their request for documents or information on the grounds that discovery is not appropriate in the Federal Magistrates Court.

5.156 There were no issues raised in the course of this Inquiry in relation to discovery of documents in general civil law matters—that is, anything other than family law matters—in the Federal Magistrates Court.

Submissions and consultations

5.157 In the Consultation Paper, the ALRC proposed that s 45 of the *Federal Magistrates Act* should note that disclosure obligations under pt 24 of the *Federal Magistrates Court Rules* were not contingent upon compliance with s 45 of the Act.

5.158 This proposal sought to ensure compliance with the disclosure obligations established under the Rules, in family law matters before the Federal Magistrates Court. However, parties seeking broader disclosure than the Rules currently permit would still be required to comply with s 45 of the Act.

5.159 In its submission, the Law Council called for further reform. It submitted that s 45 of the *Federal Magistrates Act* should have no application in family law matters,

188 Ibid, s 3.
189 *Family Law Rules 2004* (Cth) r 13.07.
190 Law Council of Australia, Family Law Section, *Consultation*, Canberra, 21 July 2010.

and the breadth of disclosure obligations in the Federal Magistrates Court's family law jurisdiction should be comparable to Family Court proceedings.[191]

5.160 The Law Council argued that, although the Federal Magistrates Court was established to be a place in which simple matters could be determined more quickly and cheaply, its family law jurisdiction had grown to overlap 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.[192]

5.161 Although the types of cases heard in the Federal Magistrates Court may be comparable to Family Court proceedings, the Law Council pointed out that the breadth of disclosure obligations in each court is not the same:

> 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 ... The Rules do not set out any general obligation for full and frank disclosure [as per the *Family Law Rules*].[193]

5.162 The Law Council stated that, on occasion, s 45 of the Act has been applied capriciously by some parties to protract proceedings or deprive litigants of their legitimate expectation to be informed of relevant matters.[194]

ALRC's views

5.163 The ALRC considers that reform is required to ensure parties' compliance with existing disclosure obligations in financial matters under pt 24 of the *Federal Magistrates Court Rules*.

5.164 The duty of disclosure established under pt 24 of the Rules—including the duty to produce documents[195]—is a duty of general application, albeit limited in its range of documents and information. A general duty of this nature applies independently of any action of the Court or any party. As such, disclosure under pt 24 of the Rules is not contingent upon a court declaration under s 45 of the *Federal Magistrates Act*.

5.165 The ALRC considers that reform is necessary to promote a party's right to disclosure of information and documents under pt 24 of the Rules. This could be achieved, for example, by inserting a note to s 45 of the *Federal Magistrates Act*, to clarify that disclosure under pt 24 of the Rules is not contingent upon compliance with this section. This would promote the principle of consistency, in comparison with the Family Court, in terms of parties' access to disclosure processes. That is, in both

---

191 Law Council of Australia, *Submission DR 25*, 31 January 2011.
192 Ibid.
193 Ibid.
194 Ibid.
195 *Federal Magistrates Court Rules 2001* (Cth) rr 24.04, 24.05.

courts, parties would have a clear right to disclosure of documents—albeit a right that differs in the scope of disclosure.

5.166 This means that s 45 of the Act would continue to apply generally in family law proceedings before the Federal Magistrates Court—to restrict discovery of documents beyond the limited duty of disclosure currently required by the Rules.

5.167 The current scope of disclosure obligations under existing Rules is appropriate for proceedings in the Federal Magistrates Court. That is, the ALRC does not support reform to expand disclosure obligations in the Court's family law jurisdiction to match the duty to disclose in Family Court proceedings.

5.168 The Federal Magistrates Court is intended to operate under informal and streamlined procedures suitable for the simple and less complex cases which the Court is intended to handle. The limited duty to disclose documents under rr 24.04 and 24.05 of the Rules is indicative of the types of cases that are supposed to be conducted in the Court's family law jurisdiction. These rules indicate that straight forward financial cases which can be determined on the basis of contained categories of documents are suited to the Federal Magistrates Court.

5.169 Likewise, s 45 of the *Federal Magistrates Act* provides important statutory guidance as to the types of cases Parliament intended for the Court's family law jurisdiction. It sends a clear message that complex cases which require broader disclosure than the Rules permit are generally unsuitable for the Federal Magistrates Court.

5.170 The current restrictions on discovery, under s 45 of the Act, and the current limitations on disclosure in family law matters, under pt 24 of the Rules, in the Federal Magistrates Court are supported by the principle of appropriateness—that the justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.[196] Where there are concerns that compelling disclosure in the Federal Magistrates Court is more difficult than in the Family Court, this may be symptomatic of underlying issues about family law matters being determined at the appropriate level—rather than an issue with the laws of disclosure.

5.171 The ALRC recognises that the streamlined procedures employed in the Federal Magistrates Court—such as the limited duty to disclose documents[197]—may be at odds with the fact the Court's family law jurisdiction is now more expansive than was originally intended. However, the ALRC notes that the Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth) proposed to remove the Federal Magistrates Court's family law jurisdiction and make the Family Court the single court dealing with all family law matters.[198]

---

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

197 *Federal Magistrates Court Rules 2001* (Cth) rr 24.04, 24.05.

198 Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth), Explanatory Memorandum. This Bill lapsed when Parliament was prorogued in July 2010.

5.172 The Bill would establish two Divisions within the Family Court, and confer discretion on the Chief Justice to allocate matters commenced in the Court to either of its two divisions.[199] The Superior and Appellate Division would hear complex cases and appeals, and apply existing Family Court rules.[200] The General Division would hear less complex cases, and would have powers to make rules of court which apply to only that Division.[201] The General Division's caseload is intended to be equivocal to the simple, straightforward cases which the Federal Magistrates Court is intended to hear in its family law jurisdiction. In that event, the ALRC understands that the General Division might adopt Rules similar to those currently applying in the Federal Magistrates Court's family law jurisdiction.

5.173 The ALRC considers that reform to address the respective jurisdictions of the Family Court and the Federal Magistrates Court in family law matters would be a better approach than reform to expand disclosure obligations in family law proceedings before the Federal Magistrates Court.

Recommendation 5–3 The *Federal Magistrates Act 1999* (Cth) should be amended to clarify that a declaration pursuant to s 45 of the Act is not required for the disclosure obligations in family law matters under pt 24 of the *Federal Magistrates Court Rules 2001* (Cth) to apply.

199 Ibid cl 21A.
200 Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth), Explanatory Memorandum.
201 Ibid.

6. Limited Discovery and Discovery Plans

Contents

Summary

6.1 This chapter examines civil practice and procedure for the discovery or disclosure of documents in proceedings before federal courts. Issues about case management and the strategies employed to facilitate the process of discovery or disclosure in federal court proceedings are explored, including discussion of relevant practice notes, directions and guidelines on discovery in Australia and other jurisdictions.

6.2 The Federal Court of Australia uses case management strategies to limit discovery obligations to specific categories of documents. This chapter examines a number of ways to highlight especially important issues in dispute, in order to focus the categorisation of documents for discovery. The ALRC considers that these procedures should be adopted where appropriate in the circumstances of each case.

6.3 The use of technology in the process of discovering electronically-stored information (ESI) in Federal Court proceedings is also considered in this chapter. The ALRC recommends the introduction of procedural obligations in the Federal Court, in suitable cases, for the development of discovery plans setting out the practical steps required of the parties in the process of discovery. Discovery plans would be required, at the Court's direction, before orders for discovery are made, so that the time and cost implications of the discovery process may be taken into account.

6.4 The ALRC recommends that best-practice guidelines should be established in the Federal Court to direct the formation and content of discovery plans. In addition,

the ALRC recommends that arrangements should be put in place for these reforms in the Federal Court to be monitored and assessed.

6.5 This chapter also examines disclosure practices in the Family Court of Australia, which the ALRC understands are usually carried out successfully. It also considers whether the detailed disclosure processes set out in the *Family Law Rules* should be adopted in the Federal Magistrates Court family law jurisdiction. The ALRC considers that such reform would be inappropriate for the Federal Magistrates Court, which is intended to deal with less complex matters as informally as possible.

6.6 The ALRC is not aware of any concerns with discovery procedure in the High Court of Australia, or the Federal Magistrates Court's general civil law jurisdiction.

Federal Court of Australia

6.7 In *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (2000) (*Managing Justice*), the ALRC noted that:

> judges play a critical role in case management, case resolution and in assisting to engender compliance with court *timetables and orders* ... This is not to say that all judges are good managers and are effective at securing compliance or in focusing issues in the case. Their skills in these matters vary.[1]

6.8 The *Managing Justice* inquiry noted that the development of 'managerial judging' had shifted the balance towards judicial rather than lawyer or party control of litigation.[2] In the present Inquiry, the ALRC examines the role of judges through a 'facilitative' model—to take into account the values-based decision-making that occurs in case management, as opposed to the measurements-based approach implied in a 'managerial' model.[3]

6.9 This section of the chapter looks at particular strategies endorsed by the Federal Court through which judges may facilitate the discovery of documents in proceedings. This includes limiting discovery to specific categories of documents, and encouraging parties to agree on practical arrangements for the discovery of electronically-stored information.

Facilitating discovery by categories of documents

6.10 Concerns about the breadth of standard or general discovery obligations applicable in Federal Court proceedings,[4] in terms of the large amount of irrelevant documents that can be captured and the disproportionate costs that may result, have been raised by a number of commentators and law reform bodies.[5] Chapter 5 considers the possibility of reform to narrow the parameters of general discovery as one way to

---

1 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.16]–[6.17].

2 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997), [5.09]–[5.11].

3 See Ch 2.

4 *Federal Court Rules* (Cth) O 15 r 2.

5 See Ch 5.

contain the volume and cost of discovery in Federal Court proceedings. Another way to avoid discovery of unnecessary volumes of documents and irrelevant documents, and to maintain proportionality in discovery costs is for the Court to tailor discovery obligations in each case to suit the issues that matter most in the litigation.

6.11 The latter approach has been endorsed by the Federal Court through practice notes and Court Rules. *Practice Note CM 5* establishes a presumption against general discovery and provides that the Court will fashion discovery orders to suit the issues in a particular case.[6] In practice, this typically means that orders for discovery will specify particular documents or classes of documents relevant to the issues in dispute. Discovery by categories of documents was introduced into the Federal Court by *Practice Note 14*, issued on 12 February 1999, which was replaced by *Practice Note CM 5* on 25 September 2009.

6.12 The adoption of a categories-based approach to discovery was followed by amendments to the *Federal Court Rules* (Cth) in 2004, to clarify that the Court may limit discovery to particular documents or classes of documents or certain issues in dispute, by orders under O 15 r 3 on its own initiative, rather than on application by a party.[7]

6.13 In January 2000, shortly after the Federal Court introduced *Practice Note 14*, the ALRC noted in *Managing Justice* that:

> For these changes to the rules of discovery to work effectively, lawyers and parties have to spend time determining which documents are to be disclosed and the Court provide close judicial supervision of discovery. Practitioners have commented to the Commission that streamlined discovery with categories of documents works well if parties give time to the formulation of categories.[8]

6.14 Subsequent commentary suggests, however, that a categories-based approach has not achieved significant efficiencies in the discovery process. There are concerns that, in many cases, parties and their legal representatives are not exercising due diligence in narrowing the scope of discovery, instead seeking overbroad categories of documents. The 2006 *Final Report in Relation to Possible Innovations to Case Management* of the Law Council of Australia (Law Council) described this as the 'gaming' process of the categories stage in litigation:

> It is not uncommon to receive lists of categories sought by a party which are 10 to 20 pages long where parties seek to formulate, in the most minute detail, every conceivable sort of document which might possibly, on a fine day with a following breeze, be of remote assistance in the conduct of the litigation (and which almost inevitably will impose an enormous cost and work burden to the party required to respond).[9]

---

6 *Practice Note CM 5: Discovery* (Federal Court of Australia).

7 *Federal Court Amendment Rules 2004 (No 1) 2004* (Cth), item 24.

8 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.180].

9 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), [84].

6.15 There is also the concern, noted by the Hon Justice Ray Finkelstein with respect to large and complex cases in particular, that 'the Court has abdicated responsibility [for discovery], resulting in excessive costs for very little return'.[10] The absence of judicial case management was commented upon by the Intellectual Property Committee of the Law Council:

> although not currently a common practice, it is highly desirable that the docket judge take an active role in working with practitioners in identifying the limits of discovery.[11]

6.16 The 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. Justice Finkelstein summarised the current position at a workshop on the Court's case management system in 2008:

> It is also time for the court to admit that the idea of staged category discovery contained in *Practice Note 14*, to the extent it has been implemented at all, does not work. Although the idea was introduced with the goal of saving costs and reducing burdens, in practice it seems to have the opposite effect ... Parties now incur great expense in formulating and disputing appropriate categories of discoverable documents, and a good deal of court time is taken up hearing the disputes. So much time and cost is involved that there is a view, shared by many, that discovery by categories is a failure and that it is more efficient to provide for general discovery rather than engage the *Practice Note 14* model.[12]

Submissions and consultations

6.17 In the Consultation Paper, the ALRC asked whether discovery by categories of documents or particular issues in dispute has reduced the burden of discovery in Federal Court proceedings and, if not, why not.[13]

6.18 The Law Council pointed out that the use of categories of itself did not burden the discovery process—rather it was the way in which categories are formulated that can add to the burden of discovery.[14] In line with this view, a number of submissions raised concerns about the way categories were formulated in practice.[15]

---

10 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [6].

11 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), [85].

12 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [9].

13 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–4.

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

15 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; Michael Legg, *Submission DR 07*, 17 January 2011.

6.19 Some submissions suggested that, on occasion, parties failed to collaborate and instead worked separately to devise categories for discovery.[16] This may increase the likelihood of disputes between the parties as to the appropriate description of categories.

6.20 When parties do make attempts to discuss and agree on categories, submissions noted a variety of instances where the timing of these discussions can be counter-productive. Sometimes these discussions may be held too early—before the parties have turned their minds to the issues in dispute,[17] or before the parties have considered the number and types of documents they hold.[18] On other occasions, these discussions may be held too late—after parties have started to collect and review documents or after a timetable for discovery has been set.[19]

6.21 The Law Council submitted that categories of documents formulated in terms of relevance to certain issues in dispute do not substantially reduce the burden of discovery, since it still requires parties to review all of their documents to ascertain their relevance.[20] This approach may introduce an element of subjectivity, which can be compounded by the 'imprecision or merely the vagueness of the English language so that there is room for argument as to whether particular documents are within or not within the category'.[21]

6.22 Some submissions suggested that categories were most effective in limiting discovery obligations when formulated with objective criteria, such as where the documents were located, or when the documents were created.[22]

6.23 Several submissions also suggested that greater judicial involvement in the formulation of categories would reduce the complexity, uncertainty and cost associated with discovery.[23]

ALRC's views

6.24 The ALRC considers that, in some cases before the Federal Court, general discovery could be an appropriate way to facilitate the disposal of litigation. The breadth of general discovery obligations might not give rise to significant difficulties or expense in routine or straightforward cases—where a relatively small volume of documents will be relevant to the proceeding.

---

16 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, January 2011; Michael Legg, *Submission DR 07*, 17 January 2011.

17 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.

18 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

19 Ibid.

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

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

22 Law Council of Australia, *Submission DR 25*, 31 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

23 Law Council of Australia, *Submission DR 25*, 31 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

6.25 However, the Federal Court's jurisdiction also includes complex cases which require extensive inquiry into numerous issues in dispute, involving large volumes of documents. While these types of cases might represent only a portion of the Federal Court's overall caseload, it is these cases in particular where the problems associated with discovery can impose serious restrictions on parties' access to justice—and give rise to major concerns about costs.

6.26 The ALRC considers that, in cases where general discovery would put the parties to considerable expense, it is appropriate for the Court to order limited discovery suited to particular issues in each case. Confining discovery in this way promotes the principles of effectiveness and efficiency.

6.27 An effective justice system is directed towards the resolution of disputes.[24] Parties may be encouraged to settle their disputes, and judges may be positioned to determine disputes, on the basis of discovered documents that are particularly relevant to the important issues in proceedings. Where general discovery would capture documents of less probative value or documents relating to less crucial issues, this may do comparatively little to facilitate the resolution the dispute.

6.28 An efficient justice system achieves the resolution of disputes at a cost that is proportionate to the issues in dispute.[25] Targeting discovery at documents relating to particularly important issues in proceedings is conducive to maintaining proportionality in litigation costs. It may avoid or minimise the costs associated with discovery of documents of lesser importance in the proceeding.

6.29 The ALRC is concerned, however, that the intention expressed in *Practice Note CM 5* for general discovery to be avoided in cases where orders tailored to the issues in dispute would be more appropriate, is not being carried out in practice. The ALRC understands that most orders for discovery in Federal Court proceedings are for general discovery—with close to an estimated 70% of discovery orders being made by consent of the parties.[26]

6.30 The ALRC is also concerned that, where discovery orders are limited to certain issues in proceedings, they are not always formulated effectively to reduce the burden of discovery. In practice, the formulation of specific categories of documents requires the parties and their lawyers to decide exactly what the case is about and what needs to be discovered to prove it. It also requires the Court to manage the parties actively in this regard, preventing the expansion of categories of documents beyond manageable boundaries—otherwise, the categories of documents that are identified will do little to narrow the scope of general discovery.

6.31 A number of ways to improve the facilitation of discovery by categories of documents are considered below. These involve clarifying the main facts in issue so that discovery orders can be better fashioned to suit the issues that matter most.

---

24 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

25 Ibid.

26 R Finkelstein, *Consultation*, Melbourne, 17 November 2010.

Identifying issues in dispute to focus categories

6.32 For the Court to case manage a discovery process effectively, the parties need to define the issues in the proceedings clearly. This was recognised at the Australian Institute of Judicial Administration's discovery seminar in 2007, which reported

> a widely held view from the profession that the courts need to exercise more control over the discovery process, and a parallel view from the courts that in order to do so, they need to have more information about the case that would be presented to the court.[27]

6.33 The parties' role in facilitating judicial case management of a proceeding, by identifying and clarifying the issues in dispute, is described in the Courts (Consolidation and Reform) Bill 2010 (Ireland) developed by the Law Reform Commission of Ireland.[28] Clauses 75 and 76 of the Bill require anyone involved in civil proceedings to comply with 'case conduct principles' and impose a corresponding obligation on the courts to engage in 'judicial case management'. In particular, the Bill states that 'issues between parties should, at as early a stage as possible, be identified, defined, narrowed (where possible) and prioritised or sequenced'.[29]

6.34 Similarly, a note to the legal profession issued by the Supreme Court of Queensland about the Court's Supervised Case List requires parties to 'identify at an early stage in litigation the real issues in dispute'.[30] The note also encourages parties to 'defer disclosure until the real issues in dispute are identified'.[31]

6.35 Pleadings are supposed to define the issues in each case and, in so doing, limit the ambit of discovery and the evidence that needs to be prepared for trial.[32] However, as the ALRC commented in *Managing Justice*, pleadings in Federal Court proceedings are often too general in scope and inadequately particularised so that there is no narrowing of issues.[33] Pleadings couched in broad, vague or general terms, those which rely on numerous causes of action or defences or plead the case in a number of alternative ways, have the consequential effect of setting broad boundaries for the discovery of documents.

6.36 Amendments to pleadings, particularly when introduced late in civil proceedings, may be another cause of excessive discovery. In an article aptly named 'Turning Mountains into Molehills—Improvements to Formal Dispute Resolution', Andrew Stephenson explained that:

---

27 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <http://www.aija.org.au/Discovery/Discovery%20Notes.pdf> at 8 November 2010.

28 Law Reform Commission of Ireland, *Consolidation and Reform of the Courts Act* (2010), LRC 97.

29 Courts (Consolidation and Reform) Bill 2010 (Ireland) cl 75.

30 Supreme Court of Queensland, *Note to the Profession: Supervised Case List* (2010).

31 Ibid.

32 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), 440.

33 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.166].

> It simply does not pay to be too surgical in removing documents from consideration if the issues are likely to change. It is better to discover more (perhaps irrelevant documents) so when the case does change, discovery does not need to be redone.[34]

6.37 Stephenson argues that, in most cases, significant improvements could be made in the discovery process if the real issues in dispute were more clearly defined beforehand:

> it is important at the outset, before any preparation in relation to discovery is done, that the scope of the controversy be properly defined.[35]

6.38 The following sections of this chapter outline a number of ways in which the crucial issues in dispute could be more clearly identified and defined, with a view to limiting the ambit of discovery by categories of documents in Federal Court proceedings, including:

- imposing an obligation on the parties to outline their case at an early directions hearing or case management conference;
- requiring parties to submit a written statement of the issues in dispute, in relation to which documents may be discovered; and
- requiring the parties, prior to discovery, to produce an outline of the evidence on which they intend to rely at trial.

6.39 The implementation of these procedures in Federal Court proceedings was proposed in the Consultation Paper.[36] Submissions responding to these proposals are outlined below in relation to each proposal, and conclusions on all of these proposals are drawn together in setting out the ALRC's views on recommendations for such reform.

Initial directions hearing or case management conference

6.40 The Federal Court has introduced specific procedures for matters in its Fast Track List and with respect to tax matters. Both *Practice Note CM 8* and *Practice Note Tax 1* impose an obligation on the parties to such proceedings to outline the issues and facts that appear to be in dispute, at an initial directions hearing, called the 'scheduling conference'.[37]

6.41 A similar procedure, called the 'case planning conference', was introduced in the Supreme Court of British Columbia on 1 July 2010.[38] This mechanism was suggested by the Civil Justice Reform Working Group in 2006, which recommended that the parties should be required to 'personally attend a case planning conference

---

34 A Stephenson, 'Turning Mountains into Molehills: Improvements to Formal Dispute Resolution' (Paper presented at Society of Construction Law Inaugural Conference, Perth, 2010), unpublished, 16.

35 Ibid.

36 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposals 3–1, 3–2, 3–3.

37 *Practice Note CM 8: Fast Track (Federal Court of Australia)*, pt 6; *Practice Note Tax 1 Tax List (Federal Court of Australia)*, pt 5.

38 *Supreme Court Civil Rules* (British Columbia) pt 5.

before they actively engage the system, beyond initiating or responding to a claim'.[39] The Working Group identified key objectives of the case planning conference to include the narrowing of issues and directions for discovery.[40]

6.42 The same objectives are sought to be achieved in the United States (US) through 'Pre-Trial Conferences' under r 16 of the *Federal Rules of Civil Procedure 2009* (US). The publication, *The Elements of Case Management: A Pocket Guide for Judges* (Pocket Guide) explains that, 'the primary objective of the r 16 conference is for the judge and the lawyers to discern what the case is really about'.[41]

6.43 In her account of the Fast Track experience, the Hon Justice Michelle Gordon explained the profound effect that the early identification of issues has in relation to discovery:

> [t]he users of the list have anecdotally reported a substantial improvement in relation to discovery with their corporate clients. There are certain questions that members of the legal profession are used to being asked—why do I need to search for those documents? How can those documents be relevant? In Fast Track, such questions are more easily answered because they are discussed during the scheduling conference and the obligations narrowed to only those issues really in dispute. In colloquial terms, the parties own the result because they are involved in it.[42]

6.44 While this practice is not as explicitly required in the Federal Court outside of the Fast Track List and Tax List, any party seeking discovery in a Federal Court proceeding is expected to specify the issues in relation to which discovery is sought. *Practice Note CM 5* applies generally to applications for discovery in the Federal Court and states that parties are expected to answer the question: is discovery necessary at all, and, if so, for what purpose?[43]

6.45 However, in practice, the parties or their legal representatives might not always be forthcoming with admissions as to which of the issues in dispute really matter most—at least not in the interlocutory stages. This was evident in *Seven Network Ltd v News Ltd*[44] where, according to Mallesons Stephen Jacques partner Roger Forbes, representing Telstra in this case, the parties did not want to give away 'points' too early:

---

39 British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006), rec 2.

40 Ibid, 10.

41 W Shwarzer and A Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* (2nd ed, 2006), 5.

42 M Gordon, 'The Fast Track Experience in Victoria: Changing and Evolving the Way in Which We Administer Justice' (Paper presented at International Commercial Litigation and Dispute Resolution Conference, Sydney, 2010), 8.

43 *Practice Note CM 5: Discovery (Federal Court of Australia)*, [1].

44 *Seven Network Limited v News Limited* [2007] FCA 1062.

> They would say 'we're entitled to run all the points we want to and we don't have to, at the outset, decide which are the best ones and which are the bad ones'.[45]

6.46 In effect, the judge or registrar presiding at a directions hearing or scheduling conference may be required to interrogate the parties to determine the crucial issues in dispute. The need for active judicial participation in this context is noted in the Pocket Guide in the US:

> Detecting the underlying issues in dispute sometimes requires vigorous questioning of the attorneys by the judge to get beyond the pleadings. Parties may raise assorted causes of action or defenses that create the impression of a complex lawsuit when, upon probing, it turns out that the entire case hinges on a straightforward factual or legal dispute—or no triable issue at all.[46]

6.47 The approach which some judges in the United Kingdom (UK) have adopted to achieve a narrowing of issues was aptly summarised by the Mercantile Judge Simon Brown QC:

> What I want to know, is this: what is this case about? Which of the ... issues really matter in getting to the heart of the dispute? Can we split the case up and limit disclosure to the subjects which matter, or which matter most?[47]

Submissions and consultations

6.48 The Consultation Paper proposed that:

> 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:
>
> (a) outline the facts and issues that appear to be in dispute;
>
> (b) identify which of these issues are the most critical to the proceedings; and
>
> (c) 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.[48]

---

45 Lawyers Weekly, *Excess or Necessity? Lawyers Reflect on C7 Litigation* (2010) <http://www.lawyersweekly.com.au/blogs/top_stories/archive/2007/09/28/excess-or-necessity-lawyers-reflect-on-c7-litigation.aspx> at 21 July 2010.

46 W Shwarzer and A Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* (2nd ed, 2006), 5.

47 Quoted in C Dale, 'CaseMap Issue Linking in UK Civil Proceedings' (Paper presented at Second International Workshop on Supporting Search and Sense Making for Electronically Stored Information in Discovery, London, 2008)), [2].

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

6.49 All the submissions that addressed this proposal expressed 'in principle' support for the goal of focusing the parties on the crucial issues in dispute to contain the discovery process, in appropriate cases.[49] For example, the Australian Government Solicitor agreed that 'reform to ensure clearer definition of the real issues in dispute, prior to discovery, would have the greatest practical impact on limiting the ambit of discovery and reducing the overall burden of the discovery process'.[50]

6.50 These submissions were also generally supportive of the use of case management conferences, as a means of facilitating stronger judicial control of the parties in considering the scope of discovery obligations.[51] For example, the Law Council submitted 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.[52]

6.51 The Commissioner of Taxation of the Commonwealth of Australia (Tax Commissioner) confirmed that the proposed pre-discovery conference resonated with

---

49 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011;Queensland Law Society, *Submission DR 28*, 11 February 2011;Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011; I Turnbull, *Submission DR 05*, 15 January 2011.

50 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

51 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011; I Turnbull, *Submission DR 05*, 15 January 2011.

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

the current process under *Practice Note Tax 1*, and advised that it has been largely successful in taxation litigation.[53]

6.52 However, a number of submissions suggested that there would need to be a degree of flexibility in this process—particularly in relation to the timing of when pre-discovery conferences were held—to maximise its effectiveness.[54] Some noted that parties and their lawyers would need adequate time to prepare for a pre-discovery conference;[55] and one suggested that no less than seven days would be needed.[56] Others argued that pre-discovery conferences should not be held too early in proceedings when the important issues in dispute have not sufficiently emerged.[57] For example, Allens Arthur Robinson submitted that:

> Ideally, it would always be possible to identify the 'core issues in dispute' at an early stage of a proceeding. However, this is not always the case. In many proceedings issues evolve and change over time for legitimate reasons, including as a result of information gathered from the discovery process. It is critical, therefore, that any early identification of issues be seen as a dynamic process, and that it not be used to constrain one or the other party as the proceeding unfolds. Further, the ability of parties to resolve issues at the beginning of a proceeding should not be overestimated. It should be possible to defer pre-discovery conferences if in all the circumstances it would be more productive to do so.[58]

6.53 The Queensland Law Society also pointed out that a pre-discovery conference should not be held too late, when parties have already undertaken significant document collection.[59]

6.54 Submissions from public interest advocates noted that increased funding to legal service providers—such as legal aid and community legal centres—would be required to ensure that they have sufficient resources to assist litigants in complying with the requirements of a pre-discovery conference.[60]

6.55 At the same time, several submissions were opposed to the introduction of pre-discovery conferences in all cases before the Federal Court.[61] Some expressed the view that, while pre-discovery conferences might be beneficial in large complex cases, the

---

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

54 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

55 Law Society of NSW, *Submission DR 22*, 28 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

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

57 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

58 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

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

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

61 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

cost of the conference may be greater than its benefits in smaller routine cases.[62] Similarly, other submissions argued that a pre-discovery conference would be an unnecessary expense in cases where the parties agreed to the scope of discovery, but could be useful where there were disputes surrounding discovery.[63] The Federation of Community Legal Centres (Vic) submitted that individual litigants, particularly those who were unrepresented or impecunious, were at a disadvantage in litigation against larger corporate entities—such as may occur in public interest cases—and in these circumstances the requirement for a pre-discovery conference should be waived.[64]

6.56 A number of submissions also expressed the view that, for the purposes of containing discovery obligations, consideration of the important issues in dispute and the correspondingly relevant documents should also take into account practical concerns such as how those documents would be located, collected, reviewed or produced—especially when the documents are stored in an electronic format.[65] For example, a group of large law firms submitted that more detail about the discovery of electronic records would be beneficial at pre-discovery conferences:

> In reality, parties are often making enquires in relation to the existence of the [electronically-stored information] and the process for retrieving and reviewing that information at an early stage of the proceedings in order to assess the costs involved in the discovery process. It would therefore seem sensible for the procedure for obtaining discovery orders to capture that information at an early stage and include a mechanism for having that information put before the Court at the time discovery orders are being considered.[66]

Statement of issues in dispute

6.57 One way to identify the crucial issues in proceedings, in relation to which the scope of discovery may be limited, is to produce a separate document drawing out key points in dispute from the pleadings. This approach is adopted in the UK's Commercial Court of the Queen's Bench Division, where a 'list of issues' is filed in proceedings in addition to the pleadings.[67]

6.58 The claimant, in consultation with other parties, will ordinarily be required to prepare a list of issues, with a section listing important issues that are not in dispute, and provide copies to the Court and other parties prior to the first hearing at which case management directions are made.[68] The *Admiralty and Commercial Courts Guide* (the Guide) states that:

---

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

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

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

65 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

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

67 *Practice Direction 58—Commercial Court* (United Kingdom).

68 Ibid, pt 10.8.

> At the first case management conference ... the court will review and settle the draft list of issues ... [which] will be used by the court and the parties as a case management tool as the case progresses to determine such matters as the scope of disclosure.[69]

6.59 In 2007, a review of the procedures used in the Commercial Court was undertaken by a working party of the Court's User's Committee.[70] The Commercial Court Long Trials Working Party formed serious concerns about the way in which pleadings—referred to as 'statements of case'—were being used in the Court.[71] The Working Party reported that:

> It is obviously imperative that in any litigation a claimant sets out the case it wishes to make so that the other parties to the litigation can see what issues they have to meet and defendants can set out their defences and counterclaims to the claimant's points. But the [Working Party] concluded that the length and complexity of statements of case in even 'average' cases in the Commercial Court, let alone [heavy and complex cases], had increased, is increasing and ought to be diminished. The prolixity of statements of case means that they become virtually unreadable.[72]

6.60 In response to these concerns, the Working Party recommended that the list of issues should be used as the keystone for case management and, as such, replace the pleadings as the key working document in Commercial Court cases.[73] This recommendation and others from the Working Party were adopted in a year-long pilot program running in the Commercial Court from February 2008.

6.61 Concerns with the 'list of issues' approach to case management in the Commercial Court have been examined in a number of reviews. Lord Jackson found in his *Review of Civil Litigation Costs* in 2009 that it was questionable whether a list of issues 'promotes saving of costs (through better case management) or causes wastage of costs (because lists are expensive to prepare and of little utility)'.[74]

6.62 Commentary on the pilot program noted that increased reliance on a list of issues in Commercial Court proceedings led to tactical manoeuvring by the parties in preparing the list, which carried an additional cost burden:

> The list of issues caused more controversy than any other recommendation during the pilot, because of the amount of time parties were spending on ensuring that it advanced their particular case. This was due in part to the statement in the working party recommendations that, once the list of issues had been produced, the pleadings would have only secondary importance.[75]

6.63 In light of the concerns raised during the Commercial Court's pilot program, a modified version of the Working Party's proposal was implemented in a revised edition of the Guide, as follows:

---

69 D Steel and A Smith, *The Admiralty & Commercial Courts Guide* (8th ed, 2009), [D6.3 (b)]–[D6.4].
70 Judiciary of England and Wales, *Report and Recommendations of the Commercial Court Long Trials Working Party* (2007).
71 Ibid, section D.
72 Ibid, [44].
73 Ibid, [51].
74 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 27, [2.12].
75 Mayer Brown, *The Commercial Court of England & Wales: New Court Guide* (2009), 2.

> **D6.2(a)** The list of issues is intended to be a neutral document for use as a case management tool at all stages of the case by the parties and the court. Neither party should attempt to draft the list in terms which advance one party's case over that of another.
>
> **(b)** It is unnecessary, therefore, for parties to be unduly concerned about the precise terms in which the list of issues is drafted, provided it presents the structure of the case in a reasonably fair and balanced way. Above all the parties must do their best to spend as little time as practicable in drafting and negotiating the wording of the list of issues and keep clearly in mind the need to limit costs. ...
>
> **D6.5** The list of issues is a tool for case management purposes and is not intended to supersede the pleadings which remain the primary source for each party's case.[76]

6.64 Despite an attempt to remove adversarial practices from this procedure, Lord Jackson did not recommend that the list of issues procedure be adopted outside the Commercial Court. Rather, he recommended that section D6 of the Guide be reconsidered after 18 months experience under the new provisions.[77]

Submissions and consultations

6.65 In the Consultation Paper, the ALRC proposed that:

> 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. They 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, 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.[78]

6.66 Most submissions that addressed this proposal expressed in-principle support for the introduction of 'issues statements' in Federal Court proceedings.[79] For example, the Australian Government Solicitor submitted that:

> We agree that such a requirement may be beneficial in helping to crystallise the issues truly in dispute in some cases, particularly those which do not involve pleadings or where the issues may not fully emerge until after pleadings have closed (although in such matters, amendments of pleadings may be possible).[80]

---

76 D Steel and A Smith, *The Admiralty & Commercial Courts Guide* (8th ed, 2009).

77 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), rec 3.1.

78 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 3–2.

79 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; I Turnbull, *Submission DR 05*, 15 January 2011.

80 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

6.67 The Tax Commissioner supported this proposal, on the basis that a similar document was already being used in taxation litigation—with great effect.[81] The submission advised that the obligations on the parties arising under *Practice Note Tax 1* include the filing of an appeal statement by the respondent Commissioner and the applicant within 28 days and 40 days respectively of the application commencing the proceeding being served on the Commissioner.[82] The Tax Commissioner observed that:

> the appeal statement can be a very useful document to determine the position of each party and informs the Court where the dispute remains.[83]

6.68 However, many of the submissions in support of this proposal also noted concerns about the costs involved.[84] For example, the Law Council stated that:

> 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.[85]

6.69 Submissions from public interest advocates noted that increased funding to legal service providers would be required to ensure that they had sufficient resources to assist litigants with drafting a statement of issues.[86]

6.70 To address concerns about the cost of preparing statements of issues, a number of submissions suggested amendments to the proposed procedure.[87] Michael Legg recommended that written statements should only be required if the docket judge decided in the circumstances of a particular case that course of action would be warranted for its efficient management.[88] The Department of Immigration and Citizenship suggested that written statements would not be warranted where the parties were in agreement as to the scope and process of discovery.[89]

---

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

82 Ibid.

83 Ibid.

84 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

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

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

87 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

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

6.71 NSW Young Lawyers recommended that the written statement should be limited to addressing only factual issues in dispute (and related categories of documents for discovery) that are evident from the pleadings.[90] The submission argued that legal issues are not apparent or easily identifiable until at least the close of pleadings and the service of evidence by the parties.[91]

6.72 The Law Society of Western Australia proposed that the written statement should only be an outline of submissions to be made at the pre-discovery conference:

> identifying the document/classes of documents in respect of which discovery is sought, indicating the issue (factual and/or legal) in respect of which it is said the documents are relevant, identifying how the documents are said to be relevant and stating why it is in the interests of justice that, in the particular case, the documents ought be discovered.[92]

6.73 The Law Council submitted that, in any event, the written statement should be only four pages—to limit the time and cost to the party preparing the statement, and the burden on the other party reviewing the statement.[93]

6.74 On the other hand, several submissions suggested that—instead of introducing written statements of issues into Federal Court proceedings—the existing rules on pleadings should be reformed.[94] For example, Allens Arthur Robinson advised that:

> In our experience, failure to identify 'core issues in dispute' is usually the result of deficient pleadings. Many pleadings are vague, repetitive, insufficiently particularised and often contain irrelevant material ... We consider that this is one area in which the Court might be encouraged to intervene more actively.[95]

6.75 Allens Arthur Robinson also identified a number of issues with the rules on pleadings which might be considered further:

> This is a large issue and we are conscious that it may be outside the scope of the ALRC's reference but the issues worthy of consideration include:
>
> - encouraging the Court to strike out deficient pleadings on its own motion (that 'encouragement' could take the form of a statement of intent of policy in a Practice Note);
> - a re-assessment of the rule in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 and s 31A of the *Federal Court of Australia Act 1976* (Cth); and
> - in conjunction with or separately from that assessment, allowing the Court to take into account the likely effect of the pleading under attack on the other side's discovery burden. The discovery burden could be taken into account in a manner analogous to the 'balance of convenience' in an interlocutory

90 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
91 Ibid.
92 Law Society of Western Australia, *Submission DR 26*, 11 February 2011.
93 Law Council of Australia, *Submission DR 25*, 31 January 2011.
94 Queensland Law Society, *Submission DR 28*, 11 February 2011; Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; C Enright and S Lewis, *Submission DR 03*, 12 January 2011.
95 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

> injunction application. A weak or vague pleading that results in an onerous discovery burden ought to be more vulnerable than one which would not have that result.[96]

6.76 The Australian Government Solicitor submitted that written statements of issues may be superfluous in most cases if a more rigorous pleadings model were adopted, singling out the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) as an example of a more rigorous approach that might be introduced in the Federal Court.[97] The submission advised that stringent requirements in the UCPR for pleadings of denials and non-admissions were aimed at forcing defendants to plead in a way that positively assisted in narrowing the issues, rather than simply putting a plaintiff to proof:

> The theory behind these requirements is that if it is not possible for a defendant to simply 'not admit' in the course of pleadings, defendants will be more likely to focus their minds on what can be admitted and what is to be denied, thereby crystallising the issues in dispute.[98]

6.77 Christopher Enright and Simon Lewis argued that a redesigned system of pleadings should be introduced based on the relationship between the law—in particular, the elements of the cause of action or defence—and the material facts:

> The advantage is that the elements, being a generalisation of a material fact, and visibly so, are devices for monitoring pleadings to ensure that they have incorporated the material facts ... By this means the pleadings make crystal clear, generally after the first exchange of documents, precisely what are the issues of fact.[99]

Adducing evidence prior to discovery

6.78 Another way to clarify the crucial issues in dispute—so that discovery can focus on them—may be to require production of the evidence, or at least an outline of the evidence, on which the parties intend to rely at trial, prior to discovery of documents. The Fast Track List and Tax List provide models for such a procedural requirement.

6.79 *Practice Note CM 8* and *Practice Note Tax 1* state that each party must bring to the scheduling conference an initial witnesses list with the names of each witness the party intends to call at trial. The list is to include a very brief summary of the expected testimony of each witness and, unless it is otherwise obvious, must state the relevance of the evidence of each witness.[100]

6.80 Another model for this approach is found in Rule 7–4 of the British Columbia *Supreme Court Civil Rules*. This rule requires parties to proceedings before the Supreme Court of British Columbia to file and serve on every other party a list of witnesses the party may call at trial.[101] The introduction of this Rule was recommended by the Civil Justice Reform Working Group in 2006, which considered that:

---

96 Ibid.
97 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.
98 Ibid.
99 C Enright and S Lewis, *Submission DR 03*, 12 January 2011.
100 *Practice Note CM 8: Fast Track* (Federal Court of Australia), [6.4].
101 *Supreme Court Civil Rules* (British Columbia) r 7–4(1), which came into force on 1 July 2010.

> in order to encourage the early exchange of information, we recommend that the parties exchange a list of the witnesses that each party intends to call at the trial of the action, along with a summary of the evidence that the party believes the witness will give at trial.[102]

6.81 Consideration of discovery issues in light of the parties' evidence—or at least an outline of any expected testimonial evidence—might result in limiting the need for, or narrowing the scope of, discovery. Once the parties and the Court have had an opportunity to consider the evidence, it may become easier to identify the areas where discovery is necessary and to assess whether relevant documents are likely to be discovered.

6.82 The idea of producing evidence prior to discovery was considered by the Law Council in 2006. The Law Council reported general opposition to this idea but conceded that, in some cases, it may be useful for parties to file their evidence in chief in support of a claim (and perhaps cross claim) prior to any discovery:

> A number of submissions commented that this was likely to lead not only to a duplication of work on evidence in chief, but also to delays in the making of genuine discovery. There may be some cases where although the facts are likely to be substantially uncontentious they may be also substantially in the knowledge of only one party. It is perhaps possible that in those cases the parties might find the filing of evidence prior to discovery a useful process.[103]

6.83 While the model considered by the Law Council might have involved the filing of evidence, perhaps in the form of an affidavit, the witness list in the Fast Track List or Tax List proceedings requires only an outline of the evidence.

Submissions and consultations

6.84 In the Consultation Paper, the ALRC proposed that:

> 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.[104]

6.85 A few of the submissions that addressed this proposal expressed in-principle support for the early production of evidence, to identify and clarify the crucial issues in the proceeding, as a means of narrowing the scope of discovery and expediting the resolution of disputes in general.[105] These included submissions from public interest

---

102 British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006), 28.

103 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), Proposal 5(c), [94]–[96].

104 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 3–3.

105 Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; The Federation of Community Legal Centres (Vic), *Submission DR 17*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; I Turnbull, *Submission DR 05*, 15 January 2011.

advocates, which noted that increased funding to legal service providers would be required to assist litigants prepare a list of witnesses.[106]

6.86 However, most submissions responding to this proposal opposed the introduction of witness lists as a general requirement in all cases before the Federal Court, on the grounds that, in some cases, the costs of compliance might outweigh any benefits in the litigation.[107] Several of these submissions commented that, in the early stages of proceedings, it is difficult for parties and their lawyers to identify the witnesses whom they will be likely to call at trial—usually, the identities of witnesses becomes apparent after the parties have examined relevant documents.[108] For example, the Law Society of Western Australian submitted that it:

> does not agree that the identification of witnesses and the summarising of their expected testimony is a matter that will assist (greatly, if at all) issues of discovery. Again, any perceived benefit would be outweighed by the time and costs involved in the process. This is particularly so since the finalisation of the witnesses to be called at trial is only properly done after a party has had an opportunity to inspect the other side's discovered documents.[109]

6.87 Submissions argued that if parties were required to provide a summary of witnesses' testimony, prior to discovery of documents, it would involve additional and overlapping work—inspecting documents and interviewing witnesses—and thereby increase the costs of litigation.[110]

6.88 The Tax Commissioner advised that, in practice, the witnesses to be called in tax litigation will often be determined at a later stage in proceedings—rather than at the scheduling conference as required by *Practice Note Tax 1*:

> in practice it has often been difficult to identify with any great specificity the person who will be called to give evidence by the time of the scheduling conference. The Court has often been prepared to accept the parties' initial views as to the general nature of the witnesses to be called (i.e. whether the taxpayer or, if a company, which office holders will be called and whether expert witnesses will be required). This has

---

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

107 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011.

108 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011.

109 Law Society of Western Australia, *Submission DR 26*, 11 February 2011.

110 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011.

> allowed the Court to determine whether the parties require time to obtain affidavits, including experts' reports.
>
> It is suggested that should this proposal be adopted, the Court should, in practice, accept that parties may require additional time to determine the witnesses to be called.[111]

6.89 As an alternative to summarising the testimony of potential witnesses, two submissions suggested that the proposed procedure should require parties to produce only the names of persons who may hold relevant documents.[112] For example, the Queensland Law Society submitted that:

> parties should focus on the types of documents (and their custodians) to be searched bearing in mind the likely issues in the proceedings. There may therefore be a need for parties to identify names of likely custodians, and perhaps to exchange these names.[113]

6.90 At the same time, several submissions acknowledged that an early indication of the evidence of witnesses to be called in the proceeding may be appropriate in some cases—and the Court may require parties to do so on a case-by-case basis.[114]

ALRC's views

6.91 As discussed above, the ALRC considers that discovery by categories of documents can be an effective and efficient way to facilitate the disposal of litigation in some cases. Appropriately formulated categories may target documents of particular importance in proceedings, leading to the resolution of disputes without the expense of pursuing subordinate issues through discovery.

6.92 The ALRC is also of the view that identifying and clarifying the crucial issues in a proceeding may enhance the effectiveness of a categories-based approach to discovery of documents. This was highlighted in *Managing Justice*, where the ALRC reported that:

> discovery by categories works well if the parties take the time and expense to define the categories carefully and sort the disclosed documents into the correct categories and if the issues in dispute are sufficiently well defined that the documents are amenable to classification.[115]

---

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

112 Queensland Law Society, *Submission DR 28*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

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

114 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

115 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.70].

6.93 An effective justice system should be directed towards the prevention and resolution of disputes.[116] A clear definition of the issues may help to avoid, or assist the resolution of, disputes between the parties over the appropriateness of proposed categories for discovery. Establishing a clear and shared understanding of the main facts in issue may assist the parties to identify particular documents or categories of documents relevant to those issues. It may also provide the parties with a basis for assessing whether a proposed category of documents is relevant to the important issues in dispute.

6.94 However, the proposed means of clarifying the issues in a proceeding prior to discovery—whether through discussion at a case management conference, in a written statement of issues or an outline of evidence—might not be efficient in every case. The proposed procedures would be an additional expense for many litigants in the Federal Court but not all of these cases would necessarily benefit from taking those steps in the litigation. Large, complex and high-value cases might achieve efficiencies in discovery through the proposed procedures, and at a cost that is proportionate to the issues in dispute.[117] On the other hand, the cost of complying with these procedures may be disproportionate to small claims in straightforward cases—which might manage an efficient discovery process in any event. The most efficient means of managing discovery in proceedings is not a 'one-size-fits-all' approach, and will depend on the circumstances of each case.

6.95 For example, in some complex cases, a case management conference might be a useful way to focus the scope of discovery on the crucial issues in proceedings. The Hon Chief Justice Robert French of the High Court of Australia, formerly of the Federal Court, often found case management conferences to be a productive working environment:

> The case management conference where the judge sits around a table with counsel and solicitors (and sometimes the parties) was the most effective technique which I experienced in relation to pre-trial management of complex litigation. The psychological landscape of the case management conference, as a roundtable meeting of counsel and solicitors (and sometimes clients), presided over by a judge differs significantly from that of a directions hearing with its attendant formalities. It can become a kind of pre-trial procedural negotiation, assisted by the judge. It is a forum in which particular techniques for pre-trial case management can be crafted.[118]

6.96 However, situations where a pre-discovery conference to focus discovery on crucial issues would be an unnecessary cost might include cases in which parties are in agreement as to the appropriate scope of discovery. This cost might also be overly burdensome in cases involving impecunious litigants.

---

116 See Access to Justice Principles: Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

117 Ibid.

118 R French, 'The Future of Litigation: Dispute Resolution in Jurassic Park?' (Paper presented at Bar Association of Queensland Annual Conference, Brisbane, 2009).

6.97 A written statement of issues might be an efficient means of drawing out the most important matters from the pleadings—for the purposes of focusing discovery—in cases where the parties are cooperative and willing to utilise this mechanism flexibly. However, experience with lists of issues in the UK's Commercial Court suggests that it might create inefficiencies in cases where parties are aggressively adversarial and would treat this statement as an opportunity to gain tactical advantage over each other.

6.98 Witness lists might be an efficient means of conducting some cases in the Fast Track or Tax Lists. Similarly, an outline of evidence might be a useful tool in cases where parties have already received some disclosure of relevant documents and identified potential witnesses—for example, through alternative dispute resolution procedures prior to the commencement of proceedings. In other circumstances, however, putting on evidence before discovery of documents could require significant additional work for litigants if the identities of likely witnesses were unknown at that stage in proceedings.

6.99 The ALRC does not, therefore, recommend reform to introduce any of these proposed procedures as general requirements in all Federal Court proceedings. However the ALRC considers that reform is warranted to encourage the Court and parties to adopt appropriate means of clarifying the important issues in dispute to focus the scope of discovery in proceedings—which might involve the use of case management conferences, statements of issues and outlines of evidence in some cases. This is discussed below in the context of discovery guidelines in Federal Court practice notes.[119]

6.100 The ALRC also considers that, while beyond the scope of this Inquiry, reform of the rules on pleadings may improve the identification and clarification of issues in dispute and, in turn, enhance the efficiency and effectiveness of the discovery process. The ALRC supports further consideration of reform in relation to pleadings, which may form part of current consultations on proposed amendments to the *Federal Court Rules*.

6.101 In some cases, decisions about the scope of discovery should not be made in isolation from practical issues arising in the discovery process—such as where or with whom those documents are located or held, how the documents are stored and how they may be retrieved. Decisions about the practicalities of discovering relevant documents—particularly in relation to electronic documents—can have a far greater impact on the cost and time involved, than deciding what the relevant documents are. In the ALRC's view, these cost implications, in particular, should inform decisions about the scope of discovery, or even whether discovery should be given at all. As such, the practicalities of discovering relevant documents need to be considered at the time orders for discovery are made. This is discussed below in the context of electronic discovery.[120]

---

119 See Rec 6–5.
120 See Recs 6–1 to 6–4.

Facilitating electronic discovery by agreement of the parties

6.102 Electronic technologies have proved necessary to manage the large volumes of documents being discovered in Federal Court proceedings. Early technologies were used to transform hardcopy documents into electronic format, making vast amounts of information more manageable.[121] Technologies have evolved to become the means by which documents are discovered from source to production in electronic format, commonly described as 'e-discovery'. This follows contemporary corporate behaviour whereby 98% of documents are said now to exist in electronic form only.[122]

6.103 The move towards electronic discovery is evident in proposed amendments to the *High Court Rules* (NZ) which would require parties to carry out discovery obligations electronically in all cases, with limited exceptions.[123] That is, only parties who are not represented by a lawyer would be exempt from the obligation to give discovery electronically if a judge decides that it is not practicable or that justice so requires.[124]

6.104 A key concern that often arises in an e-discovery process is whether the party giving discovery has conducted a 'reasonable' search for discoverable documents stored in electronic document management systems or databases.[125] Whether the search was 'good enough', as described by Lord Jackson,[126] will be assessed by the courts weighing the cost and inconvenience to the party giving discovery against the value of the documents sought in the context of the litigation.[127] As Mummery J said in *Molnlycke AB v Procter & Gamble Limited (No 3)*:

> The Court takes account of such considerations as the value of the discovery to the person seeking it and the burden imposed on the party giving it, with a view to restricting the volume of documents and the labour and expense involved to that which is necessary for fairly disposing of the issues in the case.[128]

6.105 For example, in *NT Power Generation Pty Ltd v Power & Water Authority*, Mansfield J considered an interlocutory application to restrict discovery to hardcopies of printed emails. His Honour accepted that it would be a very substantial burden on the respondent to search for relevant emails stored electronically in computer terminals, servers and backup tapes. However, Mansfield J ultimately held that he was not satisfied that the material which might be discoverable in those records was of 'sufficiently insubstantial moment' to warrant simply ignoring them.[129]

---

121 D McGrath, *Australian E-Discovery Industry Grows Up* (2010) <http://idm.net.au/article/007901-australian-ediscovery-industry-grows> at 9 November 2010.

122 S Byrne, 'E-Discovery: Where Information Management and Litigation Meet' (Paper presented at Institute for Information Management Conference, Melbourne, 2010), 7.

123 *High Court Amendment Rules (No 1) 2011* (NZ) r 8.25.

124 Ibid r 8.25(2).

125 *Federal Court Rules* (Cth) O 15 r 2(3).

126 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009), ch 40, [3.20].

127 *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1623.

128 *Molnlycke AB v Procter & Gamble (No 3)* [1990] RPC 498, [503].

129 *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1623, [2].

6.106 By comparison, in *Leighton Contractors v Public Transport Authority of Western Australia*, Le Miere J found that the burden of giving discovery of deleted emails would have been disproportionate to the potential probative value of that electronic information—had the defendant not already embarked upon the course of recovering the deleted emails from the backup tapes.[130]

6.107 Whether it is 'reasonable' for a party to search through backup tapes or disaster recovery systems for discoverable documents is a question of fact and degree and will therefore depend on the circumstances of each case. This creates an element of uncertainty for a party giving discovery who might hold relevant documents on backup tapes. For example, in *BT (Australasia) Pty Ltd v New South Wales & Telstra*,[131] Sackville J found that Telstra failed to comply fully with its discovery obligations in relation to electronic documents, in a number of respects including:

> First ... Telstra neither disclosed the existence of back-up tapes, nor took any steps to restore those tapes with a view to ascertaining whether and how discoverable electronic material could be identified and presented in usable form. I accept and appreciate that the purpose of making and retaining the back-up was essentially disaster recovery, rather than archival. Nonetheless, as subsequent events have demonstrated, it is feasible, albeit difficult and expensive, for the tapes to be restored and a review process set in place to identify discoverable material.[132]

6.108 Another cause for concern sometimes arising in an electronic discovery process is the form in which documents are to be exchanged or produced for inspection by the parties or the Court. For example, in *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited*,[133] the applicant sought orders that documents be produced in portable document format (PDF) format rather than tagged image file format (TIFF), to assist the applicant in reviewing discovered documents. As Tamberlin J explained:

> The essential difference between these two formats is that the PDF format is 'text-searchable', whereas with the TIFF format each page is scanned as a single image and cannot be text-searched.[134]

6.109 Some of the respondents in this case did not object to production of documents in PDF format, but other respondents argued that such a requirement would be unduly oppressive and involve substantial extra time and expense—as they were well advanced in preparing discovery using the TIFF format.[135] In this case, the Court decided not to make an order requiring the conversion of records to PDF format.

6.110 The Federal Court has sought to deal with these issues by encouraging the parties to agree on such matters at the outset of an electronic discovery process. As stated in *Practice Note CM 6*, 'the Court expects parties to meet and confer for the

---

130 *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65 (22 March 2007).

131 *BT (Australasia) v New South Wales & Anor (No 9)* [1998] FCA 363.

132 Ibid, [20].

133 *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2006] FCA 1802.

134 Ibid, [25].

135 J Eyers, 'Chief Justice Keen to Get to the Point', *Australian Financial Review* (Sydney), 19 February 2010, 20 [26].

purpose of reaching an agreement about the protocols to be used for the electronic exchange of documents'.[136] Similarly, parties are expected to discuss and agree upon a practical and cost-effective discovery plan,[137] setting out such matters as the scope of discovery, strategies for conducting a reasonable search and a timetable and estimated costs for discovery.[138] The Court may facilitate agreement on these issues by requiring the parties to attend a directions hearing or case management conference.[139]

6.111 This approach to electronic discovery commenced in the Federal Court on 29 January 2009.[140] This followed a comprehensive review of the practice note, starting in 2007, with the assistance of a consultant and in consultation with litigants, the legal profession and others.[141]

6.112 Similar procedures have been established in other Australian jurisdictions,[142] aimed at achieving agreement between the parties under the supervision of the court as to the conduct of an electronic discovery process.

6.113 In 2009, the Federal Court's practice note was reported to be operating satisfactorily, shortly after it was revised.[143]

Submissions and consultations

6.114 In the Consultation Paper, the ALRC asked whether the directions in *Practice Note CM 6*—particularly the expectation that parties have discussed and agreed upon a practical and cost-effective discovery plan—have helped to ensure proportionality in the discovery of electronically-stored information and, if not, why not.[144]

6.115 All of the submissions that addressed this issue expressed support for the model espoused in *Practice Note CM 6*, but advised that it has not been successfully

---

136 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [7.1].

137 *Ibid*, [6].

138 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [3].

139 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [7]; *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [9].

140 These provisions were included in a revised publication of *Practice Note 17*, which was replaced by *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia) on 25 September 2009.

141 S Byrne, *Formal Update: Federal Court of Australia Practice Note 17* (2008) <http://www.elitigation.com.au/pursuit/2008/10/20/formal-update-federal-court-of-australia-practice-note-17.html> at 9 November 2010.

142 See: New South Wales Supreme Court, *Practice Note SC Gen 7: Use of Technology* (2008) <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/444> at 5 November 2010; *Practice Direction No 8 of 2004: Electronic Management of Documents (Qld)*; *Practice Direction No 2.1 of Supreme Court Practice Directions 2006: Guidelines for the Use of Electronic Technology (SA)*; Supreme Court of Victoria, *Guidelines for the Use of Technology in Any Civil Matter* (2007) <http://www.supremecourt.vic.gov.au/> at 5 November 2010; *Standard Operating Procedure No 3 of 2009: Technology, Engineering and Construction list* (Supreme Court of Vic); *Practice Direction No 2 of 2002: Guidelines for the Use of Technology in any Civil Matter (NT)*.

143 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009), ch 40, [7.9].

144 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–5.

implemented in practice.[145] These submissions suggested that litigants rarely discussed and agreed upon the substantive matters that should be included in discovery plans—such as strategies for a reasonable search and estimates of the time and cost involved.[146]

6.116 Submissions by law firms and law societies argued that discovery plans were not widely used in practice because they were not mandatory, and parties—as adversaries in the proceeding—were generally unwilling to cooperate.[147] For example, Allens Arthur Robinson submitted that:

> Our experience has shown that, due to its advisory nature, CM6 is less effective because parties are disinclined to meet and confer voluntarily early in a proceeding to discuss discovery related issues.[148]

6.117 The Association of Legal Support Managers (Qld) submitted that there was a 'lack of enforcement by the courts' in relation to the use of discovery plans,[149] and that there was also

> an insufficient practical knowledge of technology (both in business and in the practice of litigation) and a lack of familiarity with newer practices and trends in the management of discovery.[150]

6.118 Some submissions suggested that, while parties were not conferring in relation to the searches to be conducted in discovery, more commonly parties agreed to the terms of 'document management protocols'.[151] These protocols typically specify the format in which discoverable documents will be exchanged or produced for inspection by the parties or the Court.[152]

6.119 On the other hand, Allens Arthur Robinson submitted that inconsistency in the format used to produce electronic documents was widespread and created unnecessary expense in the discovery process:

> in most proceedings, the use of technology is governed entirely by the parties themselves with no attempt to negotiate and agree on a consistent process or mode of

---

145 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

146 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

147 Queensland Law Society, *Submission DR 28*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

148 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

149 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

150 Ibid.

151 Ibid; Queensland Law Society, *Submission DR 28*, 11 February 2011.

152 See for example, *Practice Note CM 6: Default Document Management Protocol* (Federal Court of Australia).

> exchange for discoverable documents. Therefore parties commonly make decisions ... that lead to inconsistent treatment of documents as compared with other parties to the proceeding. This, in turn, results in subsequent additional costs being incurred by all parties in an attempt to effectively utilise documents and data which has been provided by others.[153]

6.120 The reason for the apparent weakness of *Practice Note CM 6* was the means by which its requirements are applied to proceedings.[154] The practice note applies to proceedings in which the Court has ordered that discovery be given of documents in an electronic format.[155] Allens Arthur Robinson pointed out that, problematically:

> parties are required to apply to the Court for an order that CM6 will apply to the proceeding. Such applications are rarely made and are generally reserved only for the very largest matters.[156]

6.121 As noted by a group of large law firms, this means *Practice Note CM 6* only comes into effect after orders for discovery have been made.[157] The problem with this timing is that discovery obligations are determined without regard to the practical issues that might arise in relation to the discovery of electronic documents, including the time and expense involved:

> It is not uncommon for unforeseen difficulties, particularly with discovery of ESI, to arise after discovery orders have been made ... Most litigation now involves discovery of ESI. The volume of the electronic documents discovered will differ from case to case, but the issues in relation to them, including whether they exist and any difficulties involved in discovering them, should be considered at an early stage of the proceedings and certainly before discovery orders are made. As it presently stands, parties are not required to consider practical issues in relation to the discovery of ESI until after an order for discovery is made. Reform is needed so that the Court is apprised of all issues relevant to the discovery process before discovery is ordered.[158]

ALRC's views

6.122 The time and expense that parties and courts must spend addressing often extensive side litigation about electronic discovery issues can be significant—so much so that 'the mere availability of such vast amounts of electronic information can lead to a situation of the ESI-discovery-tail wagging the poor old merits-of-the-dispute dog'.[159]

6.123 The ALRC considers that the intentions of *Practice Note CM 6*, which aims to establish agreement between the parties as to how electronic discovery issues will be handled before they arise, are consistent with the principle of efficiency—that the justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute

---

153 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
154 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
155 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [1.1].
156 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
157 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
158 Ibid.
159 *Moody v Turner* (Unreported, SD Ohio 1:07-cv-692, 21 September 2010).

resolution process, including through preventing disputes.[160] Where parties agree in advance to methods for collecting, processing and producing electronic documents, they can avoid the numerous applications that might otherwise be made to the Court for orders or directions on the technicalities and practicalities of an e-discovery process.

6.124 The ALRC is concerned that, in some cases, parties are not meeting the expectation upon them to discuss and agree on practical issues relating to the process of discovery, especially the strategies used to conduct a reasonable search of electronic databases. Certainty may be compromised where the party giving discovery makes unilateral decisions about the way in which the process is carried out.[161] For example, there is likely to be a degree of uncertainty as to whether the party's chosen search techniques are 'reasonable'.[162]

6.125 Such uncertainty can prompt some litigants to undertake searches that are more than 'reasonable' to avoid challenges from another party and possible rebuke by the Court. This can result in discovery of more electronic material than is necessary, which burdens the other party with the task of trawling through masses of documents, possibly only distantly related to the proceeding—or entirely irrelevant. This outcome may also be a consequence of time and budgetary constraints on the parties, as vetting irrelevant documents can be a lengthy and costly process, or the result of simple lack of due diligence on the part of litigants and their lawyers.

6.126 The ALRC is also concerned that, in some cases, judges are not actively utilising existing case management powers to impose and enforce compliance with the requirement on parties to agree on relevant issues before commencing an e-discovery process or, in other cases, not facilitating an appropriate agreement between the parties. *Practice Note CM 6* suggests that judges should, where necessary, require parties to address discovery issues at a directions hearing or case management conference.[163] However, some judges may be more reticent than others to get into the detail of the mechanics of a discovery process.

6.127 The ALRC is particularly concerned that in many cases the practicalities of the discovery process—how to locate, collect, process, review and produce discoverable documents—are not being considered by the parties and the Court until after discovery orders have been made. This means obligations may be imposed on parties to discover certain documents without any regard to how that might be achieved. *Practice Note CM 6* states that parties are expected to consider the matters outlined therein 'at as early a stage in the proceeding as practicable',[164] and 'to be in a position to inform the Court on how the issues are to be addressed prior to or at the first Directions hearing or

---

160 See Access to Justice Principles: Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

161 See Ch 2.

162 *Federal Court Rules* (Cth) O 15 r 2(3).

163 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [7.2]; *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [9].

164 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [4.1].

case management conference'.[165] However, in practice it seems that, in many cases, the parties and the Court initially focus on the types of documents to be discovered—in terms of their relevance to proceedings—but do not turn their minds to the practical issues of how those documents will be discovered until later in proceedings, when practical problems arise. The decisions made in relation to such issues—for example, the strategies used to search for discoverable documents or the format in which documents are produced—can have a substantial impact on the time and cost associated with discovery. For example, different search techniques will return different volumes of documents, which will affect how much time and money the parties must spend reviewing the documents.

6.128 The ALRC's view is that, in certain cases, the time and cost implications of the methods employed in a discovery process can be so significant that they should be taken into account by the parties and the Court when seeking and making orders for discovery. The likely cost is a key consideration for judges in determining whether to order discovery,[166] and should also inform the scope of any discovery requested by the parties and required by the Court. Considerations of costs must be balanced against another core consideration in relation to discovery, namely, the attainment of justice through fact-finding. Judges need to achieve the just resolution of disputes according to law but must do so as quickly, inexpensively and efficiently as possible.[167] In some cases, the costs involved with discovery might frustrate the administration of justice. In order for judges to consider time and cost factors when making orders for discovery, and for parties to be in a position to properly inform the Court as to the likely timeframe and cost of discovery, the practicalities of the proposed discovery must be determined at that stage in proceedings.

6.129 In considering the potential for reform to address the concerns expressed above, the following section of this chapter examines the approach taken in other jurisdictions in relation to discovery of documents.

Facilitating the development of discovery plans

6.130 The provisions of *Practice Note CM 6* share a number of elements in common with the approach taken in other countries in relation to discovery of documents in litigation—including the US and the UK, as well as that proposed for adoption in New Zealand, as discussed below. This approach includes an element of cooperation between the parties, to reach agreement on the scope and process of discovery, and the facilitative role of courts in ensuring that such agreements are appropriate and sufficient. However, the expression of these requirements in other jurisdictions is noticeably different by comparison with the Federal Court. The expectations placed on the parties and the courts are expressed in clearer and more mandatory terms. This may have consequences in practice for the parties, their lawyers and the court in their approaches towards discovery.

---

165 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [1.2].
166 *Practice Note CM 5: Discovery* (Federal Court of Australia), [2].
167 *Federal Court of Australia Act 1976* (Cth) s 37M.

6.131 The Federal Court 'expects' parties to have agreed upon a discovery plan and document management protocol.[168] The obligations on parties are expressed in other jurisdictions in more mandatory terms. *Practice Direction 31B* (UK), for example, requires that parties 'must' discuss the disclosure of electronic documents.[169] The UK practice direction previously suggested that parties 'should' do so, but it was amended in October 2010 to impose a mandatory obligation on parties.[170] This reform, as explained by Senior Master Whitaker, sought to redress the situation of litigants failing to pay attention to the requirements of the practice direction and also responded to demands from the legal profession for 'a stronger lead' from the practice direction.[171]

6.132 Similarly, the *Federal Rules of Civil Procedure 2009* (US) require that parties 'must' confer and develop a proposed discovery plan.[172] The benefits of cooperation between the parties, as required by the Rules, include greater certainty and efficiency in the discovery process—as noted in an American practitioner's guide to planning discovery:

> By coming together early, defining what is important and what is not, and working with your adversary, not against them, means less risk, less cost and more certainty.[173]

6.133 Likewise, proposed amendments to the *High Court Rules* (NZ) state that 'parties must ... discuss and endeavour to agree on an appropriate discovery order'.[174] The reforms in New Zealand would also impose an express requirement on litigants to cooperate generally in relation to discovery:

> **8.17 Cooperation**
>
> (1) The parties must cooperate to ensure that the processes of discovery and inspection are—
>
> (a) proportionate to the sums in issue or the value of the rights in issue; and
>
> (b) facilitated by agreement on practical arrangements.[175]

6.134 The New Zealand Rules Committee commented that such cooperation is 'no more than should occur presently in any event' and will encourage parties 'to reduce the scope and burden of discovery, achieve reciprocity in electronic format and processes, [and] ensure technology is used efficiently and effectively'.[176]

---

168 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [6]–[7].

169 Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents* [9].

170 *Practice Direction 31.2A* of the *Civil Procedure Rules* (UK) was repealed on 1 October 2010. It stated that: 'The parties *should*, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents': [2A.2].

171 S Whitaker, *Electronic Disclosure (Practice Direction 31B): Q&A with the Senior Master, Master Whitaker* (2010).

172 *Federal Rules of Civil Procedure 2009* (US) r 26(f)(1)–(2).

173 J Rosenthal and M Cowper, 'A Practitioner's Guide to Rule 26(f) Meet & Confer: A Year After the Amendments' (2008) 783 *Practising Law Institute: Litigation* 236, 248.

174 *High Court Amendment Rules (No 1) 2011* (NZ) r 8.23(1).

175 Ibid.

176 New Zealand High Court Rules Committee, *Proposals for Reform of the Law of Discovery Including Electronic Discovery and Inspection* (2010), [18], [23].

6.135 The expectations on parties in these jurisdictions are also expressed in clear terms as to when in the proceedings they are required to discuss discovery issues and reach an agreement. In each of these jurisdictions, prior to the hearing at which orders for discovery will be made, parties are required to: first, discuss and endeavour to agree upon discovery issues; and, secondly, provide an outline of their agreement or areas of disagreement to the court.[177]

6.136 In the US, for example, parties must confer as soon as practicable—and in any event at least 21 days before a pre-trial hearing—and must submit a proposed discovery plan to the court within 14 days after their conference.[178] In the UK, the documents submitted to the court in advance of the first case management conference must include a summary of the matters on which the parties agree and disagree in relation to disclosure.[179] Therefore, parties must discuss disclosure issues before the first case management conference but are encouraged to do so even before proceedings are commenced in complex cases.[180] Equally, proposed amendments to the *High Court Rules* (NZ) would require parties to discuss discovery orders not less than 14 days before the first case management conference—when the judge will decide on discovery orders—and file a memorandum setting out the orders sought not less than seven days before that conference.[181]

6.137 By way of contrast, the Federal Court's *Practice Note CM 6* does not require parties to provide the Court with any account of agreements in relation to the discovery process—at any stage—not least, before orders for discovery are made. Rather, the practice note suggests that the Court will have already made orders for discovery—and subsequently ordered that documents be discovered in electronic format—when the expectation on parties to consider practical discovery issues arises.[182]

6.138 When considering discovery issues and preparing an agreement on these matters, litigants in the UK are assisted by detailed provisions in *Practice Direction 31B* that discuss a variety of topics the parties might address—such as the use of keyword and other automated searches for documents, the factors relevant to the reasonableness of searches, including the accessibility of documents, and the disclosure of metadata.[183] In the course of their discussions, parties can complete and exchange the Electronic Document Questionnaire attached to the practice direction, 'in order to provide information to each other in relation to the scope, extent and most suitable format for disclosure of Electronic Documents'.[184]

---

177 See Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents*, [14]; *Federal Rules of Civil Procedure 2009* (US) r 26(f)(2); *High Court Amendment Rules (No 1) 2011 (NZ)*, [8.23].

178 *Federal Rules of Civil Procedure 2009* (US) r 26(f)(2).

179 Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents*, [14].

180 Ibid, [9].

181 *High Court Amendment Rules (No 1) 2011* (NZ) rr 8.20, 8.23.

182 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [1.1].

183 Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents*, [20]–[29].

184 Ibid, [10].

6.139 The UK's practice direction was picked up by a sub-group of the New Zealand Rules Committee, comprised of members of the legal profession, which developed a discovery checklist and a detailed exchange protocol.[185] Under proposed new *High Court Rules* (NZ), parties must have regard to this checklist of matters when formulating an agreement in relation to discovery orders.[186]

6.140 The Federal Court's *Practice Note CM 6* also includes a discovery checklist and draft document management protocols.[187] While these instruments address broadly the same topics as those in the UK and proposed in New Zealand, they are not as detailed as the guidance provided, for example, by *Practice Direction 31B* (UK).

6.141 Another point of difference between the Federal Court and other jurisdictions is the expression of the court's responsibility to interrogate the appropriateness of parties' agreed approach to discovery, and to be an active participant in finalising discovery issues. The facilitative role of judges may be assumed in the Federal Court's docket system, where judges are responsible for the management of proceedings from start to finish. These expectations of the Court may also be part of the operation of s 37M of the *Federal Court of Australia Act*.[188] However, the court's role in facilitating discovery is expressed more clearly in jurisdictions other than in the Federal Court. In the UK, for example, the court must give directions in relation to disclosure of documents if it considers that the parties' agreement on the matter is inappropriate or insufficient.[189] In the US, the court is required to hold a pre-trial conference to consider the parties' proposed discovery plan, at which point the court may modify the extent of the proposed discovery or include other appropriate matters.[190]

6.142 In contrast, the Federal Court 'may' require parties to attend a hearing to resolve any disagreements.[191] However, with respect to matters agreed between the parties in relation to discovery, there is no explicit expectation on judges to assess those agreements and make adjustments where appropriate.

6.143 The approaches taken in the US and UK—in terms of the cooperation required of litigants and the active participation of the courts—have attracted some criticism. The introduction of the *Electronic Documents Questionnaire* in the United Kingdom, for example, raised concerns with the legal profession about the amount of work and cost involved. Lawyers were concerned that, in order to respond to the questionnaire, they would have to get across the structure of their clients' document management and storage systems:

---

185 New Zealand High Court Rules Committee, *Proposals for Reform of the Law of Discovery Including Electronic Discovery and Inspection* (2010).

186 *High Court Amendment Rules (No 1) 2011* (NZ) r 8.23(1).

187 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [11].

188 *Federal Court of Australia Act 1976* (Cth) s 37M(3) requires that civil practice and procedure provisions must be interpreted and applied in the way that best promotes the overarching purpose—namely, the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.

189 Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents*, [18].

190 *Federal Rules of Civil Procedure 2009* (US) r 16(b)(3).

191 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [7.2]; *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [9].

> lawyers will effectively need to carry out 'data mapping' exercises with their clients and IT experts so that they understand their client's IT systems and data management practices.[192]

6.144 There were also concerns about the expense incurred by parties in completing the questionnaire, and frontloading litigation costs:

> the general form of the complaint is that there is already too much pre-issue and pre-trial paperwork and that the questionnaire merely adds to the pile.[193]

6.145 Concerns in the US largely relate to the way in which parties and courts meet and enforce the expectations upon them in the discovery process. There are reports that 'the meet-and-confer is too often treated as a perfunctory "drive-by" exchange', which then means that 'the Rule 16 conference may accomplish little more than setting a few dates'.[194] Judge Paul Grimm has stated that, in his experience, 'courts seldom receive discovery plans from the parties that reflect meaningful efforts to drill down on the issues they are supposed to discuss at the r 26(f) conference'.[195] At the same time, legal practitioners in the US have noted that judges themselves may fail to exercise the broad power that r 16 gives them to order conferences, control timing, and discourage waste.[196]

Submissions and consultations

6.146 In the Consultation Paper, the ALRC proposed that:

> In any proceeding before the Federal Court in which the court has directed that discovery be given of documents in electronic format, the following procedural steps should be required:
>
> (a) 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;
>
> (b) the parties jointly file in court a written report outlining the matters on which the parties agree in relation to discovery of electronic documents and a summary of any matters on which they disagree; and
>
> (c) 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.

---

192 D Kavan and T Streeton, 'A Change in Direction on E-disclosure', *Law Society Gazette* (online), 1 October 2010, <http://www.lawgazette.co.uk/in-practice/practice-points/a-change-direction-electronic-disclosure>.

193 C Dale, *Over-Estimating Both Costs and Risks in the eDisclosure Practice Direction* <http://chrisdale.wordpress.com/2010/09/28/over-estimating-both-costs-and-risks-in-the-edisclosure-practice-direction> at 25 October 2010.

194 L Rosenthal, 'A Few Thoughts on Electronic Discovery After December 1, 2006' (2006) 116(176) *Yale Law Journal Pocket Part* 167.

195 P Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules be Changed to Reduce Costs and Burdens, Or Can Significant Improvements be Achieved Within the Existing Rules?* <http://civilconference.uscourts.gov/> at 25 October 2010.

196 J Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (2010) <http://civilconference.uscourts.gov/> at 25 October 2010.

> If so satisfied, the court may make orders for discovery by approving the parties' discovery plan.[197]

6.147 All submissions that addressed this proposal were in support.[198] However, a number of submissions suggested that the proposed procedure should not be restricted to discovery of documents in electronic format.[199] For example, the Queensland Law Society submitted that it:

> supports these procedural steps being required in all matters in which discovery is to be given (not simply those matters in which discovery is to occur electronically). The Society recognises that this proposal reflects CM6, but in mandatory terms.[200]

6.148 Another suggestion for modification to the proposed procedure was made by a group of large law firms, which expressed concerns that this planning process would only commence after the Court had ordered discovery of documents, and only result in directions as to how such documents stored in an electronic format are to be discovered.[201] The group argued that the matters addressed in a discovery plan should be made known to the Court when making orders for discovery of documents:

> the procedure envisages that the Court will make directions in relation to the discovery of ESI before the parties are required to give a proper consideration to the time and cost involved in providing discovery of such documents or have adequate information about their opponents' documents and storage and retrieval systems, which is one of the downfalls of the current position ...
>
> In reality, parties are often making enquiries in relation to the existence of the ESI and the process for retrieving and reviewing that information at an early stage of the proceedings in order to assess the costs involved in the discovery process. It would therefore seem sensible for the procedure for obtaining discovery orders to capture that information at an early stage and include a mechanism for having that information put before the Court at the time discovery orders are being considered.[202]

6.149 The submission proposed that the outcome of the procedure should be orders for discovery of documents that endorse a plan setting out the process the parties are required to undertake in order to produce those documents, including the agreed reasonable searches that should be undertaken.[203] The benefit of this approach would

---

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

198 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

199 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011.

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

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

202 Ibid.

203 Ibid.

be that the Court could consider the costs implications of the parties' proposed plan for discovering documents when making orders:

> This procedure will require parties and the Court to properly consider all aspects of discovery, including the costs and time involved in discovering ESI, before discovery orders are made, rather than orders being made in a vacuum and those issues being addressed only after such orders are made and costs incurred.[204]

6.150 The group also supported the intention for discovery plans to delineate the entirety of the parties' discovery obligations—in terms of both the range of documents to be discovered and the process for discovering those documents—so as to avoid the inefficiencies and expense of an ad hoc discovery regime:

> Accordingly, in the ordinary course once parties have agreed on the discovery plan and the Court has made orders in accordance with it there should be no departure or modifications arising should further documents be located in the future. This is a key issue for large corporate defendants when dealing with huge volumes of both electronic and hard copy documents. Expansion of discovery categories often requires retrieval processes to be repeated at considerable cost.[205]

6.151 While supporting this proposal, the Law Council expressed concern about its impact on relatively small cases and suggested that the proposed procedure should only be utilised where the number of documents was expected to be greater than 500.[206] On the other hand, the Association of Legal Support Managers (Qld) took the view that parties should be required to comply with these procedural requirements in all cases—noting that 'it is flexible enough to be of little burden to parties in matters where there are few records to be gathered or produced'.[207] With respect to large-scale litigation, the group of large law firms advised that the proposed procedure 'may result in costs being incurred by parties before discovery orders are made, [but] we believe it will reduce the overall costs incurred as it will promote a more efficient discovery process'.[208]

6.152 Importantly, the group dismissed the concern that parties might prepare ill-considered or under-developed plans, pointing out that this was

> countered by the fact that there will be an incentive for parties to develop a plan properly where they know it is required by the Court (rather than just expected) and will be actively reviewed by the Court. The purpose of the plan is to ensure that discovery is only provided to the extent that is necessary and reasonable in the context of the proceedings. However, judges will need to be diligent in enforcing these requirements so that parties know that ill-considered plans will not be accepted by the Court.[209]

6.153 A number of submissions proposed that parties should be required to take certain steps in the process of formulating a discovery plan. For example, some

---

204 Ibid.
205 Ibid.
206 Law Council of Australia, *Submission DR 25*, 31 January 2011.
207 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.
208 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
209 Ibid.

suggested that, as a preliminary step, parties should be required to exchange information about the likely locations and custodians of relevant documents.[210] Similarly, others suggested that parties should be empowered to hold pre-trial oral examinations of each other as to the existence and likely location of relevant documents.[211] In addition, there were suggestions made in a number of submissions about particular topics that discovery plans should address, such as: strategies for reviewing potentially discoverable documents;[212] the timeframe for discovery;[213] and its likely cost.[214] These suggestions and proposals are considered further below, in relation to Recommendations 6–5 to 6–7 for guidelines on discovery plans.

ALRC's views

6.154 Commentators on e-discovery acknowledge cooperation and transparency between the parties as keys to success. For example, the Sedona Conference Commentary on Achieving Quality in the E-Discovery Process recognises that:

> Practicing cooperation and striving for greater transparency within the adversary paradigm are key ingredients to obtaining a better quality outcome in e-discovery. Parties should confer early in discovery, including, where appropriate, exchanging information on any quality measures which may be used.[215]

6.155 The ALRC considers that the Federal Court's *Practice Note CM 6* is broadly consistent with the ideals of cooperation and transparency in the discovery process. The ALRC supports the intentions of the practice note in encouraging parties to discuss and agree upon practical and cost-effective measures for the discovery and production of documents stored in an electronic format.

6.156 However, in the ALRC's view, reform is necessary to ensure that parties are meeting these expectations and that the Court is enforcing these requirements, in appropriate cases and at a suitable stage in the proceedings. This may be achieved through changes that express, in clearer and more mandatory terms, the expectations of the parties to cooperate and to be transparent in relation to discovery issues, as well as the expectations of the Court to facilitate a cooperative and transparent approach to discovery in litigation.

Specific expectations of the parties and the Court

6.157 The ALRC considers that the expectations of the parties should be that, before orders for discovery are made, the parties should:

- discuss in good faith and endeavour to agree upon a practical and cost-effective plan in relation to the scope and process of any discovery;

---

210 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

211 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; C Enright and S Lewis, *Submission DR 03*, 12 January 2011.

212 e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011.

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

214 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

215 The Sedona Conference, *Commentary on Achieving Quality in the E-Discovery Process* (2nd ed, 2009).

- file a draft discovery plan, setting out the matters on which the parties agree and disagree in relation to discovery; and
- attend the Court to resolve any areas of disagreement, or to inform the Court of the reasonableness and proportionality of the proposed discovery plan.

6.158 The ALRC considers that the expectations of the Court should be that, in making orders for discovery, it should:

- resolve any areas of disagreement between the parties as to the scope and process of the proposed discovery;
- assess the reasonableness and proportionality of a proposed discovery plan, making amendments to the plan where necessary; and
- make orders for discovery by endorsing a final discovery plan.

Principles of discovery plans

6.159 The ALRC considers that the development of discovery plans, in appropriate cases, will promote the principle of efficiency—that the costs of discovery should be proportionate to the issues in dispute.[216] It will ensure that, in appropriate cases, parties and the Court consider the practical aspects of discovery process—including the likely time and costs involved—in addition to the categories of discoverable documents, when seeking and making orders for discovery. A more comprehensive view of discovery, encompassing the cost implications of the whole discovery process, will better inform the parties and the Court on the issue of proportionality.

6.160 In the ALRC's view, discovery plans, where appropriate, will also promote the principle of accessibility through greater certainty—in that justice initiatives should reduce the net complexity of the justice system.[217] Complexity in discovery, particularly large-scale discoveries, can often be the result of uncertainty. For example, excessive measures might be taken to make sure a search was 'reasonable'.[218] The development of a discovery plan will ensure that, in appropriate cases, orders for discovery specify not only the range of documents to be discovered, but also the process by which those documents will be discovered and produced for inspection. This level of certainty in the discovery process—through judicial determination of parties' practical obligations, before discovery is carried out—will obviate the need for unnecessarily complex, repetitive or overly stringent discovery techniques. Parties would not be required to do any more or less than what is set out in a court ordered discovery plan.

---

216 See Access to Justice Principles: Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 63.

217 Ibid.

218 *Federal Court Rules* (Cth) O 15 r 2(3).

Empowering parties and the Court to utilise discovery plans

6.161 The ALRC considers that these expectations of the parties and the Court should be made clear in the *Federal Court Rules*, supported by Federal Court of Australia practice notes to guide the parties on what the Court expects of them.

6.162 The *Federal Court Rules* should provide that before the Court makes an order for a party to give discovery, a party may apply for an order that the parties file a practical discovery plan setting out the matters on which the parties agree or disagree in relation to the scope and process of any discovery.

6.163 The ALRC considers that this rule would complement the Court's existing case management powers that may already be used to make such orders—on its own motion, without an application by the parties. As stated in s 37P of the *Federal Court of Australia Act*, when making directions about the practice and procedure to be followed in proceedings, the Court may 'require things to be done'[219]—such as, require the parties to prepare a discovery plan for electronic documents in accordance with *Practice Note CM 6*.[220] The recommended rule is not intended to limit the use of discovery plans to proceedings in which the parties apply for such orders. The Court may, on its own motion, order parties to file a discovery plan in any case.

Providing the opportunity to prepare discovery plans

6.164 The ALRC considers that measures should be put in place to ensure that the Court and the parties turn their minds specifically to the possibility of preparing a discovery plan in each case. The potential benefits of discovery plans will not be realised unless the parties actively seek to use them or the Court requires their use in appropriate cases. Moreover, the utility of discovery plans should be considered as early as practicable in proceedings in order to maximise the potential efficiencies of any discovery plan. The need for a discovery plan should be considered, for example, before the parties carry out extensive searches of their own documents in preparation for discovery—which can occur early in some cases where parties need time to search through large volumes of documents—as those searches might turn out to be unnecessary under an agreed discovery plan. Having the parties address this issue early in proceedings might also assist the Court in scheduling other interlocutory stages of the proceeding.

6.165 The ALRC recommends, therefore, that Federal Court practice notes should draw to the parties' attention the relevant Rule and provide that the parties will be expected to address, at the earliest practicable stage in proceedings, whether an order for the preparation of a discovery plan is likely to be sought.

Types of cases in which to use discovery plans

6.166 The ALRC considers that reform should ensure that orders to prepare a discovery plan are only sought by the parties and made by the Court in appropriate

---

219 *Federal Court of Australia Act 1976* (Cth) s 37P(3)(a).

220 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [6].

cases. As such an order would generate costs for all parties, this may not be proportionate to the issues in dispute in every case. Large, complex and high-stakes litigation—only a portion of the Federal Court's overall caseload—may be able to carry this cost while maintaining proportionality to the issue in dispute, and a discovery plan may generate efficiencies in such litigation. However, in other cases, the costs associated with discovery plans might be disproportionate to the issues in dispute—even though the planning process may be flexible enough to run at a lower cost in more straightforward cases.

6.167 The types of cases in which discovery plans might be appropriate could include cases where the parties should be seeking limited or non-standard discovery.[221] Large volumes of documents may require a limited scope of discovery to keep the number of documents within manageable bounds, and might also require a discovery plan to ensure a reasonable and proportionate process of discovery. Where parties seek standard or general discovery,[222] the proceeding should be routine or straightforward so as not to warrant the preparation of a discovery plan. However, in some cases, a discovery plan setting out the process by which a party will provide general or standard discovery may be appropriate.

6.168 While it may be a relevant consideration, the format in which discovery is to be given or in which the documents are stored should not determine whether discovery plans are used in proceedings. The preparation of a discovery plan might create efficiencies and enhance certainty in litigation, whether the documents are in an electronic or hardcopy format.

6.169 The ALRC does not recommend any provisions that will limit the circumstances in which the Court may consider it appropriate for the parties to prepare a discovery plan. While the Court has discretion to determine, in the circumstances of each case, whether to grant an application for an order requiring the parties to prepare a discovery plan, the proposed amendments to the *Federal Court Rules* will provide expressly that the Court may have regard to the nature and complexity of the proceedings, and deal with them in a manner proportionate to their nature and complexity.[223]

6.170 To support the operation of these rules in relation to orders for the preparation of discovery plans, the ALRC recommends that Federal Court practice notes should provide the factors likely to be relevant in an application for such orders. This might include, for example: the issues in dispute and the likely number of documents or volume of data that might be discoverable in relation to them; the format in which documents are stored or managed; the format in which documents would be produced; and the methods or technologies that might be used in the discovery process.

Highlighting the expectations of the parties and the Court

6.171 Where the Court orders parties to file a discovery plan, the expectations of the parties in carrying out such orders should be made clear. The ALRC recommends that

---

221 See *Federal Court Rules* (Cth) O 15 r 3. Compare Federal Court Rules (Cth) [Draft 2010] r 20.15.
222 See *Federal Court Rules* (Cth) O 15 r 2. Compare Federal Court Rules (Cth) [Draft 2010] r 20.14.
223 Federal Court Rules (Cth) [Draft 2010] r 1.31.

the *Federal Court Rules* should provide that, if the Court makes this order, the parties must discuss in good faith and endeavour to agree upon a practical and cost-effective discovery plan, having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them. Such reform would mandate the expectations of parties currently expressed in *Practice Note CM 6*, in cases where the Court has decided that a discovery plan should be filed. This will ensure that parties are cooperative and their actions transparent, within the context of adversarial litigation, in the development of a discovery plan.

6.172 The ALRC also considers that practice notes should provide additional support for the parties by setting out what is expected of them in conducting good faith discussions and endeavouring to agree on a discovery plan. The ALRC recommends that Federal Court practice notes should provide that the parties are expected to take into account relevant guidelines on the formation and content of discovery plans.[224]

6.173 The parties may also be expected to attend the Court to resolve any areas of disagreement, or to inform the Court of the reasonableness and proportionality of a proposed discovery plan. These expectations are consistent with the facilitative model of justice which frames this Report, as well as the overarching purpose of civil practice and procedure stated in s 37M of the *Federal Court of Australia Act.* It would not be possible for the Court or the parties to devise a reasonable and proportionate discovery plan without the assistance of the other. The ALRC recommends that Federal Court practice notes should also highlight these particular expectations of the parties in the development of a discovery plan.

6.174 The ALRC acknowledges that the efficiency and effectiveness of discovery plans will depend, to some extent, on the Court rejecting any plans that are unreasonable, uncertain or would incur disproportionate costs. The ALRC considers that the expectation of judges critically to assess discovery plans and make appropriate amendments is consistent with the operation of s 37M of the *Federal Court of Australia Act.*[225] In particular, s 37M of the Act states that the overarching purpose of civil practice and procedure includes 'the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute'.[226] In addition, proposed r 20.11 of the *Federal Court Rules* provides that a party may apply for discovery only if it is necessary for the just determination of issues in the proceedings.[227]

6.175 The requirement of s 37M of the *Federal Court of Australia Act*—to interpret and apply the *Federal Court Rules* in the way that best promotes the overarching purpose of civil practice and procedure—should ensure that judges are consistent in evaluating the adequacy of parties' discovery plans against this purpose. These

---

224 These guidelines are discussed below in Recs 6–6 to 6–8.

225 *Federal Court of Australia Act 1976* (Cth) s 37M(3) provides that civil practice and procedure provisions must be applied in the way that best promotes the overarching purpose of civil practice and procedure—namely, the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.

226 Ibid s 37M(2)(e).

227 Federal Court Rules (Cth) [Draft 2010] r 20.11.

provisions highlight the expectation of the Court to assess whether the terms of a discovery plan are proportionate and necessary in the circumstances of each case. The Court would be expected to reject any plan or make amendments to the plan to ensure that any discovery orders are necessary and proportionate. The clear expectation of the Court to scrutinise discovery plans should, in turn, ensure that parties do not present to the Court plans that are ill-considered or under-developed. Parties will be encouraged to plan a proportionate discovery process carefully if they are aware that the Court will take a critical eye to any proposed discovery plan.

Recommendation 6–1 The *Federal Court Rules* (Cth) should provide that, before the Federal Court of Australia makes an order for a party to give discovery, a party may apply for an order that the parties file a practical discovery plan setting out the matters on which the parties agree or disagree in relation to the scope and process of any discovery (a discovery plan order).

Recommendation 6–2 Federal Court of Australia practice notes should draw the parties' attention to the rule concerning a discovery plan order and provide that the Court will expect the parties to address, at the earliest practicable stage in proceedings, whether a discovery plan order is likely to be sought.

Recommendation 6–3 Federal Court of Australia practice notes should provide the factors likely to be relevant in an application for a discovery plan order. For example:

(a) the issues in dispute and the likely number of documents or volume of data that might be discoverable in relation to them;

(b) the format in which documents are stored or managed;

(c) the format in which documents would be produced; and

(d) the methods or technologies that might be used in the discovery process.

Recommendation 6–4 The *Federal Court Rules* (Cth) should provide that, if the Court makes a discovery plan order, the parties must discuss in good faith and endeavour to agree upon a practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.

Recommendation 6–5 Federal Court of Australia practice notes should provide that, if the Court makes a discovery plan order, the Court will expect the parties to:

(a) take into account relevant guidelines on the formation and content of discovery plans; and

(b) attend the Court to resolve any areas of disagreement in a discovery plan, or to inform the Court of the reasonableness and proportionality of the proposed discovery plan.

Guidelines on the formation and content of discovery plans

6.176 A number of submissions suggested that the use of discovery plans in Federal Court proceedings should be supported by greater guidance about the matters that should be addressed.[228] There were also suggestions made in several submissions about certain steps the parties should take in the process of developing discovery plans,[229] which might be included in such guidelines.

6.177 In addition, submissions provided examples of particular approaches to discovery that have proved effective and efficient, as well as certain methods which had caused inefficiencies in proceedings.[230] Such examples might also be captured in guidelines to inform the parties in relation to the reasonableness and proportionality of discovery plans, enhancing certainty of expectation and, in turn, consistency in practice.

6.178 As pointed out by Legg, the advantage of having these kinds of guidelines in place is that 'it will avoid matters being overlooked or omitted because of a lack of knowledge or inadvertence'.[231]

6.179 There is a variety of existing guidelines, checklists, directions and pro-forma documents relating to discovery in Australia and overseas which could be referenced in the development of a discovery plan, including:

- the Federal Court's *Pre-Discovery Conference Checklist* and draft Document Management Protocols;[232]
- the UK's *Practice Direction 31B* and *Electronic Documents Questionnaire*;[233]
- the Ontario Bar Association's *Checklist for Preparing a Discovery Plan* and *Annotated E-Discovery Checklist* (with suggestions on how to minimize e-discovery costs);[234]

228 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

229 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

230 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

232 See *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [11].

233 Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents*.

234 Ontario E-Discovery Implementation Committee, *Model Document #9: Checklist for Preparing a Discovery Plan* (2010) <http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx> at

- the US Electronic Discovery Reference Model;[235] and
- the *Practical Discovery Guidelines for Lawyers* published by the Association of Legal Support Managers (Queensland).[236]

6.180 In addition, proposed amendments to the *High Court Rules* (NZ) would provide a discovery checklist and examples of listing and exchange protocols.[237]

6.181 The following section of this chapter outlines a number of matters that could be included in guidelines for discovery plans, based on comments in submissions and existing guidance in relation to discovery.

Identification of repositories of documents

6.182 Contributors from a group of large law firms submitted that, as an initial step in the development of a discovery plan, the party giving discovery should provide the party seeking discovery with information about the places that might be searched and any issues with accessing those locations.[238] The submission proposed that, in respect of a party's own discovery, the party should be required to set out:

> - a summary of the location of potentially discoverable documents (eg archives, computer servers, email accounts, back up tapes) and the relationship between them (ie are the same documents likely to be stored in more than one place);
> - a list of individuals, employees, agents or contractors who may hold relevant documents (categories may therefore be framed by reference to the individuals who hold, created or received documents so as to avoid the need for a more extensive and costly search); and
> - any difficulties or issues that they foresee arising with the discovery of documents. For example costs, time, confidentiality, accessibility of ESI and any potential gaps in ESI where, for example, emails are deleted after a certain amount of time.[239]

6.183 Similarly, the Law Society of New South Wales submitted that a 'search protocol' should be exchanged between the parties which identifies the possible repositories of discoverable documents:

> Such a protocol document would:
>
> - identify each and every database which may contain relevant discoverable material; and

---

3 March 2011; Ontario E-Discovery Implementation Committee, *Model Document #8: Annotated E-Discovery Checklist* (2010) <http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx> at 3 March 2011.

235 *EDRM: The Electronic Discovery Reference Model* (2010) <http://www.edrm.net> at 25 October 2010.

236 Association of Legal Support Managers (Qld), *Practical Discovery Guidelines for Lawyers* (2010) <http://www.alsm.com.au/> at 3 March 2011.

237 *High Court Amendment Rules (No 1) 2011* (NZ), Schedule.

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

239 Ibid.

- record detailed information regarding the level of effort in terms of time and cost that would be required in order to retrieve, review and produce discoverable material from each of those identified document repositories.[240]

6.184 The Law Council also suggested that planning a discovery process should involve 'identifying the systems used and types of records held by the client, and the physical custodians'.[241]

6.185 The Law Society argued that such planning would 'enable the Court to make determinations that reduce costs by ensuring that the parties are only required to undertake reasonable and proportionate searches having regard to a cost/benefit analysis'.[242]

6.186 As noted by the Law Council and in other submissions, parties might use the *Electronic Documents Questionnaire* attached to *Practice Direction 31B* (UK) to identify potential repositories of discoverable documents.[243] The use of this questionnaire is also recommended in the *Practical Discovery Guidelines for Lawyers* published by the Association of Legal Support Managers (Queensland).[244]

6.187 Another way for the party seeking discovery to pinpoint potential repositories of relevant documents might be to conduct an oral examination of representatives of the party giving discovery about their document management systems and record retention policies. Some submissions suggested that the Court and the opposing party should be able to examine a party as to their knowledge and possession of relevant documents.[245] For example, the Australian Government Solicitor submitted that:

> at a theoretical level at least, we can see the use of depositions directed to identifying evidence and documents that an opposing party may hold as a potentially useful adjunct to the discovery process. Depositions may allow a party who is considering seeking discovery to better assess what documents the other party has in its possession and whether it is relevant to a material issues in dispute. This could assist in reducing speculative discovery. One potential advantage of depositions is that answers are given on oath which may give a party seeking discovery the confidence to be more precise in targeting documents to be discovered without fear that potentially relevant documents or classes of documents might be missed.[246]

6.188 The use of pre-trial oral examinations is discussed further in Chapter 10.

---

240 Law Society of NSW, *Submission DR 22*, 28 January 2011.
241 Law Council of Australia, *Submission DR 25*, 31 January 2011.
242 Law Society of NSW, *Submission DR 22*, 28 January 2011.
243 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
244 Association of Legal Support Managers (Qld), *Practical Discovery Guidelines for Lawyers* (2010) <http://www.alsm.com.au/> at 3 March 2011.
245 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; C Enright and S Lewis, *Submission DR 03*, 12 January 2011.
246 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

Identification of relevant categories of documents

6.189 The Federal Court's *Pre-Discovery Conference Checklist* currently provides that parties should agree on the scope of discovery having regard to *Practice Note CM 5*, which asks whether discovery should be limited to defined categories of documents.[247]

6.190 The Law Council submitted that standard discovery in intellectual property disputes should be limited 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 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.[248]

6.191 In relation to patent cases, the Law Council referred to the decision in *Wellcome Foundation v VR Laboratories (Aust) Pty Ltd*, in which Aitkin J commented that:

> [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.[249]

6.192 The Law Council submitted that, within these categories it would expect the following documents to be discovered:

- documents summarising the invention;
- the inventor's notebooks; and
- minutes of relevant meetings of or with the inventor.[250]

6.193 In relation to trade mark cases, the Law Council submitted that standard discovery should exclude documents relating to the extent of use of a mark or its commercial success, unless this is a real issue in dispute—for example, in cases under ss 60 or 120(3) of the *Trade Marks Act 1995* (Cth).[251] It also submitted that documents relevant to the quantum of damages in trade mark cases should be excluded from discovery until after a determination of infringement has been made.[252]

Identification of excluded documents

6.194 The Federal Court's *Pre-Discovery Conference Checklist* provides that parties should consider any sources or categories of discoverable documents that are to be excluded from the conduct of a reasonable search.[253] As discussed in Chapter 5, this

---

247 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [2.1]; *Practice Note CM 5: Discovery (Federal Court of Australia)*, [1(c)].
248 Law Council of Australia, *Submission DR 25*, 31 January 2011.
249 Ibid, citing *Wellcome Foundation Ltd v VR Laboratories (Aust) Pty Ltd* [1981] HCA 12.
250 Ibid.
251 Ibid.
252 Ibid.
253 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [3.1].

might include, for example, documents that were once but have not been in the parties' control for more than six months prior to the commencement of proceedings.

6.195 The group of large law firms submitted that, unless the Court ordered otherwise, discovery should be limited to data that was 'reasonable accessible' in the course of the discovering party's business.[254] The group also argued that, if the party seeking discovery requested data that was not 'reasonably accessible', it should be required to demonstrate that its discovery was necessary.[255]

6.196 A similar proposal was made by Allens Arthur Robinson, arguing that a rebuttable presumption should be imposed that certain categories of documents need not be searched or produced in the absence of demonstrated need—such as documents stored on backup tapes.[256]

6.197 Excluding data on backup tapes from discovery in appropriate cases would be consistent with the approach taken in the US. The *Federal Rules of Civil Procedure* provide that a party need not discover electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.[257] This is in line with the principles for electronic document production, published by the Sedona Conference in the US:

> The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.[258]

6.198 The group of large law firms also set out a number of relevant factors that the Court might take into account in determining the issue of whether requested documents are 'reasonably accessible'. The Court might consider, for example:

(a) the purposes for which the data is being held in its current format (eg why has it been stored in this way/for what purpose?);

(b) the party's historical use of the data (eg do they access it regularly?);

(c) the format of the data (eg data which is stored in such a way as to require forensic expertise to restore it to usable format); and

(d) the method(s) required to access the data and the time and costs involved in accessing the data.[259]

---

254 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
255 Ibid.
256 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
257 *Federal Rules of Civil Procedure 2009* (US) r 26(b)(2).
258 The Sedona Conference, *The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production* (2004) <http://www.thesedonaconference.org/> at 18 March 2011.
259 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

6.199 When considering whether the discovery of documents that are not 'reasonably accessible' is justified in the circumstances, the court might consider, for example:

> (a) whether the burden or expense outweighs the data's likely benefit or relevance;
>
> (b) whether the request is unduly cumulative or duplicative;
>
> (c) the quantity of data involved;
>
> (d) a party's inability to obtain the same or equivalent information from more accessible sources;
>
> (e) the magnitude of the issues at stake in the litigation; and
>
> (f) the resources of the parties involved.[260]

6.200 Where the Court decides that discovery should be given of documents that are not 'reasonably accessible', it was argued that the Court should consider 'shifting' the cost of accessing the data on to the requesting party.[261] This issue, and the factors which the Court might consider in this regard, are discussed in Chapter 9.

Strategies for reasonable searches

6.201 The Federal Court's *Pre-Discovery Conference Checklist* currently provides that parties should agree upon the strategies they will use for conducting a reasonable search to locate discoverable documents.[262]

6.202 A range of computer software can be used to facilitate a 'reasonable search' of electronic databases of documents, as one submission explained:

> Advanced concept searching software, and more recently predictive coding technology (which is much more accurate than keyword searching), can quickly process large quantities of data and assist in identifying records relating to particular issues. This can be used not only to eliminate clearly irrelevant material, but can significantly reduce the amount of review time required.[263]

6.203 A number of submissions suggested that discovery plans should specify the terms or functionality of any automated searches which parties will use to interrogate electronic databases of documents.[264] For example, Allens Arthur Robinson submitted that, where the use of automated searches is appropriate, the parties should agree upon:

- the grouping of documents by concept and the methodology for such categorisation; and
- the nature of searches which may be carried out.[265]

---

260 Ibid, citing r 26(b)(2) of the *Federal Rules of Civil Procedure* (US).

261 Ibid, citing *Zubulake v UBS Warburg, 229 FRD 422 (SDNY, 2004)*, [32] and [323], where the court considered whether and to what extent the cost of restoring backup tapes should be shifted to the party requesting them.

262 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [3.1].

263 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

264 Ibid; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

265 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

6.204 Allens Arthur Robinson also suggested that parties should agree to use a common search engine when carrying out any agreed automated searches for documents. This would ensure that:

> the results obtained from parties' searches are as consistent as is technically possible. This should make parties more confident of the search results and may reduce disputes and related expenses, particularly when used as an exclusionary tool.[266]

De-duplication of documents

6.205 Allens Arthur Robinson proposed that guidelines should establish standards for the de-duplication of documents, to form a basis for the market to create a uniform method of eliminating duplicate documents from discovery, explaining that:

> Currently, de-duplication is carried out using an algorithm such as MD5 or SHAH1. Each electronic file receives a unique value with such values used to identify and eliminate duplicates from a data set. Presently, there are a number of different software applications and methods used to create these unique MD5 and SHAH1 values. The effect of this is that while a party can eliminate duplicates from their own data set, it is generally not possible to eliminate duplicates across other parties' documents. Therefore, parties may well need to review documents received from an opposing party which are, in fact, duplicates of their own documents.[267]

6.206 To address this problem, Allens Arthur Robinson proposed that practice notes should prescribe certain fields that should be used to describe documents—such as those listed in sch 8 of the *Advanced Document Management Protocol* annexed to *Practice Note CM 6*—as well as the order in which those fields should be used in the process of identifying duplicate documents.[268] The intention would be:

> over time, for software developers to modify their tools so that the prescribed fields are utilised as a matter of course facilitating a consistent de-duplication process across the industry.[269]

Timetable and estimated costs of discovery

6.207 The Federal Court's *Pre-Discovery Conference Checklist* provides that parties should agree on a timetable for discovery and exchange their best preliminary estimate of the costs associated with discovery.[270]

6.208 NSW Young Lawyers commented that discovery plans should specify, in particular, a timeline for the completion of discovery by the parties.[271]

---

266 Ibid.
267 Ibid.
268 Ibid.
269 Ibid.
270 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [6].
271 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

6.209 Several submissions supported including estimates of costs in discovery plans.[272] For example, the Law Council saw value

> in the practitioners for a 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 be 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.[273]

6.210 The Association of Legal Support Managers (Qld) commented that:

> arguments as to costs will be significantly reduced if the parties exchange estimates of the costs of discovery at an early stage and *before* those costs are incurred. By exchanging such details, the parties and the Court will be better informed to make an assessment as to whether the proposed approach is proportionate. The Court could then make an informed decision as to whether costs should borne by the requesting party.[274]

6.211 The Association also noted that there are tools available which can provide a 'snapshot' of the number and types of records held by a party—which can be used to estimate the likely time and cost of discovery.[275]

ALRC's views

6.212 The ALRC considers that establishing practical guidelines will enhance the accessibility of discovery plans. The provision of information enables litigants to understand their position, the options they have and to decide what steps to take. Decisions made by parties and the Court as to the terms of discovery plans would have a direct effect on the course of litigation and the resolution of disputes. In addition to helping parties to develop effective and efficient discovery plans, guidelines may also play a role in assisting the Court when evaluating the appropriateness of a proposed discovery plan.

6.213 The ALRC recommends that Federal Court practice notes should provide a detailed set of best-practice guidelines on the formation and content of discovery plans. These guidelines should: highlight particular matters to be addressed in discovery plans; suggest various ways in which those issues could be explored; and provide guidance as to the best practice for addressing those issues.

6.214 For example, guidelines should direct parties to identify, in the early stages of the planning process, repositories or custodians of potentially discoverable documents. The guidelines could also refer to the UK's *Electronic Documents Questionnaire*, or

---

272 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

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

274 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

275 Ibid.

the use of pre-trial oral examinations, as particular means by which this might be achieved.[276]

6.215 The guidelines should also, for example, direct litigants to focus the scope of discovery on particular categories of document relevant to the crucial issues in dispute. In this respect, the guidelines could suggest various procedures through which the parties might determine which issues in proceedings matter most—for example, as discussed above, parties could provide an outline of the evidence on which they expect to rely at trial, or exchange key documents of particular importance in the proceeding.[277]

6.216 Where possible, these guidelines should identify specific categories of documents that are typically relevant in certain types of cases for litigants to incorporate into discovery plans, including, for example, in relation to patent disputes, research and development documents created before the priority date.[278]

6.217 At the same time, the recommended guidelines should direct litigants to identify 'negative' categories of documents—which will not be searched for or discovered in proceedings.[279] In this regard, guidelines might encourage parties to identify repositories of documents that are not 'reasonably accessible'[280]—for the purposes of including provisions in discovery plans explicitly excluding these repositories of documents from the conduct of a 'reasonable search'.[281] This might include, for example, documents stored on backup tapes or data recovery systems.

6.218 The ALRC considers that guidelines will provide assistance to the parties by setting out relevant factors to be taken into account when considering whether documents are 'reasonably accessible' and, if not, whether they should be excluded in the conduct of a reasonable search or whether the party requesting discovery should bear the cost of accessing those documents.[282] These factors might include, for example, the burden on the party giving discovery and the availability of the information from other sources, the relevance of the requested documents and the magnitude of the issues in dispute, and the resources of the parties.

6.219 In particular, the ALRC considers that guidelines should direct parties to specify in their discovery plan the terms of any proposed strategies for conducting a reasonable search, and provide guidance as to the various strategies that parties might use in these endeavours—such as concept searches and predictive coding.

6.220 Guidelines might usefully outline best practice for the de-duplication of documents, to encourage parties to adopt the same practices in their discovery plans and, through that consistency, ensure that duplicate documents are more readily

---

276 See Ch 10.
277 See Ch 5.
278 Law Council of Australia, *Submission DR 25*, 31 January 2011.
279 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
280 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
281 *Federal Court Rules* (Cth) O 15 r 2(3).
282 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

identified and removed.[283] Similarly, best-practice examples of document management protocols could be provided in new guidelines—building on those annexed to current *Practice Note CM 6*—to ensure that parties include such protocols in their discovery plans and achieve consistency in the format in which the parties produce or exchange documents.

6.221 Other topics that the guidelines could address in discovery plans include the redaction of privileged documents, the disclosure of metadata and the form in which the party giving discovery will provide a list of documents. As suggested in Chapter 5, the guidelines could direct parties to consider the application of standard discovery criteria. In particular, parties might address whether a particular kind of 'relevance' test should be specified in discovery plans, and whether any limitations should be prescribed in discovery plans for documents no longer in a party's possession, custody or power.

6.222 Importantly, in the ALRC's view, guidelines should ensure that parties include a timetable and estimate of costs in their discovery plans—as currently suggested in the Federal Court's *Pre-Discovery Conference Checklist*.[284] The ALRC considers that new guidelines could also provide parties with direction as to how time and costs estimates might be formulated—for example, through the use of software to measure the number and types of documents held by a party.

6.223 The recommended guidelines would serve an important educative function in terms of what is best practice in the formation and content of discovery plans. This would not only guide the parties in developing effective and efficient discovery plans but provide a valuable resource for the Court in assessing the reasonableness and proportionality of the parties' proposals. This would enhance certainty of expectation and, in turn, consistency in practice.

6.224 The development of the recommended guidelines should involve contributions from all persons with an interest in discovery in Federal Court proceedings. That is, establishing these guidelines in practice notes is not a matter for the Federal Court alone—it should involve the legal profession, litigants and the litigation support industry, among others.

6.225 Chapter 8 considers the potential for judges to refer discovery issues to a registrar or an independent referee, which might involve such persons in the development of a proposed discovery plan for the Court's approval.

Recommendation 6–6 Federal Court of Australia practice notes should provide a detailed set of best-practice guidelines on the formation and content of discovery plans.

283 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
284 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [6].

Recommendation 6–7 The guidelines on the formation of discovery plans in Recommendation 6–5 should direct parties, when forming a discovery plan, to identify where practicable:

(a) likely repositories or custodians of relevant documents—for example, by completing a questionnaire or under pre-trial oral examination;

(b) crucial issues in dispute—for example, by outlining the evidence on which the parties intend to rely or by exchanging critical documents;

(c) search strategies the parties can use to carry out a reasonable search for discoverable documents—such as concept searches or predictive coding;

(d) repositories of documents that are not 'reasonably accessible', whether discovery of such documents is justified in the proceedings and, if so, whether the party seeking discovery should bear the costs of accessing the documents—for example, documents stored on backup tapes or data recovery systems;

(e) whether metadata should be discovered, and the methods and technologies that may be used to preserve the integrity of metadata;

(f) methods and technologies that may be used to identify and remove duplicate documents in the discovery process; and

(g) methods and technologies that can be used to estimate the likely time and cost of discovery.

Recommendation 6–8 The guidelines on the content of discovery plans in Recommendation 6–5 should direct parties to include in a discovery plan:

(a) the repositories or custodians of documents to be searched in the discovery process;

(b) specific categories of documents, relevant to the crucial issues in dispute, to be searched for in the discovery process;

(c) specific categories of metadata, relevant to the crucial issues in dispute, to be searched for in the discovery process, and the methods used to extract the metadata;

(d) the terms or functionality of any strategies to be used for carrying out a reasonable search in the discovery process—for example, the keywords or concepts to be used in automated searches;

(e) any repositories of documents to be excluded from the conduct of a reasonable search in the discovery process—for example, backup tapes or data recovery systems;

(f) the methods and technologies to be used to de-duplicate discoverable documents;

(g) the methods and technologies to be used to redact privileged documents;

(h) the form in which the party giving discovery will provide a list of documents;

(i) the format in which documents will be produced for inspection—including examples of document management protocols for the production of electronic documents in proceedings; and

(j) a timeframe and an estimate of the costs of discovery.

Review of discovery reform in the Federal Court

6.226 In responding to the proposal in the Consultation Paper concerning the collection of data on the proportionality of discovery costs,[285] a number of submissions commented that this would also be necessary to evaluate any reforms to discovery process.[286] For example, one submission remarked that 'the collection of data is essential to the accurate assessment of the substantive impact of any scheme, and is a useful process in its own right'.[287]

6.227 In support of data collection on discovery costs, the Public Interest Advocacy Centre submitted that it:

> should be part of a comprehensive and ongoing review of the federal civil justice system as it is important that questions about the cost of discovery be weighed against issues such as equity and perception of justice.[288]

6.228 Legg suggested that concerns about the costs incurred in the development of discovery plans should be monitored through the collection of relevant data.[289]

6.229 Enright and Lewis suggested that the impact of any discovery reform needs to be tested and, in doing so, evaluation of the reform should canvass the experiences of judges who utilise proposed procedures, their feedback on the implementation of the reform, and their suggestions for addressing any concerns.[290]

ALRC's views

6.230 It is important that the operation of discovery reform is regularly monitored and assessed to determine whether these changes are achieving the overarching purpose of civil practice and procedure—namely, the just resolution of disputes according to law

---

285 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 3–7.

286 Law Society of NSW, *Submission DR 22*, 28 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

288 Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

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

290 C Enright and S Lewis, *Submission DR 03*, 12 January 2011.

as quickly, inexpensively and efficiently as possible.[291] In particular, the implementation of Recommendations 6–1 to 6–5 should be assessed to examine whether the use of discovery plans makes litigation more expensive and, if so, whether that additional expense is justified by the efficiencies achieved through this procedure.

6.231 A particular issue to be assessed in relation to discovery plans would be whether parties are actively seeking to use discovery plans—or whether judges are actively exercising discretion to require the use of discovery plans—in appropriate cases. On the one hand, the use of discovery plans in inappropriate cases may impose disproportionate costs on the parties. On the other hand, failing to use discovery plans in appropriate cases might deny the parties efficiencies in the proceedings. An assessment of these issues might inform further consideration of whether prescriptive measures should be introduced to ensure that discovery plans are utilised in suitable cases.

6.232 Ongoing review and revision of the discovery plan guidelines[292] also seems necessary, to keep pace with developments in technologies used in the discovery of documents and to reflect current best-practice.

6.233 The Federal Court would be an appropriate body to monitor and assess the operation of discovery plans and supporting guidelines. In particular, the experience of judges who have utilised discovery plans in proceedings would be an important measure of these instruments. Monitoring and assessment should also involve the legal profession, litigants and the litigation support industry. The evaluation of discovery plans could also benefit from the collection of relevant data as referred to in Recommendation 3–1.

Recommendation 6–9 The Federal Court of Australia should monitor and assess whether the reforms in Recommendations 6–1 to 6–8, if implemented, help achieve the overarching purpose of civil practice and procedure set out in s 37M of the *Federal Court of Australia Act 1976* (Cth).

Effective document management systems

6.234 The Association of Legal Support Managers (Qld) proposed that reform should require corporate litigants to adopt appropriate record management systems.[293] The Association argued that the 'root cause' of problems with discovery is the disorganised manner in which many litigants keep their records:

> Perhaps the single greatest challenge in discovery is how to effectively and efficiently deal with the ever increasing volume of records being retained by organisations (noting that, due to email and social networking, many of the records retained may not relate directly to the business at all) ... Compounding the difficulties faced when dealing with these increasing number of records is the fact that many organisations do

291 *Federal Court of Australia Act 1976* (Cth) s 37M.
292 Recs 6–6 to 6–8.
293 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

> not have in place systems for managing records. Accordingly, when a lawyer wishes to undertake a review of records for the purpose of case preparation or discovery, the lawyer often encounters large numbers of disorganised records and is tasked with having to create a system for managing those records before any consideration can be given to commencing a review.[294]

6.235 Australian Lawyers Alliance also observed that:

> The reality is that most businesses organise their information, electronic or otherwise, in a way that is suitable to them and there is no thought of litigation at the time this is carried out. It is one of the main reasons why the preservation, collection and discovery of documentation is such an onerous process.[295]

6.236 It noted that 'it may not be possible for a party (specifically the respondent) to advise how it can produce documents if they are scattered over a number of personal computers without any formal system in place to retrieve them, other than simply going through what they have retained'.[296]

ALRC's views

6.237 Effective information management is an essential pre-cursor to an efficient discovery process.[297] The ALRC supports initiatives aimed at encouraging litigants to adopt functional document management systems, given the potential for consequential benefits in the discovery process.

6.238 However, the ALRC considers that reform imposing requirements on prospective litigants to manage their records effectively, is beyond the scope of the Terms of Reference for this Inquiry.[298] Such reform would have an impact on corporations and individuals outside the context of litigation in federal courts, by regulating the conduct of everyday business in relation to information management.

Other federal courts

High Court of Australia

6.239 The High Court will determine what procedure is to be adopted for discovery of documents in any proceeding and may give directions in those cases.[299] In the Consultation Paper, the ALRC asked what issues, if any, have arisen in the procedures adopted by the High Court for the discovery of documents in proceedings.[300]

---

294 Ibid.
295 Australian Lawyers Alliance, *Submission DR 11*, 19 January 2011.
296 Ibid.
297 *EDRM: The Electronic Discovery Reference Model* (2010) <http://www.edrm.net> at 25 October 2010.
298 See Ch 1.
299 *High Court Rules 2004 (Cth)* r 6.01.
300 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–1.

6.240 The Law Council submitted that it was:

> 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.[301]

6.241 The ALRC makes no recommendations for reform concerning the procedures for discovery adopted in High Court proceedings. As discussed in Chapter 5, the need for discovery of documents is unlikely to arise in the High Court and, as such, there is no need for reform.

Family Court of Australia

6.242 As outlined in Chapter 4, the *Family Law Rules 2004* (Cth) impose an obligation of full and frank disclosure on parties to Family Court proceedings and provide specific means by which that obligation must be fulfilled. In the Consultation Paper, the ALRC asked what issues, if any, arise in the procedures prescribed for disclosure of documents in proceedings before the Family Court.[302]

6.243 The Law Council submitted that disclosure procedures in the Family Court are generally working well, and the procedures prescribed in the *Family Law Rules* are operating effectively to reinforce a culture of full and frank disclosure.[303]

6.244 The Family Court submitted that there are a number of theories as to why the comprehensive obligation to make full and frank disclosure works well in the Family Court, but one probable reason is the application of the less adversarial process.[304] The Court explained that it has taken an activist approach to case management in child-related matters, which has enhanced the operation of disclosure obligations in those proceedings:

> Over the last decade the Family Court of Australia developed, piloted and implemented a less adversarial approach to hearing children's cases, known as the Less Adversarial Trial (LAT). LAT is a judge-directed and controlled process; one that has been described as having 'significant implications, not only for the conduct of family law litigation but also for the conduct of litigation as a whole'. Crucial to the model is the early identification of issues by the trial judge and the ability of the trial judge to confine the evidence to such issues within a procedure whereby the best interests of the children, rather than parental grievances, are the focus.[305]

6.245 The features of LAT were given legislative force through the enactment of div 12A of the *Family Law Act 1975* (Cth),[306] which contains principles for the conduct of child-related proceedings. The second principle, found in s 69ZN(4) of the Act, is that 'the Court is to actively direct, control and manage the conduct of the

---

301 Law Council of Australia, *Submission DR 25*, 31 January 2011.
302 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–11.
303 Law Council of Australia, *Submission DR 25*, 31 January 2011.
304 Family Court of Australia, *Submission DR 23*, 31 January 2011.
305 Ibid.
306 Introduced in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

proceedings'.[307] The Family Court noted that the principal benefit of this approach was that:

> the *actual* issues in dispute between parties can be properly identified and narrowed. As a consequence, the discovery process in children's proceedings may also be limited in scope as the parties are able to focus on the discrete issues that require judicial determination.[308]

6.246 The ALRC considers that the comprehensive provisions of the *Family Law Act* and *Family Law Rules*, setting out the procedures through which full and frank disclosure is given, are operating successfully and do not require any reform. In the ALRC's view, the procedural steps set out in the Act and the Rules in relation to the duty of full and frank disclosure promote the principle of accessibility in the Family Court. Initiatives that create obligations should include mechanisms to allow people to understand and carry out those obligations.[309] By setting out the means by which parties must fulfil their duty to give full and frank disclosure, the Act and the Rules provide practical guidance to assist parties in discharging their duties in relation to disclosure, and promote certainty of expectations of the parties.

Federal Magistrates Court of Australia

6.247 As noted in Chapter 4, the Federal Magistrates Court was established to deal with smaller and simpler cases than those conducted in the Federal Court or Family Court.[310] As such, procedures for disclosure or discovery of documents in the Federal Magistrates Court reflect streamlined versions of the mechanisms utilised in Federal Court and Family Court proceedings. The Consultation Paper asked what issues, if any, arise in the procedures prescribed for disclosure of documents in proceedings before the Federal Magistrates Court.[311]

6.248 The Law Council suggested that, in the context of family law matters, disclosure procedures adopted in the Federal Magistrates Court are inadequate by comparison to those prescribed in the Family Court.[312] For example:

> 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*.[313]

---

307 *Family Law Act 1975* (Cth) s 69ZN(4).
308 Family Court of Australia, *Submission DR 23*, 31 January 2011. Emphasis in the original.
309 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 62.
310 *Federal Magistrates Act 1999* (Cth), Explanatory Memorandum.
311 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–12.
312 Law Council of Australia, *Submission DR 25*, 31 January 2011.
313 Ibid.

6.249 The submission also noted that there are no mandatory pre-action procedures such as those prescribed in the *Family Law Rules*, which may facilitate full and frank disclosure of documents.[314]

6.250 On the other hand, in many cases before the Federal Magistrates Court, the parties will make appropriate, informal arrangements for the disclosure of documents.[315] This may be possible due in part to the nature of the smaller, less complex matters that the Court is intended to handle in its jurisdiction.

6.251 There were no issues raised in the course of this Inquiry in relation to discovery of documents in general civil law matters—that is, anything other than family law matters—in the Federal Magistrates Court.

6.252 The ALRC considers that the disclosure procedures adopted in the Federal Magistrates Court's family law jurisdiction are consistent with the principle of appropriateness—in that the justice system should be structured to create incentives to encourage people to resolve disputes as the most appropriate level.[316] In the ALRC's view, disclosure procedures in the Federal Magistrates Court are appropriate for the simple and straightforward cases that the Court is intended to handle.

6.253 The ALRC does not support reform to adopt in the Federal Magistrates Court the comprehensive procedures prescribed in the Family Court in relation to the duty of full and frank disclosure. Such reform would compromise current incentives for parties to commence proceedings in the appropriate jurisdiction according to the complexity and needs of each case.

---

314 Ibid.

315 Federal Magistrates Court, *Consultation*, 13 August 2010.

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

7. Judicial Case Management and Training

Contents

Summary

7.1 This chapter considers whether increased judicial case management would help control discovery in federal litigation. First, it considers whether the *Federal Court of Australia Act 1976* (Cth) should be amended to prescribe in detail the Court's broad case management powers in relation to discovery. Arguably, this would serve to ensure that the Court, parties and practitioners remain aware of the Court's extensive powers to control discovery. The ALRC sees considerable potential benefit, and little harm, in this reform. However, in light of the limited support the proposal received and the limited evidence that it would have the intended effect, no such recommendation is made.

7.2 The Court has extensive case management powers. Encouraging the judiciary to take a more robust approach to its existing powers to control discovery is the focus of the second half of this chapter. The ALRC recommends that the Federal Court and judicial education bodies develop and maintain a continuing judicial education and training program specifically dealing with case management of the discovery process. The ALRC recommends that this program consider the appropriate and targeted use of the tools—such as discovery plans—that are considered throughout this Report. Training in methods of discovering electronically-stored information (ESI) is singled out as being particularly needed.

Judicial case management

7.3 Stronger judicial control over the scope and process of discovery has been singled out by some commentators as critical to discovery reform. For example, in its 2006 report on case management innovations in the Federal Court, the Law Council of Australia (Law Council) recommended 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'.[1] These aspirations were taken up by the Hon Justice Ray Finkelstein in 2008 at a workshop on case management reforms:

> The key to discovery reform lies in active and aggressive judicial case management of the process. The most effective cure for spiralling costs and voluminous productions of documents is increased judicial willingness to just say no.[2]

7.4 Other Australian jurisdictions, most recently Victoria, have also tied discovery reform to stronger judicial case management. The Victorian Law Reform Commission (VLRC) stated, in its *Civil Justice Review*, that 'increased judicial management of the disclosure process ... will greatly assist in keeping the scope of disclosure focused and reduce delay and costs'.[3] Other jurisdictions have also concluded that improvements to the discovery process are a matter for judicial case management. For example, the Hong Kong Chief Justice's Working Party on Civil Justice Reform found 'a broad consensus that the excesses of discovery ought to be tackled by appropriate case management by the courts'.[4]

Case management powers

7.5 The VLRC's *Civil Justice Review* recommended 'the introduction of more clearly delineated and specific powers to facilitate proactive judicial case management in relation to discovery'.[5] Accordingly, the report included draft provisions based in part on the *Rules of the Supreme Court 1971* (WA) and the *Supreme Court Civil Rules 2006* (SA). The substance of these provisions was enacted in s 55 of the *Civil Procedure Act 2010* (Vic). Section 55 provides that 'a court may make any order or give any directions in relation to discovery that it considers necessary or appropriate' and then gives an extensive, but non-exhaustive, list of directions that Victorian courts may give in relation to discovery. A court may make any order or give any directions:

> (a) requiring a party to make discovery to another party of—
>
> (i) any documents within a class or classes specified in the order; or
>
> (ii) one or more samples of documents within a class or classes, selected in any manner which the court specifies in the order;
>
> (b) relieving a party from the obligation to provide discovery;
>
> (c) limiting the obligation of discovery to—
>
> (i) a class or classes of documents specified in the order; or
>
> (ii) documents relating to one or more specified facts or issues in dispute;

---

1 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), Proposal 5(a).

2 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, 12.

3 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

4 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), [500].

5 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

(d) that discovery occur in separate stages;

(e) requiring discovery of specified classes of documents prior to the close of pleadings;

(f) expanding a party's obligation to provide discovery;

(g) requiring a list of documents be indexed or arranged in a particular way;

(h) requiring discovery or inspection of documents to be provided by a specific time;

(i) as to which parties are to be provided with inspection of documents by another party;

(j) relieving a party of the obligation to provide an affidavit of documents;

(k) modifying or regulating discovery of documents in any other way the court thinks fit.

7.6 Section 55(3) of the *Civil Procedure Act* also provides that a court may make any order or give any directions requiring a party discovering documents to:

(a) provide facilities for the inspection and copying of the documents, including copying and computerised facilities;

(b) make available a person who is able to—

(i) explain the way the documents are arranged; and

(ii) help locate and identify particular documents or classes of documents.

7.7 While the *Federal Court of Australia Act* does not include this level of detail, the Federal Court does have authority to make such orders in relation to discovery. However, the source of the Federal Court's power to make discovery orders is largely found in subordinate legislation—O 15 of the *Federal Court Rules*—or in its inherent jurisdiction.

7.8 The *Federal Court of Australia Act* was amended in 2009 to provide 'clear legislative direction and support to judges so that they can confidently employ active case management powers'.[6] While the Act does not specify the kinds of orders the Court may make in relation to discovery, it provides that the Court may, among other things, 'require things to be done' and 'set time limits for the doing of anything, or the completion of any part of the proceeding'.[7]

7.9 Greater specification of the Court's case management powers in legislation would not necessarily increase the Court's powers. However, it might raise awareness of the ways in which discovery can be managed and encourage greater and more effective use of case management powers. As the VLRC reasoned in its *Civil Justice Review*:

---

6 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), 3. *Federal Court of Australia Act 1976* (Cth) s 37P was enacted by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).

7 *Federal Court of Australia Act 1976* (Cth) s 37P(3)(a), (b).

> Expanding discovery case management powers should encourage the judiciary and the parties to be more proactive in confining the scope of discovery and ensuring that the process assists rather than hinders the administration of justice.[8]

Sanctions

7.10 A court's powers to sanction non-compliance with discovery orders may also be prescribed in more or less detail in legislation. The Victorian *Civil Procedure Act* sets out a range of orders the Court may make, without limiting the Court's power to sanction a failure to comply with discovery obligations or other conduct amounting to abuse of the discovery process.[9] The VLRC argued that:

> More clearly defined sanctions will also encourage parties to work towards the efficient resolution of discovery issues and discourage the use of discovery as an adversarial tool.[10]

7.11 Section 56 of the *Civil Procedure Act* now provides:

> (1) A court may make any order or give any direction it considers appropriate if the court finds that there has been—
>
> (a) a failure to comply with discovery obligations; or
>
> (b) a failure to comply with any order or direction of the court in relation to discovery; or
>
> (c) conduct intended to delay, frustrate or avoid discovery of discoverable documents.
>
> (2) Without limiting subsection (1), a court may make an order or give directions—
>
> (a) that proceedings for contempt of court be initiated;
>
> (b) adjourning the civil proceeding, with costs of that adjournment to be borne by the person responsible for the need to adjourn the proceeding;
>
> (c) in respect of costs in the civil proceeding, including indemnity cost orders against any party or a legal practitioner who is responsible for, or who aids and abets, any conduct referred to in subsection (1);
>
> (d) preventing a party from taking any step in the civil proceeding;
>
> (e) prohibiting or limiting the use of documents in evidence;
>
> (f) in respect of facts taken as established for the purposes of the civil proceeding;
>
> (g) awarding compensation for financial or other loss arising out of any conduct referred to in subsection (1);
>
> (h) in respect of any adverse inference arising from any conduct referred to in subsection (1);

---

8 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 471.

9 *Civil Procedure Act 2010* (Vic) s 56. See also *Federal Court of Australia Act 1976* (Cth) s 37P(6).

10 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 473.

(i) compelling any person to give evidence in connection with any conduct referred to in subsection (1), including by way of affidavit;

(j) dismissing any part of the claim or defence of a party who is responsible for any conduct referred to in subsection (1);

(k) in relation to the referral to an appropriate disciplinary authority for disciplinary action to be taken against any legal practitioner who is responsible for, or who aids and abets, any conduct referred to in subsection (1).

7.12 In the *Federal Court of Australia Act*, the sanction powers are equally broad, but outlined in less detail. Section 37P(2) provides that, if a party fails to comply with a direction given by the Court or a judge, the Court or judge 'may make such order or direction as the Court or Judge thinks appropriate'.[11] In particular, the Court or judge may:

(a) dismiss the proceeding in whole or in part;

(b) strike out, amend or limit any part of a party's claim or defence;

(c) disallow or reject any evidence;

(d) award costs against a party;

(e) order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.[12]

7.13 The Federal Court's power to make costs orders and to refer legal practitioners to appropriate disciplinary authorities for failures to comply with discovery obligations are discussed, respectively, in Chapters 9 and 12 of this Report.

Submissions and consultations

7.14 In the Consultation Paper, the ALRC proposed that pt VB of the *Federal Court of Australia Act* 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 Victorian *Civil Procedure Act*.[13]

7.15 Although a few submissions supported this proposal,[14] most did not, noting that the Federal Court already had the power to manage the discovery process effectively.[15] The Law Council, for example, submitted that amendments in line with the Victorian Act were not necessary, as the Court 'already has discretion under the *Federal Court of Australia Act 1976* (Cth) and through the *Federal Court Rules* (Cth)'.[16] A group of

---

11 *Federal Court of Australia Act 1976* (Cth) s 37P(5).

12 Ibid s 37P(6).

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

14 I Turnbull, *Submission DR 05*, 15 January 2011; M Legg, *Submission DR 07*, 17 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

15 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

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

large law firms argued that the Rules and *Federal Court Practice Note CM 5* 'outline with sufficient particularity the case management powers the Court may employ in determining an application for discovery'.[17]

7.16 The Law Society of Western Australia submitted that a broad discretion applicable generally was preferable, 'rather than a specific and express power with respect to a particular aspect of the litigation process, namely discovery of documents'.[18]

7.17 While some agreed with the ALRC's preliminary view that express powers in the primary legislation might increase awareness, and therefore the use, of the case management powers,[19] others suggested that it was unlikely to have that effect, and that greater judicial education and a culture shift were necessary instead.[20] Allens Arthur Robinson submitted that it was not the availability of case management powers and sanctions that caused concerns, but 'the manner in which those powers are currently exercised':

> Lenience is often shown where a party wilfully or negligently fails to comply with the rules or a timetable … New or more express powers would not address these concerns unless the Court exercises its discretion more strictly and consistently. Instead, judges and special masters should be encouraged, through judicial education or otherwise, to make greater use of their existing case management powers and to monitor more closely the parties' compliance with the timetable.[21]

ALRC's views

7.18 If changes were to be made to the *Federal Court of Australia Act* to articulate more clearly the Court's existing statutory powers to manage the discovery process, this may encourage judges, the parties and practitioners actively to confine the scope of discovery and reduce the burden of litigation. Placing specific detailed powers in primary legislation could help drive cultural change in civil litigation in federal courts.

7.19 It is debatable, however, whether prescribing the Federal Court's case management powers in greater detail in legislation would generate such an improvement in the discovery process. Unless the Court actually uses its case management powers or the parties actively petition the Court to control the discovery of documents—and unless the Court, on its own initiative, imposes sanctions on parties abusing the discovery process, or the abused party actively seeks those Court sanctions—the changes envisaged by the VLRC might not materialise.

7.20 Given that most submissions that addressed this question did not support the proposal, and given the limited evidence that the proposal would have the desired effect, the ALRC has decided not to make a recommendation to prescribe in detail such

---

17 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
18 Law Society of Western Australia, *Submission DR 26*, 11 February 2011.
19 M Legg, *Submission DR 07*, 17 January 2011.
20 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
21 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

powers in the *Federal Court of Australia Act*. Instead, the ALRC suggests that the Federal Court consider whether articulating in practice notes some of the specific ways the Court might exercise its broad powers in relation to discovery, including its powers to order sanctions, might serve to drive cultural change and generate certainty of expectations and obligations. This would alert practitioners, and remind the Court, of the range and flexibility of the powers available to the Court. As discussed later in this chapter, the powers might also be considered in greater detail in judicial education programs and court bench books. These suggestions are intended not to fetter the Court's discretion, but simply to encourage the appropriate and targeted use of the existing powers by articulating them in material that the Court, parties, practitioners often refer to.

7.21 The ALRC also suggests that policy makers study whether the articulated powers in the *Civil Procedure Act 2010* (Vic) serve to encourage stronger and more effective judicial management of discovery. The question of whether to include similar powers in the *Federal Court of Australia Act* may therefore be usefully reconsidered in the future.

Judicial education and training

7.22 Effective case management skills are necessary for judges to narrow the issues in dispute and control the scope and process of discovery. Providing training that encourages judges to use their existing powers more actively and effectively is another potential way to control discovery. The need for judicial education and training in case management skills was recognised by the Access to Justice Taskforce, in making the following recommendation:

> The Attorney-General should work with the courts and the National Judicial College of Australia (NJCA) to ensure that judicial education includes measures aimed at enhancing the understanding and use of ... case management techniques.[22]

7.23 The Law Council expressed 'strong support' for this recommendation of the Access to Justice Taskforce.[23] Training on the use of computer technologies in the production of ESI may be particularly necessary. The need for effective training for judges managing an e-discovery process was specifically targeted in the United Kingdom by Lord Jackson in his *Review of Civil Litigation Costs*:

> E-disclosure as a topic should form a substantial part of … the training of judges who will have to deal with e-disclosure on the bench.[24]

7.24 Currently, there are a number of avenues open to judges for training in case management skills. The National Orientation Program for new judges conducted by the National Judicial College of Australia includes a session on case management, examining 'the role of judges dealing with busy application lists, the identification of

---

22 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Rec 8.5.

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

24 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), Rec 4.1(i).

cases requiring management and the referral of cases for alternative dispute resolution'.[25]

7.25 Continuing education for judges includes modules on pre-trial case management, under the national curriculum for professional development for Australian judicial officers.[26] This program covers the challenges and problems that can arise from discovery and using alternative dispute resolution techniques in the management of cases, including settlement.[27]

7.26 While the curriculum includes a module on information and other technologies, there is currently no express inclusion of e-discovery in the national curriculum.[28] Programs in this module are focused on technologies used in the court room—the design of electronic courtrooms, the use of audiovisual technologies and electronic filing—and computers as a research tool for writing judgments—rather than those used in the discovery process.

7.27 Judicial education at a national level may be lacking a particular focus on the management of large-scale discovery that involves masses of ESI. This might reflect the fact that such discovery processes are largely confined to the Federal Court, and a few state Supreme Courts. It may also be difficult to take a national approach on this topic, since each court has its own case management system to deal with discovery issues.

7.28 Professional development specifically for Federal Court judges may be provided through the Federal Court itself, the Judicial Education Committee or the Practice Committee. The Practice Committee, together with the Law Council, was jointly responsible for organising the workshop held in 2008 on the Federal Court's case management system—which paid particular attention to the management of discovery issues.[29] The ALRC understands that plans for a further case management workshop are in train.

7.29 The Australian Institute of Judicial Administration (AIJA) holds regular conferences and seminars for judicial officers. In the past, some of these have covered discovery issues—including the use of computer technologies.[30]

7.30 Another source of information on case management for Federal Court judges is the Court's bench book. It includes a chapter on discovery covering the general principles and rules for making discovery orders, with model orders. However, the ALRC understands that the bench book has fallen out of date—for example it does not

---

25 National Judicial Conference of Australia, *National Judicial Orientation Program* (2010), Session 13B.

26 C Roper, *Report: A Curriculum for Professional Development for Australian Judicial Officers* (2007), prepared for the National Judicial College of Australia, Program 2.1.

27 Ibid, Program 2.1.

28 Ibid, Module 7.

29 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia.

30 For example: Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <http://www.aija.org.au/Discovery/Discovery%20Notes.pdf> at 8 November 2010; Australian Institute of Judicial Administration, *AIJA Law & Technology Conference 2008 [Program]* <http://www.aija.org.au/Law&Tech%2008/Program.pdf> at 8 November 2010.

refer to the requirements of *Practice Note CM 6*—and is not widely used. The ALRC also understands that work is progressing in the Federal Court on a replacement benchbook. This may be a timely opportunity for the dissemination of up-to-date information across the Federal Court with a particular focus on effective case management of the discovery process.

Submissions and consultations

7.31 In the Consultation Paper, the ALRC proposed that the Federal Court 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 ESI.[31] This proposal was widely supported by submissions,[32] many of which stressed the importance of robust case management, the judicial understanding of the implications of ESI and related judicial training.

7.32 The Law Council expressed its concern that 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'.[33] A group of large law firms submitted that more informed judges 'will exercise greater control over the process and create a new culture of active judicial case management'.[34]

7.33 The Association of Legal Support Managers (Qld) submitted that, in their experience, parties and their representatives were slow to change their practices, but that more rapid change was required. Accordingly,

> there will need to be a greater level of engagement in, and management of, discovery processes by the judiciary from the commencement of proceedings.[35]

7.34 Many submissions stressed the importance of educating the judiciary about information technology and other electronic discovery matters. One submitted that, without understanding the technology issues, a judicial officer cannot meaningfully engage with the electronic discovery process.[36] A group of large law firms submitted that judges 'do not always test practitioners on the proposed conduct of electronic discovery':

---

31 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 3–6.

32 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

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

35 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

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

> The method employed to retrieve, review and produce the material is generally left to the parties. Unless the issue is raised by a party, judges do not always balance the cost of retrieving and reviewing the material with the probative value of the documents sought to be obtained. Greater knowledge of the discovery process may lead to judges further engaging with these issues.[37]

7.35 Elements of electronic discovery that it was suggested should be taught in judicial education programs included: data storage (including new developments such as 'cloud computing'); data searching (keyword searches and 'concept' searches); data retrieval or restoration; standard document retention policies; standard legal databases; and the use of outsourcing.[38] The Association of Legal Support Managers (Qld) submitted that judicial education should 'clearly encompass training in relation to technology and practices that can be used to assist in litigation and discovery generally (not just discovery of electronic information)'.[39] The Association went on to say that:

> A judiciary that is well educated in available technology and practices can ask the hard questions of parties and their representatives who are proposing approaches to discovery that may not be proportionate or efficient.[40]

7.36 Submissions noted that it was not only judges that required this training, but also clients and lawyers,[41] and that training needs to be ongoing as technology changes.[42]

7.37 Information systems and searching can make discovery easier—but not always. The Law Society of NSW submitted that:

> keyword searches can often take many days to run particularly over large repositories of documents and can return vast numbers of results all of which need to be reviewed by a party and its solicitors to determine whether the material is discoverable. These issues have a significant cost implication. Basic information of this nature should be available to the Court to ensure that the complexities of technology and the costs of using such technology are taken into account when considering the scope of discovery.[43]

ALRC's views

7.38 There are already many opportunities for Federal Court judges to develop their case management knowledge and skills—including those required to manage the discovery process effectively—through continuing education, training and the information resources of the Court. However, in the ALRC's view, existing case management training and education for Federal Court judges should give greater focus

---

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

38 Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011. One submission particularly noted that electronically-stored informed can sometimes be altered without detection: e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011.

39 Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

40 Ibid.

41 Ibid.

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

43 Law Society of NSW, *Submission DR 22*, 28 January 2011.

to the discovery process. The training should encourage judges to manage discovery confidently and robustly, and so facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible.[44]

7.39 Regular training of this kind—properly resourced, of high quality and professionally appropriate—is an essential aspect of long term cultural change. Accordingly, the ALRC also recommends that all judges are actively encouraged and supported to participate in this training.

7.40 There appears to be a particular need for Federal Court judges to be given regular and continuing education in electronic discovery, in line with developments in information and communication technologies. This is especially important so judges are able to interrogate detailed discovery plans.

7.41 The focus of this chapter has been on judicial case management, but this Report considers a number of tools the Court might use to manage discovery, such as discovery plans and pre-trial oral examinations. Those tools are discussed throughout the Report, but in this chapter the ALRC recommends that judicial training on discovery address the circumstances in which it might be appropriate to use these tools.

Recommendation 7–1 The Federal Court of Australia, in association with relevant judicial education bodies, should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings.

Recommendation 7–2 The program referred to in Recommendation 7–1 should cover, among other things:

- the technologies and practices used to discover electronically-stored information;
- the circumstances in which it might be appropriate to order the parties to prepare a discovery plan (see Recommendation 6–1);
- how to evaluate a discovery plan;
- the circumstances in which it might be appropriate to direct a Registrar to make orders in relation to discovery (see Recommendation 8–1);
- the circumstances in which it might be appropriate to order pre-trial oral examination for discovery (see Recommendation 10–2); and
- the availability of costs orders to control discovery (see Recommendation 9–1).

44 The overarching purpose of civil practice and procedure provisions, as defined in *Federal Court of Australia Act 1976* (Cth) s 37M.

Recommendation 7–3 The Federal Court of Australia should ensure that all judges are actively encouraged and supported to participate in the judicial training program referred to in Recommendation 7–1.

8. Registrars and Referees

Contents

Summary

8.1 This chapter considers whether persons should be called on to assist judges of the Federal Court of Australia and parties to help manage discovery and prepare discovery plans. A number of models, with many common characteristics, are considered: Federal Court registrars; masters under r 53 of the *Federal Rules of Civil Procedure* (US); masters proposed by the Victorian Law Reform Commission (VLRC); referees under s 54A of the *Federal Court of Australia Act 1976* (Cth); and the expert or adviser referred to in a current Federal Court practice note.

8.2 The ALRC concludes that the docket judge should remain primarily responsible for managing discovery. However, in some cases being able to call upon the assistance of an additional, properly trained person may bring considerable cost and time savings to a discovery process, particularly in complex cases involving extensive electronic discovery. The ALRC concludes that this properly trained specialist in managing discovery, if not the docket judge, should be a registrar. Accordingly, the ALRC recommends that registrars in each registry of the Federal Court be trained and equipped to undertake the discovery tasks delegated to them, including preparing and critically interrogating discovery plans and making discovery orders, especially in large or complex proceedings. The ALRC also recommends that judicial training programs concerning discovery consider the circumstances in which a judge might choose to direct that a registrar hear a discovery application.

8.3 While acknowledging some real concerns, the ALRC concludes that there might be a role for referees in some, very limited, circumstances. If neither the docket judge nor a trained registrar were able to hear the discovery application and ensure discovery were properly managed, the ALRC concludes that it may sometimes be appropriate for the Court to ask a referee to work with the parties to prepare a discovery plan, draft discovery orders and report back to the Court. The ALRC therefore recommends that the *Federal Court of Australia Act* and the *Federal Court Rules* (Cth) be amended to provide clearly that the Court may refer discovery questions to a referee.

Advantages and disadvantages

8.4 A number of commentators have expressed a desire for the introduction of 'special staff to manage discovery issues in large cases'.[1] In this chapter, these persons will be referred to as 'special masters' or 'discovery masters' (although this is not meant to imply they should necessarily be officers of the Court). 'Referees' will only be used for persons to whom matters are referred under s 54A of the *Federal Court of Australia Act*.

8.5 Many of the arguments for and against the use of 'special masters' also apply to the use of Federal Court registrars for discovery work. This chapter considers whether registrars might perform this work, if circumstances suggest that someone other than the docket judge should help to manage discovery.

8.6 The work given to a registrar, special master or referee depends partly on the model chosen and on the Court's jurisdiction to delegate, but might include:

- making discovery orders;
- working with the parties to prepare a discovery plan;[2]
- reporting on specific findings of fact, such as where documents are stored;
- recommending technology to use for locating and retrieving electronic data;
- arbitrating on specific discovery questions;[3] and
- imposing sanctions.

8.7 Concerning these last two points in particular, it should be noted that ch III of the *Australian Constitution* precludes anyone other than a judicial officer from exercising judicial power, but this does not necessarily preclude the appropriate

---

1 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <http://www.aija.org.au/Discovery/Discovery%20Notes.pdf> at 8 November 2010.

2 Discovery plans are discussed in Ch 5.

3 Bernard Cairns says there is a fundamental distinction between an arbitrator and a referee: 'An arbitrator takes office pursuant to an agreement between the parties. An award is binding and is not subject to court review except on limited grounds, usually on questions of law. A referee conversely is always subject to the court's supervision and a referee's report has no binding force until the court accepts it': B Cairns, *Australian Civil Procedure* (8th ed, 2009), 558.

delegation of certain powers and functions, particularly if the judicial officer maintains the control and supervision of the powers and functions.[4]

Advantages

8.8 Those in favour of the use of special masters or referees for certain discovery work highlight the time, knowledge and expertise such a person can bring to the discovery process. In the United States (US), judges 'are increasingly appointing special masters to address issues related to electronically stored information'.[5]

8.9 One example of a task said to be too time-consuming for a judge to undertake is 'reviewing vast numbers of documents in camera—sometimes in the tens of thousands of pages—to determine whether privilege has been validly asserted'.[6] Another is the detailed, technical work that may be necessary to prepare discovery plans for complex cases.

8.10 A special master may not only have more time than the court to focus on certain discovery questions,[7] but by doing this work, may save the court considerable time in the long run. The VLRC argued that special masters would help 'free up judge time, which may otherwise be consumed by complex and protracted discovery processes', and so save on public resources.[8] The Hon Justice Ray Finkelstein said that it was:

> unfair to other judges, and to other litigants with cases before that judge, when the judge must devote a disproportionate amount of time to one case, and even close his or her docket in extreme cases.[9]

8.11 The VLRC also argued that using special masters may help preserve the neutrality of judges, as 'the use of special masters will greatly assist the court to adopt a more interventionist approach to discovery, without compromising judicial objectivity and independence'.[10]

8.12 One US District Court judge has argued that some disputes require a panel of professionals—such as investigators, accountants, economists and computer experts—working in a coordinated manner to gather information. In such situations, the judge argued, a special master may act as a 'project manager' to coordinate these professionals.[11]

---

4 See *Harris v Caladine* (1991) 172 CLR 84 and Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report 92 (2001).

5 S Scheindlin, 'We Need Help: The Increasing Use of Special Masters in Federal Courts' (2009) 58 *DePaul Law Review* 479, 483.

6 Ibid, 482.

7 If 'discovery is expected to be a full-time or expedited affair, consideration of potential appointees can be limited to retired judges or others who can guarantee a clear schedule': R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [40].

8 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

9 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [37].

10 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

11 S Scheindlin, 'We Need Help: The Increasing Use of Special Masters in Federal Courts' (2009) 58 *DePaul Law Review* 479, 485.

8.13 There are similar advantages to using Federal Court registrars to work on discovery.

Judge should manage the case

8.14 A key concern with the introduction of special masters in the Federal Court may be its impact on the Court's docket management system. In the Federal Court, each case is allocated to the docket of a judge who is then responsible for managing the case until final disposition. The docket judge's familiarity with the case is intended to promote the just, orderly and expeditious resolution of disputes.[12] Outsourcing case management to a master may detract from the judge's involvement and familiarity with cases in his or her docket and the Court's overall responsibility to facilitate the resolution of the dispute through active and robust case management.

8.15 There may also be concerns that the use of a special master may add a layer to the discovery process, thereby creating inefficiency, particularly if the Court must revisit in detail all the facts and recommendations contained in a special master's report, and also hears extensive objections from the parties.

8.16 Submissions to this Inquiry discussed these and other advantages and disadvantages of using special masters for discovery work. These submissions will be considered later in the chapter.

Review of Civil Litigation Costs (UK)

8.17 Lord Justice Jackson reported strongly opposing views—views echoing those expressed in submissions to this Inquiry—about the use of 'disclosure assessors' in 'document heavy' cases:

> Some respondents consider that this is a very bad idea, which will add another layer of costs to no useful purpose. They argue that controlling disclosure is a judicial function, no part of which could be sub-contracted. Others take a more sanguine view. The London Common Law and Commercial Bar Association considers that this is '*a very good idea and could be enormously helpful in substantial cases*'. In a client survey carried out by Herbert Smith LLP, respondents (59%) supported the use of disclosure assessors for 'heavy' cases. The Law Society takes an intermediate view on this issue: 'The use of disclosure assessors would be likely to increase costs considerably—though it might also result in significant savings in trial costs. It could usefully be piloted before a view was taken.'[13]

8.18 Lord Jackson made no recommendation about disclosure assessors, but concluded:

> If the device of disclosure assessor is tried out on a voluntary basis and proves to be effective in saving costs in 'heavy' cases, then consideration could be given to providing for this as an option in the rules. Before making any such reform to the [*Civil Procedure Rules*] on a future occasion, it would be necessary to gather up to

12 Federal Court of Australia, *Individual Docket System* <http://www.fedcourt.gov.au/how/ids.html> at 20 October 2010.

13 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), 369.

> date information about the US experience of magistrate judges and special masters supervising discovery.[14]

Federal Court Registrars

8.19 Section 35A of the *Federal Court of Australia Act* provides that, if the Court or a judge so directs, a registrar may exercise, among other powers:

> (c) the power to make orders in relation to discovery, inspection and production of documents in the possession, power or custody of a party to proceedings in the Court or of any other person; ...
>
> (f) the power to make an order as to costs; ...
>
> (h) a power of the Court prescribed by Rules of Court.[15]

8.20 The *Federal Court of Australia Act* provides that a registrar is not subject to the direction or control of any person or body in relation to the manner in which he or she exercises powers.[16] A party to proceedings in which a registrar has exercised any of the powers of the Court may apply to the Court to review that exercise of power.[17] The Court may, on application or of its own motion, review an exercise of power by a registrar and may make such order or orders as it thinks fit.[18]

8.21 Concerning these review provisions, Finn J stated, in *Official Trustee in Bankruptcy v Nedlands Pty Ltd*:

> The burden of these provisions, as also that ensuring independence, is to satisfy the second of the conditions stipulated by Mason CJ and Deane J in *Harris v Caladine* (1991) 172 CLR 84 at 95 for the constitutional validity of a delegation of a part of the Court's jurisdiction, powers and functions: '... the delegation must not be inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court.' The consequential effect of the review provisions is to ensure that an order, though made by a Registrar, 'can still be seen to be a decision of the Court': *Trustees of Franciscan Missionaries of Mary v Weir* (2000) 98 FCR 447 at 459 [20].[19]

8.22 The Court will also determine an application if the registrar considers that it is not appropriate for the application to be determined by a registrar or if an application is made for the matter to be determined by the Court.[20]

---

14 Ibid, 373.

15 *Federal Court of Australia Act 1976* (Cth) s 35A(1). However, s 35A(2) provides that 'A Registrar shall not exercise the powers referred to in paragraph (1)(f) except in relation to costs of or in connection with an application heard by a Registrar'.

16 Ibid s 35A(4).

17 Ibid s 35A(5).

18 Ibid s 35A(6). The Full Court has held that a review under s 35(6) requires a hearing de novo, that is, 'a hearing at which the parties may adduce fresh evidence as of right': *Mazukov v University of Tasmania* [2004] FCAFC 159.

19 *Official Trustee in Bankruptcy v Nedlands Pty Ltd (in liq)* [2000] 99 FCR 554, 558.

20 *Federal Court of Australia Act 1976* (Cth) s 35A(7).

8.23 Special masters and referees, discussed below, differ from registrars in a number of key respects, but perhaps most importantly:

- registrars are officers of the court—paid for by the court, not the parties;[21] and
- though reviewable, the decisions of registrars are decisions of the court.

Masters—United States

8.24 Under r 53 of the *Federal Rules of Civil Procedure*, US courts may appoint masters to perform any duties to which the parties consent, including to 'hold trial proceedings and make or recommend findings of fact' in certain circumstances and handle pre- or post-trial issues that a judge cannot handle in a timely or effective manner.[22] Special masters are appointed by an order of the court that states the master's duties, any limits on the master's authority, the nature of permitted ex parte communications, how the master's findings will be reviewed and the terms of the master's compensation.[23] The compensation must be paid either by a party or parties or 'from a fund or subject matter of the action within the court's control'.[24] A master may regulate the proceedings and 'take all appropriate measures to perform the assigned duties fairly and efficiently',[25] and may also impose a range of sanctions.[26]

8.25 Before the court acts on a master's recommendations, the parties have an opportunity to object.[27] The court reviews findings of fact *de novo* (unless the parties have agreed they will be reviewed only for clear error);[28] reviews findings of law *de novo*;[29] and reviews procedural rulings 'only for an abuse of discretion'.[30]

8.26 Rule 53 contemplates the use of masters at all three stages of a trial: pre-trial, trial and post-trial.[31] At these different stages, masters may fill any of a number of different roles: settlement master; decision-making master; or case management master.[32] The settlement master attempts to mediate and facilitate negotiation.[33] A decision-making master may decide non-dispositive motions, usually in the context

---

21 Ibid s 18E(4).
22 *Federal Rules of Civil Procedure 2009* (US) r 53(a)(1).
23 Ibid r 53(b)(2).
24 Ibid r 53(g)(2).
25 Ibid r 53(c)(1).
26 Ibid r 53(c)(2).
27 Ibid r 53(f)(1),(2).
28 Ibid r 53(f)(3).
29 Ibid r 53(f)(4).
30 Ibid r 53(f)(5).
31 Ibid r 53; M Fellows, 'Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation' (2005) 31 *William Mitchell Law Review* 1269, 1276.
32 M Fellows, 'Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation' (2005) 31 *William Mitchell Law Review* 1269, 1280. See also 'Special Masters Conference: Transcript of Proceedings' (2005) 31 *William Mitchell Law Review* 1193, 1220–1221 (transcript of a conference where special masters discuss the difference between working in an 'adjudicative' or 'settling' role and the role of 'managing the case').
33 M Fellows, 'Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation' (2005) 31 *William Mitchell Law Review* 1269, 1282.

of discovery.[34] The case management master is less involved with the merits of the dispute and has no decision-making authority. Instead, a case management master is like an administrator who establishes or oversees procedures to expedite the case.

Victorian Law Reform Commission's model

8.27 The VLRC's 2008 *Civil Justice Review* recommended special masters 'be appointed by the court to assist in the case management of discovery issues in complex cases'.[35] The VLRC's model of a special master would:

- provide court supervised intervention in the discovery aspect of the dispute;
- actively endeavour to case manage and assist in the resolution of any dispute between the parties in relation to discovery; and/or
- investigate and report to the court on any issue in relation to discovery.[36]

8.28 The VLRC said the special master should be a judicial officer or a senior legal practitioner.

> Preferably, the appointee would have experience or expertise in the areas that are the subject of the litigation. In some cases special expertise may be desirable, for example, in matters involving electronic discovery.[37]

8.29 The costs of an externally-appointed special master under the VLRC's model would be set at the discretion of the court, 'and on an interim basis may be ordered to be costs in the cause'.[38] When appointing a special master, the court would have to consider whether the financial stakes or resources of the parties justify imposing the expense of managing discovery issues on the parties.[39]

Discovery masters—Justice Finkelstein's proposal

8.30 At a workshop on case management in 2008 conducted jointly by the Federal Court and the Australian Law Council (Law Council), Justice Finkelstein outlined a proposal for the introduction of discovery masters in the Federal Court with broad authority. This included a draft of a proposed new O 72A of the *Federal Court Rules*, prepared along the lines of r 53 of the US *Federal Rules of Civil Procedure*.[40] Justice Finkelstein proposed that the rule provide that:

> Unless the appointing order directs otherwise, a master may:

---

34 Ibid, 1283. A non-dispositive motion is any motion other than those in which a party requests that the court dispose of some or all of the claims asserted in a complaint, petition, counterclaim or cross-claim.

35 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 469. The VLRC also made recommendations concerning the use of special masters for alternative dispute resolution (ADR) work and to help self-represented litigants: Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 219, 573.

36 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 469.

37 Ibid, 469.

38 Ibid, 470.

39 Ibid, 470.

40 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, Annexure E.

(A) regulate all discovery proceedings and disputes;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the assigned duties fairly and efficiently.[41]

8.31 However, there are three differences between Justice Finkelstein's model and the US model. First, r 53 allows a master to impose sanctions[42] but the proposed O 72A does not. Secondly, r 53 allows a party 20 days in which to file objections to a master's report,[43] whereas Justice Finkelstein only allowed seven days.[44] Thirdly, Justice Finkelstein limited a discovery master's rulings to managing pre-trial discovery,[45] whereas r 53 allows a master to be involved at any stage.

8.32 However, for pre-trial discovery, Justice Finkelstein would allow masters to direct the proceedings.[46] Order 72A also mirrors the court's powers of review in r 53.[47] Also consistent with r 53, the costs of a discovery master in a particular case would be paid for by the parties, rather than the court.[48]

Referees

8.33 Most Australian Courts have the power to refer certain matters to referees. The following section considers whether the Federal Court might use such referees to perform some of the discovery work described above.

Federal Court referees

8.34 The Court has a relatively new legislative power, introduced in 2009,[49] to refer proceedings and questions to referees. Under s 54A of the *Federal Court of Australia Act*, the Federal Court may refer 'a proceeding ... or one or more questions arising in a proceeding ... to a referee for inquiry and report'.[50] Order 72A of the *Federal Court Rules* provides that the Court may refer 'a proceeding in the Court' or '1 or more questions or issues arising in a proceeding, whether of fact or law or both, and whether raised by pleadings, agreement of parties or otherwise'.[51]

8.35 The Court may make directions with respect to the conduct of an inquiry by a referee, but subject to those directions, the referee:

(a) may conduct the inquiry in any way the referee thinks fit; and

---

41 Ibid, Annexure E, Rule 3.
42 *Federal Rules of Civil Procedure 2009* (US) r 53(c)(2).
43 Ibidr 53(f)(2).
44 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, Annexure E, r 6(2).
45 Ibid, Annexure E r 1(1).
46 Ibid, Annexure E r 6(5).
47 Ibid, Annexure E r 6(3), (4).
48 Ibid, Annexure E r 7(2).
49 *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* (Cth).
50 *Federal Court of Australia Act 1976* (Cth) s 54A(1).
51 *Federal Court Rules* (Cth) O 72A r 1.

(b) is not bound in the inquiry by the rules of evidence but may inform himself or herself in any way the referee thinks fit.[52]

8.36 Evidence before a referee in an inquiry:

(a) may be given orally or in writing; and

(b) must, if the Court requires, be given:

(i) on oath or by affirmation; or

(ii) by affidavit.[53]

8.37 Unless otherwise ordered by the Court, the referee must give his or her opinion in a report.[54] The Court may then choose to adopt the report in whole or in part, or vary or reject it.[55] Referees do not make decisions that are automatically binding on the parties. They are not delegated judicial power. The Court may also make 'such orders as the Court thinks fit in respect of any proceeding or question referred to the referee'.[56] The Court may make directions about the remuneration of a referee, including a direction that a party give security for the remuneration.[57]

8.38 In the Second Reading Speech for the relevant Bill introducing s 54A, the Australian Government Attorney-General said that the reform would 'enable the court to more effectively and efficiently manage large litigation':

> It will be particularly useful in many cases, such as those involving complex technical issues or where detailed examination of financial records is necessary to assess damages. It will also be of assistance in native title matters where a judge could be assisted by an inquiry into a particular aspect of the claim.
>
> The procedural flexibility with which a referee can deal with a question—along with their technical expertise—will allow a referee to more quickly get to the core of technical issues and reduce the cost and length of trials for litigants.[58]

Is discovery a question or issue arising in a proceeding?

8.39 As noted above, under O 72A of the *Federal Court Rules* the Court may refer 'a proceeding' or '1 or more questions or issues arising in a proceeding'.[59] Is a discovery matter 'a proceeding' or a question or issue arising in a proceeding, under this Rule?[60] The ALRC is not aware of any judicial consideration of this precise question, but the meaning of 'proceeding' has been considered in other contexts. Proceeding is defined in s 4 of the *Federal Court of Australia Act* to mean:

---

52 Ibid O 72A r 7.
53 Ibid O 72A r 7.
54 Ibid O 72A r 10.
55 *Federal Court of Australia Act 1976* (Cth) s 54A (3).
56 Ibid s 54A (3).
57 *Federal Court Rules* (Cth) O 72A r 5.
58 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12296 (R McClelland—Attorney-General).
59 *Federal Court Rules* (Cth) O 72A r 1.
60 *Federal Court Rules* (Cth), O 72A r 1.

> a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal.[61]

8.40 In *Carnegie Corporation Ltd v Pursuit Dynamics Plc*,[62] French J referred to authority for the definition of proceeding being 'very wide' and encompassing a motion for security of costs and the issue of summons for examination. French J then concluded:

> In my opinion and consistently with the authorities in this Court an application for preliminary discovery is an application in a 'proceeding' within the meaning of that word in the *Federal Court Act* and therefore within the meaning of O 8. An application for preliminary discovery is therefore 'an application commencing a proceeding' and is within the new definition of 'originating process' in O 8, r 1.[63]

8.41 The question whether an application under O 15A r 3 was a proceeding was answered differently in *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts*.[64] In that case, an application by a prospective applicant for an order for discovery to assist the applicant to decide whether to *commence* a proceeding was found not to be a 'proceeding'.

8.42 After considering *Telstra*, *Carnegie* and other authorities, Barker J in *Re McJannett* concluded that:

> the point to be drawn from this selective analysis of authority is that not every step or action in a court will necessarily be considered a 'proceeding'.[65]

8.43 Even if a discovery application is not a proceeding, a question or questions arising on a discovery application may fall within the description of '1 or more questions or issues arising in a proceeding'.

8.44 It may also be noted that the *Federal Court Rules* add to the words in the Act the following words in italics: 'questions or issues arising in a proceeding, *whether of fact or law or both, and whether raised by pleadings, agreement of parties or otherwise*'.[66] The words 'whether raised by pleadings, agreement of parties or otherwise' may indicate a question in the substantive proceeding rather than in an interlocutory step. Furthermore, it may be that the use of referees elsewhere in place and time may be conducive to this restrictive definition. Accordingly, not only is there a difference of judicial views about the application of the definition of 'proceeding', but the scope of the second limb of the rule (starting '1 or more questions') is also open to strong differences of opinion.

---

61 *Federal Court of Australia Act 1976* (Cth) s 4.
62 *Carnegie Corp Ltd v Pursuit Dynamics Plc* (2007) 162 FCR 375.
63 Ibid, 388.
64 *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts* [2007] FCA 1331.
65 *McJannett, Re Application for an Inquiry in Relation to Election for Offices in Construction, Forestry, Mining and Energy Union (WA)* (2009) 178 FCR 448, [27].
66 *Federal Court Rules* (Cth) O 72A r 1.

State and territory court referees

8.45 State and territory courts can refer proceedings to referees for a report.[67] In Queensland, for example, the court 'may in a proceeding, except a trial by jury, refer a question of fact to a special referee—(a) to decide the question; or (b) to give a written opinion on the question to the court'.[68] The court may direct the special referee to make a report in writing to the court.[69]

8.46 In New South Wales, in *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd*, Smart J stated that the matters that will generally require consideration when deciding whether to refer a question to a referee are:

> (a) the suitability of the issues for determination by a referee and the availability of a suitable referee;
>
> (b) the delay before the court can hear and determine the matter and how quickly a suitable referee can do so ...;
>
> (c) the prejudice the parties will suffer by any delay;
>
> (d) whether the reference will occasion additional costs of significance or is likely to save costs;
>
> (e) the terms of any reference including the issues and whether they should be referred for determination or inquiry or report.[70]

8.47 Although the NSW Supreme Court 'has power to appoint a referee against the wishes of both parties', Smart J said, 'it is understandably cautious in doing so'.[71]

Practice Note CM 6

8.48 The Federal Court's *Practice Note CM 6: Pre-Discovery Conference Checklist* provides that, if 'the Court orders the parties to attend a case management conference for the purpose of resolving any issues in relation to the scope of discovery, the protocols to be used for the electronic exchange of documents and other issues relating to efficient document management in a proceeding', then:

> the parties or the Court may engage an expert or advisor to:
>
> - attend the Pre-Discovery Conference to facilitate or mediate resolution of any issues that have arisen in relation to the matters identified in this Checklist; and/or

67 *Court Procedures Rules 2006* (ACT) r 1531; *Uniform Civil Procedure Rules 2005* (NSW) r 20.14; *Supreme Court Act 1979* (NT) s 26; *Supreme Court Act 1995* (Qld) s 255; *Uniform Civil Procedure Rules 1999* (Qld) r 501; *Supreme Court Act 1935* (SA) s 67; *Supreme Court Rules 2000* (Tas) r 574; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.01; *Supreme Court Act 1935* (WA) s 50.

68 *Uniform Civil Procedure Rules 1999* (Qld) r 501(1).

69 Ibid r 501(2).

70 *Park Rail Developments Pty Ltd v R J Pearce Associates Pty Ltd* (1987) 8 NSWLR 123, 130.

71 Ibid, 129.

- complete the Checklist and prepare a Document Management Protocol in light of the agreements reached, or directions given by the Court, at the conference.[72]

8.49 The Court's power to engage such an expert or adviser is not referred to in this practice note.

Submissions and consultations

8.50 Even if the power to refer discovery matters to referees is in the Court's inherent jurisdiction, or may be found in s 54A of the *Federal Court of Australia Act* or elsewhere, it remains to be seen whether the Federal Court should use referees in this way, rather than entirely manage the process itself or leave it to the parties. In the Consultation Paper, the ALRC asked whether special masters should be introduced to manage the discovery process in proceedings before the Federal Court. If they should be introduced, the ALRC asked, what model should be adopted?[73] Most submissions neither clearly supported nor definitely opposed the use of special masters for discovery work, but most noted the advantages and disadvantages.

Save time

8.51 A number of submissions noted that discovery masters might be more efficient and save court time, leaving judicial officers with more time to conduct trials and prepare reasons for judgment.[74] The Australian Taxation Office noted that special masters 'may assist with the additional workload of a case management process'.[75] The Law Council stated that discovery masters:

> 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.[76]

Expertise

8.52 Submissions also stressed the value and importance of using persons with special expertise in e-discovery matters.[77] The NSW Law Society's Litigation Law and Practice Committee thought this was so important that they proposed that the Federal Court retain an 'information technology registrar', with information technology and legal qualifications,

> to assist the Court to determine important questions in relation to the reasonability and proportionality of searches and retrieval particularly in the context of the tension between the 'quick and cheap' resolution of litigation and the need to identify and

---

72 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [9.1(c)].

73 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–8.

74 The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011.

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

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

77 Law Society of NSW, *Submission DR 22*, 28 January 2011; e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

> discover electronically stored information most relevant to the issues in dispute to ensure that the determination is also 'just'. The information technology registrar would assist the Court in determining questions such as forensic value of search and retrieval efforts having regard to the discovery obligations of the parties and the cost and time involved in such efforts …
>
> The specialist registrar would review the search protocols of the parties in anticipation of the pre-discovery conference and assist the Court during the pre-discovery conference to assess the proposals that are put forward by the parties in their search protocols. The purpose of the specialist registrar would be to give practical and technical advice to the Court.[78]

8.53 They might also be particularly helpful, Michael Legg submitted,

> for parties and legal representatives who do not have extensive experience with the use of information technology in relation to discovery and could therefore act as a way to balance the playing field as well as educate those parties.[79]

8.54 Though he recommended a circumspect approach, Legg submitted that special masters be introduced 'to assist in the formulation of a discovery plan and the conduct of a pre-discovery conference'. This would not 'interfere with the Federal Court's individual docket system or with case management generally':

> The judge would still remain in control of a case but they would have assistance in relation to expensive and time consuming tasks that would allow the proceedings to be dealt with more efficiently consistent with the overarching purpose.[80]

Judge should manage discovery

8.55 That it is the judge's job to manage discovery was perhaps the key objection made in submissions to the use of special masters. Assisting the parties in the discovery procedure and process was said to be an 'integral part' of the role of trial judges.[81] Allens Arthur Robinson submitted that '[a] docket judge, fully apprised of all the issues in the proceeding, is in our view best placed to resolve discovery issues'.[82] The advantage of the docket system, a group of large law firms submitted, was that:

> the judge is engaged in the particular matter, familiar with the issues and thus able to ensure the just and efficient conduct of the proceedings. We do not endorse any suggestion that special masters should manage discovery as a matter of routine. The docket judge has the greatest familiarity and engagement with the proceedings and accordingly is best placed to limit discovery obligations to the real issues in dispute.[83]

8.56 Allens Arthur Robinson suggested that special masters might be the 'next best option' to the docket judge managing the process, but submitted that if they were to be used, there should be a 'clear and automatic right of appeal to the docket judge'.[84]

---

78 Law Society of NSW, *Submission DR 22*, 28 January 2011.
79 M Legg, *Submission DR 07*, 17 January 2011.
80 Ibid.
81 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.
82 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
83 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
84 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

Parties should also be able to apply to have the docket judge deal with discovery issues at first instance.[85]

Cost

8.57 Some submissions expressed concern about the cost. The Law Council asked about the costs of a special master in discovery and whether costs would be fixed.[86] The Australian Government Solicitor observed that the costs of the process would need to be carefully considered.[87]

8.58 The Law Council also noted 'the potential that it may be too expensive for self-represented parties, impacting negatively upon those who it is designed to assist'.[88] That the initiative 'might unfairly disadvantage litigants with relatively unequal economic resources' was also a concern of the Commercial Bar Association of Victoria.[89]

8.59 Submissions also raised questions about how masters would be selected, appointed and resourced.[90] Allens Arthur Robinson noted that 'sufficient resources should be allocated to ensure that special masters have the necessary practical expertise and are able to resolve disputes quickly'.[91] Some also submitted that the scope of the master's powers would need to be considered.[92] The Law Council asked whether the role would be as extensive as in the US.[93] The Australian Government Solicitor observed 'the use of special masters to manage the discovery process is a potentially worthwhile mechanism to consider', but suggested

> questions as to the scope of a master's powers, when matters are appropriately referred to a master, supervision of the master's decisions and costs of the process would need to be carefully considered.[94]

ALRC's views

8.60 In the ALRC's view, docket judges should remain primarily responsible for managing discovery. As discussed in Chapter 7, active judicial case management is necessary to control the scale and cost of discovery. In most cases, the docket judge should be able to manage the discovery process. However, in some complex cases, the Court and the parties may benefit from the assistance of a person who can engage at length and at a high degree of technical competence in the detail of a discovery process. The occasional and targeted use of such persons need not be inconsistent with active judicial case management.

---

85 Ibid.
86 Law Council of Australia, *Submission DR 25*, 31 January 2011.
87 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.
88 Law Council of Australia, *Submission DR 25*, 31 January 2011, citing Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 573.
89 The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.
90 Law Council of Australia, *Submission DR 25*, 31 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
91 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
92 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.
93 Law Council of Australia, *Submission DR 25*, 31 January 2011.
94 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

Discovery registrar

8.61 The ALRC recommends that, in the rare cases in which a complex discovery matter cannot be managed by the docket judge, the judge should consider directing a trained registrar to hear the application.

8.62 In Chapter 7, the ALRC recommends judicial training that deals with management of the discovery process. This would include the technologies and practices used to discover electronically-stored information and how to evaluate discovery plans. Similar training would be suitable and necessary for registrars who might be directed to hear a discovery application. Accordingly, the ALRC recommends that a registrar in each registry of the Federal Court be trained and equipped to undertake the discovery tasks delegated to them, including preparing and critically interrogating discovery plans and making discovery orders, especially in large or complex proceedings. The relevant registrar might be the eRegistrar mentioned in *Practice Note CM 6* who has been nominated to provide advice and assistance in relation to the use of technology in litigation.

8.63 There are a number of advantages in using registrars for this work, rather than referees or special masters. As noted above, registrars may exercise delegated judicial power—they are independent officers of the Court and can make binding decisions that may be reviewed by a judge, but need not be.

8.64 Referees and special masters, on the other hand, cannot exercise the judicial power of the Commonwealth.[95] Therefore, referees must report any recommendations to the Court. Even if a referee's report were only briefly reviewed by the Court, some double-handling of the issues would be inevitable. Referees also lack the authority to control the parties, and must return whatever remitter they have to the Court for a judge to consider some form of sanction.

8.65 Registrars are remunerated by the Court and, as such, the costs of a registrar's services are subsidised by public funds. By comparison, referees and masters under the models discussed above would usually be paid for by the parties—at a commercial rate. The cost of the referee's time alone may be significant, but to this cost should also be added the potential cost of argument in court about whether a referee should be appointed and later argument about the conclusions reached by the referee. These and other costs suggest that it will often not be appropriate to appoint referees for discovery work.[96]

8.66 The main justification for the use of referees in managing discovery is to incorporate technical expertise, particularly in electronic technologies, which would improve the efficiency of the discovery process. To the extent that a specially trained registrar is able to manage discovery with a high degree of expertise, their use will be justified and should lower the overall cost of the discovery process. This cost saving

---

95 *Harris v Caladine* (1991) 172 CLR 84.

96 As argued throughout this Report, discovery costs should be proportionate to the issues in dispute, and these discovery costs should include the cost of any referee appointed to work on discovery.

would be particularly evident if, without the technical knowledge of a trained registrar, discovery would not be as expertly managed by the Court in some circumstances.

When to appoint a discovery registrar

8.67 The ALRC recommends that judicial training programs concerning discovery consider the circumstances in which a judge might choose to direct that a registrar hear a discovery application. Generally, interlocutory applications that are routine or straightforward might be considered appropriate for a registrar to determine—to allow the docket judge time to deal with more complex issues arising in the proceeding. However, a registrar highly trained and experienced in the management of discovery issues—in particular, the use of electronic technologies—might provide valuable support for judges dealing with complex discovery matters. Therefore, judicial education and training might alert judges to the potential for such registrars to determine, for example, complex discovery matters that may require discovery of very large quantities of electronically-stored information.

Discovery referees

8.68 Despite the real concerns noted above, the ALRC envisages some very limited role for referees in Federal Court discovery. Referees might be considered a 'third best option'—to be used only when neither the docket judge nor a trained registrar were able to hear the discovery application and spend the necessary time to ensure discovery was properly managed.

8.69 The Court might usefully ask a referee to work with the parties to prepare a discovery plan and to draft discovery orders. Both the plan and the orders might be included in the referee's report to the court. The parties may disagree with each other and the referee on appropriate orders and an appropriate plan; these disagreements should be made clear in the report, so the judge may conveniently discuss the matters with the parties in court or at a case management conference. Referees' reports might also usefully contain recommended orders concerning the cost of discovery.[97]

8.70 Justice Finkelstein argued that discovery masters would only need to be appointed 'by consent of the parties' or 'in the discretion of the court where the court is satisfied that exceptional conditions exist (eg large scale complex litigation)'.[98] The ALRC likewise considers that these might be suitable, if not necessarily sufficient, preconditions for the referral of discovery questions to a referee. Though there are real concerns with referring discovery matters outside the Court, the ALRC considers that for some complex discovery processes, the involvement of a trained, technical person who is independent of the parties and the lawyers may be invaluable. If the Court cannot provide such a person, the ALRC considers that the parties should be asked to work with an independent person from outside the Court. Without this check, discovery for some complex cases might not be planned or executed efficiently and at a cost proportionate to the issues in dispute.

---

97 Costs orders are discussed in Ch 9.

98 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, 18.

8.71 The appointment of a referee would result in costs for the parties—which may be higher than the costs of a registrar performing this task. However, this is not to say that the cost of a referee will never justify their appointment. If a referee helped to narrow the scope of discoverable documents, or perhaps helped find an efficient and technically sound method of retrieving those documents, then the costs saved for the parties may far outweigh the cost of the referee.

8.72 Whether appointing a referee would save or increase costs in a particular case would be a suitable matter for a judge to consider before referring a question to a referee. The judge should also be wary of the potential for a well-resourced party to use the cost of referees to dissuade some parties from proceeding.

Enabling the use of discovery referees

8.73 The power to refer discovery questions to referees is arguably covered by s 54A of the *Federal Court of Australia Act*, and perhaps less clearly evident in O 72A of the *Federal Court Rules*—but the power is not entirely clear in either. Accordingly, the ALRC recommends that both the Act and the Rules be amended to provide or clarify that discovery questions and issues may be referred to referees.

8.74 The use of referees for discovery appears to be consistent with the purpose of s 54A.[99] In any event, the Court considers that it has a similar power, as suggested by the fact that *Practice Note CM 6* provides for the appointment of an expert or adviser to perform discovery work.

8.75 If the power were to be so clarified, the ALRC considers that s 54A of the Act and O 72A of the Rules are well suited to referring discovery questions to referees, should a docket judge think it necessary for the efficient conduct of a discovery process. Under s 54A and O 72A the Court has considerable discretion and flexibility as to what matters to refer, how any inquiry is to operate, who should bear the cost of the referee, how the referee should report to the Court, and how the Court might use the report. Also importantly, because the referee does not make binding decisions or impose sanctions, the power to manage the case remains with the judge.

Recommendation 8–1 Registrars in each registry of the Federal Court of Australia should be trained and equipped to hear applications in relation to discovery, especially in large or complex proceedings where discovery of electronically-stored information may prove burdensome by way of cost or delay to the parties. This training should include how to prepare and critically interrogate discovery plans and make discovery orders.

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12296 (R McClelland—Attorney-General).

Recommendation 8–2 The judicial education and training program in Recommendation 7–1 should address the circumstances in which it may be appropriate for the Federal Court of Australia to direct Federal Court registrars to hear applications in relation to discovery. The training should address the circumstances in which such directions may be appropriate—for example, for complex discovery matters that may require discovery of very large quantities of electronically-stored information.

Recommendation 8–3 Section 54A of the *Federal Court of Australia Act 1976* (Cth) and Order 72A of the *Federal Court Rules* (Cth) should be amended to provide expressly that the Court may refer discovery questions and issues to a referee for inquiry and report.

9. Costs Orders and Reasonable Fees

Contents

Summary

9.1 This chapter considers how the targeted use of the Federal Court's existing costs powers might help control discovery. The chapter first considers costs between the parties, including when the Court might disallow costs that have been improperly, unreasonably or negligently incurred, and how the Court might take into account the failure of parties to conduct proceedings in manner consistent with the overarching purpose of civil practice and procedure in s 37M of the *Federal Court of Australia Act 1976* (Cth). The ALRC recommends that Federal Court practice notes provide that the Court will expect practitioners to address this matter, including how a party's failure to conduct proceedings consistently with the overarching purpose might be reflected in costs orders.

9.2 The chapter then considers whether there should be a presumption that parties requesting discovery pay the estimated costs in advance and whether cost-capping orders might sometimes be used to control discovery. The ALRC concludes that, although there should not be a presumption that parties requesting discovery pay the estimated costs in advance, the order may be useful in some limited circumstances—particularly as an incentive to confine the scope of discovery to reasonable proportions. The ALRC also concludes that cost-capping orders may be appropriate in some limited circumstances to ensure the costs of discovery are proportionate to the issues in dispute. Accordingly, the ALRC recommends that the *Federal Court of Australia Act 1976* (Cth) be amended to provide that the Court may make an order: that some or all of the estimated costs of discovery be paid for in advance by the party requesting discovery; that a party requesting discovery give security for the payment of the cost of discovery; and that specifies the maximum cost that may be recovered for giving discovery or taking inspection. Federal Court practice notes should also outline

relevant circumstances the practitioners might be expected to address in relation to these orders.

9.3 The chapter then considers whether lawyers, rather than their clients, should sometimes bear the costs of discovery or be prohibited from charging more than their actual costs in conducting discovery. The power of the Court to disallow costs as between a lawyer and their client for incurring costs, for example, without reasonable cause is discussed. The chapter notes the Court's power to order a lawyer to bear costs personally, because of a failure to comply with the duty to assist clients to conduct proceedings in a way that is consistent with the overarching purpose. The ALRC recommends that Federal Court practice notes provide that the Court will expect practitioners to ensure that they have complied with their duty to assist the parties to give discovery and take inspection in accordance with the overarching purpose in s 37M.

9.4 Finally, the chapter expresses support for the proposed introduction in the *Legal Profession National Law* of a provision to the effect that a law practice must 'charge costs that are not more than fair and reasonable in all the circumstances'.

Discretion to award costs

9.5 The Federal Court has a broad power to award costs. Section 43 of the *Federal Court of Australia Act* provides that the Court or a judge has jurisdiction to award costs in proceedings before the Court and that:

> Except as provided by any other Act, the award of costs is in the discretion of the Court or Judge.[1]

9.6 In *Hughes v Western Australian Cricket Association (Inc)*, after noting that the *Federal Court Rules* (Cth) do not qualify this discretion and that it must be exercised judicially, Toohey J summarised the way in which the discretion is to be exercised:

> 1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order.
>
> 2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed.
>
> 3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, 'issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law.[2]

9.7 Toohey J added that while there was 'no difficulty in stating the principles', their application to the facts of a particular case was 'not always easy'.[3]

---

1 *Federal Court of Australia Act 1976* (Cth) s 43(1), (2).
2 *Hughes v Western Australian Cricket Association (Inc)* [1986] FCA 382 (citations omitted).
3 Ibid.

9.8 In its report, *Costs Shifting—Who Pays for Litigation*, Report 75 (1995) (*Costs Shifting)*, the ALRC explained that the discretion to order an unsuccessful party to pay the successful party's costs evolved in the equity jurisdiction, 'apparently in response to the concern that a person should not suffer loss as a result of having to assert or defend his or her rights'.[4] The other common reasons for this rule are that it:

- compensates successful litigants for at least some of the costs they incur in litigating;
- allows people without means to litigate;
- deters vexatious or frivolous or other unmeritorious claims or defences;
- encourages settlement of disputes by adding to the amount at stake in the litigation; and
- deters delay and misconduct by making the responsible party pay for the costs his or her opponent incurs as a result of that delay or misconduct.[5]

9.9 In 2009, the *Federal Court of Australia Act* was amended to 'make it clear in the legislation that the Court may make certain orders'.[6] The following subsection and note were added to s 43:

> (3) Without limiting the discretion of the Court or a Judge in relation to costs, the Court or Judge may do any of the following:
>
> (a) make an award of costs at any stage in a proceeding, whether before, during or after any hearing or trial;
>
> (b) make different awards of costs in relation to different parts of the proceeding;
>
> (c) order the parties to bear costs in specified proportions;
>
> (d) award a party costs in a specified sum;
>
> (e) award costs in favour of or against a party whether or not the party is successful in the proceeding;
>
> (f) order a party's lawyer to bear costs personally;
>
> (g) order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.
>
> *Note: For further provision about the award of costs, see subsections 37N(4) and (5) and paragraphs 37P(6)(d) and (e).*[7]

Disallowing costs as between parties

9.10 Where a party conducts discovery in an inefficient, wasteful and costly manner, and is ultimately unsuccessful in the litigation, then that party will bear much of the

---

4 Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation*, Report 75 (1995), 51.
5 Ibid.
6 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), [40].
7 *Federal Court of Australia Act 1976* (Cth) s 43(3), inserted by *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).

cost of their own waste and inefficiency. However, it could be argued that unsuccessful parties should not have to pay the discovery costs incurred arguably wastefully or unnecessarily by the opposing side.

9.11 The Federal Court cannot control how organisations (that might never appear before the Court) manage their records,[8] but a company's poor record-keeping practices might be one cause of high discovery costs over which the opposing party has no control. This was a matter of concern expressed in a number of submissions to this Inquiry. For example, the first issue in the Queensland Law Society's list of 'most significant issues that require addressing in relation to discovery' was the 'need for many clients to more effectively manage their records (so as to facilitate the early and efficient identification and gathering of potentially relevant records)'.[9] E.law Asia Pacific submitted that discovery was becoming increasingly costly 'due to the often disorganised way in which information is stored within organisations':

> Disciplined archiving practices are the exception rather than the rule, and when a party requests discovery, they could be faced with the possibility that potentially relevant information is stored in a number of disparate locations, in email repositories, on network drives, on local drives on notebook computers, portable devices such as iPhones, BlackBerries, USB memory sticks and the like. Therefore, the question is, should one party have to pay a premium because the other party has not archived its information in an organised way, or has not archived information at all?[10]

9.12 As discussed elsewhere in this report, particularly in Chapter 6, poor record management is only one cause of disproportionately costly discovery—and only one potential target for costs orders. In considering whether the costs of allegedly wasteful discovery work should, in some circumstances, not be awarded to a successful party, it may be noted that judicial concerns have been expressed regarding comparable costs apportionment. In *Cretazzo v Lombardi*, Jacobs J noted that 'trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law':[11]

> The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case.[12]

9.13 Although Jacobs J was dealing with costs after trial, a similar objection might be made to efforts to apportion discovery costs. Concerns may be raised that parties might be dissuaded from fully disclosing all relevant documents because of the risk of an adverse costs order.

---

8 See Ch 6.

9 Queensland Law Society, *Submission DR 28*, 11 February 2011. Another submission also expressed support for reform aimed at 'requiring corporations (and other organisations to the extent possible) to adopt record management systems': Association of Legal Support Managers (Qld), *Submission DR 29*, 11 February 2011.

10 e.law Asia Pacific Pty Ltd, *Submission DR 16*, 20 January 2011.

11 *Cretazzo v Lombardi* (1975) 13 SASR 4, 16.

12 Ibid, 16.

Improperly, unreasonably or negligently incurred

9.14 The Federal Court may disallow, or direct the taxing officer to disallow, costs that have been 'improperly, unreasonably or negligently incurred' or 'direct that a party whose costs are so disallowed shall pay to the other parties the costs incurred by those parties in relation to the proceeding in respect of which his costs have been disallowed'.[13]

9.15 In a 1999 intellectual property case before the Federal Court, one party claimed that the other party 'caused unnecessary prolongation of the case and the incurring of unnecessary expenditure in the course of discovery' by maintaining unreasonably its denial that one design was consciously based on another design.[14] In that case, Lehane J considered the Court's power to apportion costs. After noting that the Court has a broad discretion that must be exercised judicially, and that ordinarily the appropriate order is that the unsuccessful party pay the costs of the successful party, his Honour said:

> Special circumstances may warrant disallowance of certain of the costs incurred by the successful party (O 62 r 36(1) of the *Federal Court Rules* deals with particular circumstances of that kind). ... Where a successful party's conduct of the case unreasonably prolongs proceedings or where that party unreasonably persists in an allegation, or in maintaining a denial, for which there is no foundation, again some apportionment may be appropriate and it may be a proper exercise of the discretion to make the apportionment so as not merely to deprive the successful party of the appropriate proportion of its costs but notionally to require it to pay a portion of the costs of the unsuccessful party.[15]

9.16 Justice Lehane noted 'the difficulty, and no doubt the inappropriateness, of attempting to state rules or even firm guidelines for the exercise of the discretion'.[16] Concerning this discretion, the Full Federal Court has said that, generally speaking,

> the demands of the community for greater economy and efficiency in the conduct of litigation may properly be reflected in a qualification of the presumption that a successful party is entitled to all its costs.[17]

Inconsistent with the overarching purpose

9.17 Section 37N of the *Federal Court of Australia Act* came into effect on 1 January 2010 and provides that parties to a civil proceeding before the Court 'must conduct the proceeding … in a way that is consistent with the overarching purpose'.[18] This overarching purpose, set out in s 37M(1), is to facilitate the just resolution of disputes 'according to law' and 'as quickly, inexpensively and efficiently as possible'. It includes as an objective, 'the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute'.[19] More particularly, s 37N(4)

---

13 *Federal Court Rules* (Cth) O 62 r 36.
14 *Koninklijke Philips Electronics v Remington Products Australia* [1999] FCA 1225, [19].
15 Ibid, [17] (citations omitted).
16 Ibid, [17]
17 *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261, [28].
18 *Federal Court of Australia Act 1976* (Cth) s 37N(1).
19 Ibid s 37M.

provides that in exercising the discretion to award costs, the Court or a judge must take account of a party's failure to comply with the duty to conduct the proceeding in a way that is consistent with the overarching purpose.[20]

9.18 The relevant Explanatory Memorandum stated that:

> The Court currently has power in the Court Rules to make disciplinary costs orders where costs have been incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default. (Order 62, Rule 9) This new provision will give legislative support to these powers and will make it clear that the court can order costs in a way other than costs against the unsuccessful party.
>
> In connection with the amendments to section 43 of the Federal Court [of Australia] Act, the Court will have the discretion to award costs against a party to the proceeding for conduct that breaches the duty, or against a party's lawyer personally for failing to assist the party to comply with the duty ...
>
> Examples of the type of conduct that the Court might consider to be a breach of this duty, and therefore impose costs, include the following (this is a non-exhaustive list that applies equally to the behaviour of applicants and respondents):
>
> - unreasonably refusing to participate in conciliation, mediation, arbitration or other alternative dispute resolution opportunities, because alternative dispute resolution provides a mechanism for the parties to resolve their dispute early, quickly and cheaply;
> - failing to act in good faith in attempting to resolve or narrow issues in the proceedings;
> - unreasonably rejecting an offer of settlement of part or whole of the proceeding; or
> - pursuing issues in the proceeding that had no reasonable prospect of success. This might include issues that were vexatious or frivolous.
>
> The intention of this amendment is to bring about a cultural change in the conduct of litigation so that the Court and the parties are focussed on resolving disputes as quickly and cheaply as possible. Parties who act consistently with this duty will be able to avoid cost orders being made against them and overall, their litigation costs should be reduced.[21]

9.19 Section 37N(4) seems to require the Court or a judge to take into account any failure to comply with the duty to conduct the proceeding in a manner consistent with the overarching purpose—whether or not costs have been found to have been 'improperly, unreasonably or negligently incurred' under O 62 r 36 of the *Federal Court Rules*.

Failing to comply with court directions

9.20 Section 37P of the *Federal Court of Australia Act* concerns the power of the Court to give directions about practice and procedure in a civil proceeding.

---

20 Ibid s 37N(4). The application of s 37N to lawyers is discussed below.

21 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), [27]–[29], [31].

Sections 37P(6)(d) and (e) provide that, if a party fails to comply with a direction given by the Court about the practice and procedure to be followed in relation to the proceedings, the Court may, among other things, award costs against a party or order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.

9.21 The Court may, therefore, award costs against a party for failing to comply with a discovery order—and if the order contained a detailed discovery plan, for failing to conduct proceedings in accordance with the discovery plan.

ALRC's views

9.22 Discovery is a vital part of litigation that should be conducted in accordance with the overarching purpose in s 37M of the *Federal Court of Australia Act*. Where parties do not conduct discovery in this way, the Court should take this into account in awarding costs—particularly where discovery is conducted in breach of a court order.

9.23 For example, the Court may consider whether the parties complied with any discovery plan order when awarding costs.[22] The ALRC considers that a party's poor record-keeping and archiving, or perhaps a party's grossly inefficient method of discovering documents, may also be matters relevant in considering the extent to which a party conducted litigation in accordance with the overarching purpose. The Court's broad discretion in awarding costs should enable it to address this concern, at least partly, when making costs orders.

9.24 Judicial training and education, discussed in Chapter 7, should reinforce for judges the need to consider these matters when awarding costs. The training might also provide broad guidance on how compliance with the duty might be reflected in costs orders. However, practitioners should also be prepared to address the court on these matters. Accordingly, the ALRC recommends that Federal Court practice notes provide that the Court will expect practitioners to address, among other things, whether the parties have complied with this duty in the conduct of discovery. Such guidance in practice notes should lead to a more consistent and predictable application of s 37N of the *Federal Court of Australia Act*, and should also alert litigants to the likely cost implications of wasteful discovery practices.

9.25 As discussed above, a note to O 62 r 9 of the *Federal Court Rules* has been amended to refer to s 37N of the Act. The ALRC suggests that a similar note be added to O 62 r 36, to further alert the Court and judges to the need to consider compliance with the overarching purpose when awarding costs.

22 Discovery plans and discovery plan orders are discussed in Ch 6.

Recommendation 9–1 Federal Court of Australia practice notes should provide that the Court will expect practitioners to ensure that they have complied with their duty to assist the parties to give discovery and take inspection in accordance with the overarching purpose in s 37M of the *Federal Court of Australia Act 1976* (Cth). The practice notes should also outline how the court, when awarding costs, may take into account a failure to comply with the duty.

Paying discovery costs in advance

9.26 Another way to limit the cost of discovery may be for the Court to order a party requesting discovery to pay the estimated cost in advance. The Access to Justice Taskforce recommended that the Attorney-General's Department 'develop options by which courts may order that the estimated cost of discovery requests would be paid for in advance by the requesting party'.[23] The Taskforce considered that requiring up-front payment

> would assist to 'reality test' discovery requests, to encourage proportionate behaviour, and to reduce the burden of carrying the costs of discovery until the end of the hearing.[24]

9.27 The Taskforce suggested that over-inflated costs estimates that attempted to intimidate a party not to persist with their discovery request may be addressed by judges assessing the reasonable costs of discovery.[25] It would not apply in all cases, but 'could be a presumption':

> The Court would need to exercise discretion before making such an order to ensure that parties with a meritorious case were not denied justice through a lack of capacity to pay for reasonable discovery, without which the case would not be able to proceed. Equally, willingness to pay for discovery should not be sufficient to justify that discovery taking place if it is not otherwise reasonably necessary for the conduct of the litigation.[26]

Submissions and consultations

9.28 In the Consultation Paper, the ALRC asked whether there should be a presumption that a party requesting discovery of documents in proceedings before the Federal Court pay the estimated cost in advance, unless the Court orders otherwise.[27]

---

23 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Rec 8.3.

24 Ibid, 105.

25 Ibid.

26 Ibid, 106.

27 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–9.

9.29 Nearly all submissions that addressed the question were opposed to the introduction of such a presumption.[28] It was suggested that being required to pay some costs in advance would prevent some parties from obtaining discovery, and obstruct access to the Court and access to justice.[29] The Department of Immigration and Citizenship submitted that, while it would 'dramatically narrow the scope of discovery' and so 'may have merit where litigation is conducted between a Government agency and a legal person, or between two legal persons', it would not be suitable 'where individuals are concerned'.[30] The Public Interest Advocacy Centre stated that

> many litigants, particularly those who are self-represented, legally aided or otherwise disadvantaged, simply could not afford to pay the estimated costs of discovery in advance and this could mean that for many ordinary individuals such interlocutory costs orders could prevent them from vindicating their legal rights, irrespective of the merits of the proceedings.[31]

9.30 There was also concern that parties might give an inflated estimate of costs, either deliberately or because the costs of discovery were difficult to estimate, and that courts might struggle to assess the reasonableness of such estimates.[32] For example, the Australian Government Solicitor expressed concern about 'the potential that inflated cost estimates, which may be hard to dispute, could be used to scare off an opposing party from seeking discovery'.[33]

9.31 Other objections to the presumption included that it would 'likely result in satellite litigation seeking to rebut the presumption or dispute the amount of any estimate',[34] and it would add 'another layer of interlocutory disputation between the parties, therefore making the proceedings more costly, lengthy and cumbersome'.[35] The Australian Corporate Lawyers Association anticipated that 'the cases in which the

---

28 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; M Legg, *Submission DR 07*, 17 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

29 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

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

31 Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

32 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

33 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

34 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011. See also NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

35 Public Interest Law Clearing House (Vic), *Submission DR 20*, 25 January 2011; Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

requirement would be waived are those in which the party is most unlikely to pay (eg the litigant in person) and so would limit the effectiveness of the requirement'.[36]

9.32 However, some submissions suggested that although there should be no such presumption, the Court should have the discretion to order advance payment in some circumstances.[37] Advance payment might be ordered, for example, for discovery of data that was not 'reasonably accessible',[38] or for documents that would not be discovered under 'specific disclosure' under the *Civil Procedure Rules* (UK).[39] Concerning the circumstances in which the cost of retrieving data that was not 'reasonably accessible' should be shifted to the requesting party, a group of large law firms noted that the following factors were considered in a case before a United States District Court:

- the extent to which the request is specifically tailored to discover relevant information;
- the availability of such information from other sources;
- the total cost of production, compared to the amount in controversy;
- the total cost of production, compared to the resources available to each party;
- the relative ability of each party to control costs and its incentive to do so;
- the importance of the issues at stake in the litigation; and
- the relative benefits to the parties of obtaining the information.[40]

ALRC's views

9.33 The ALRC considers that there should not be a presumption that parties requesting discovery pay the likely costs in advance. Such a presumption might obstruct many litigants' access to justice—the burden may be onerous and many would incur additional costs seeking to overturn the presumption. If parties who were ordered to pay the costs in advance were ultimately successful in the litigation, they might later find that they were unable to recover those costs—perhaps because the other party was unable to pay or because the order stipulated that such costs cannot be recovered.

9.34 Whether and to what extent litigants might deliberately inflate the estimated cost of discovery as a strategy to deter parties seeking discovery is unclear. The ALRC understands that actual litigation costs often exceed initial estimates. This may suggest that parties are more likely to underestimate the costs of discovery. Even so, given the high costs of discovery in some litigation, an estimate of future discovery costs might

---

36 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.

37 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Australian Taxation Office, *Submission DR 14*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

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

40 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011, referring to *Zubulake v UBS Warburg*, 229 FRD 422 (SDNY, 2004), where the court considered whether and to what extent the cost of restoring backup tapes should be shifted to the party requesting them: 322, 324. The scope of discovery is a separate question, discussed in Ch 6.

be considerable—and disproportionate to the issues in dispute—even if it later proves lower than the actual cost.

9.35 While the ALRC is not convinced of the merit of introducing this presumption, it might be appropriate for the Court to order advance payment of discovery costs in some circumstances. For example, some or all of the costs of extracting or retrieving data that is not 'reasonably accessible' might be borne by the party requesting the data. This may be a useful order to make when a party requests the discovery of data stored on backup tapes that have been kept for disaster recovery, rather than archival purposes. The Court may also make such an order if, for example, the party requesting discovery has extensive financial resources and the Court considers that an order for advance payment might narrow the scope of discovery to reasonable proportions. An order for advance payment may, therefore, be another useful tool that a judge might use as part of robust case management in relation to discovery.

9.36 While the Court's existing costs powers may already allow judges to make such orders, the order is not clearly prescribed in s 43(3) of the *Federal Court of Australia Act*. The ALRC therefore recommends that the *Federal Court of Australia Act* be amended to provide expressly that the court or a judge may make an order that some or all of the estimated costs of discovery be paid for in advance by the party requesting discovery, and that a party requesting discovery give security for the payment of the cost of discovery. This recommendation is made below, after a consideration of orders to cap the costs that may be recovered for discovery work.

Capping discovery costs

9.37 The Federal Court has the power to cap costs under O 62A r 1 of the *Federal Court Rules*, which provides:

> The Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis.[41]

9.38 Order 62A r 2 excludes certain costs that one party may have caused the other to incur unnecessarily. Order 62A r 3 provides that an order under r 1 may include any directions the Court considers necessary to effect the economic and efficient progress of the proceedings to trial or hearing of the action. Order 62A r 4 permits the Court to vary the maximum recoverable costs.[42]

9.39 The purpose of the Order was explained in a letter dated 6 November 1991 from the then Federal Court Chief Justice to the then President of the Law Council of Australia:

> There is concern within the Court, reflecting that within the wider community and the legal profession, that the cost of litigation, particularly for persons of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice.

41 *Federal Court Rules* (Cth) O 62A r 1.
42 Ibid O 62A.

> A deterrent to the assertion or the defence of rights in civil litigation is a fear of the ultimate exposure in terms of the legal costs to which an unsuccessful party may be subjected. ...
>
> One suggestion that has been made proposes a change to the Rules so as to empower a judge, early in proceedings, to make an order fixing a ceiling on the amount of costs recoverable from the unsuccessful party in the litigation. This ceiling could be defined by reference both to party and party costs and by reference to solicitor/client costs. It should be pointed out that this proposal does not involve the Court in regulating the costs recoverable by a solicitor from his or her client but rather, where costs are ordered to be paid on a solicitor/client basis, the maximum that would be recoverable would be the fixed amount. …
>
> It is anticipated that such a rule, if introduced, would be applied principally to commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute, although it could be applied in other cases as appropriate.[43]

9.40 In *Hanisch v Strive Pty Ltd*, Drummond J considered the scope and purpose of O 62A.[44] His Honour held that the principal object of O 62A was 'to arm the Court with power to limit the exposure to costs of parties engaged in litigation in the Federal Court which involves less complex issues and is concerned with the recovery of moderate amounts of money'.[45] Drummond J further concluded that, where the issues before the Court were not complex and where the monetary compensation recoverable was limited, these will be 'powerful factors that justify the making of an order under O 62A'.[46]

9.41 In *Corcoran v Virgin Blue Airlines Pty Ltd*, Bennett J outlined the following factors relevant to the exercise of the Court's discretion in making an order under O 62A r 1:

- the timing of the application;
- the complexity of the factual or legal issues raised in the proceedings;
- the amount of damages that the applicant seeks to recover and the extent of any other remedies sought;
- whether the applicant's claims are arguable and not frivolous or vexatious;
- the undesirability of forcing the applicant to abandon the proceedings; and
- whether there is a public interest element to the case.[47]

9.42 The Public Interest Advocacy Centre has called for a 'specific public interest costs rule' that 'would provide greater certainty for courts and tribunals and litigants as to the circumstances when such an order is available'.[48]

---

43 Quoted by Beazley J in *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 511.
44 *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384.
45 Ibid, 387.
46 Ibid, 388.
47 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (citations omitted).
48 G Namey, *Litigation Costs: Strategies for the Public Interest Lawyer* (2010) <http://intranet.law.unimelb.edu.au/staff/events/files/LitigationcostsGN.pdf> at 18 February 2011. See also Public Interest Advocacy Centre, *Submission DR 15*, 20 January 2011.

9.43 It has been noted that judges will often have insufficient information to fix costs caps at an appropriate level.[49]

ALRC's views

9.44 In its report, *Costs Shifting*, the ALRC recommended that a court or tribunal, by order made at a directions hearing, should be able to specify the maximum amount that may be recovered pursuant to an order for costs.[50] The ALRC argued that such a power allowed a court

> to set a budget so that management of the case may be tailored according to appropriate financial limits. The imposition of a cap allows each party to make an informed assessment of the costs and risks involved and to weigh them against the potential benefits. It can encourage the efficient and economic conduct of the proceedings. The imposition of a cap does not prevent a party who wants to spend more than the specified amount from doing so, it simply prevents those additional costs being passed on to the other party.[51]

9.45 The ALRC also recommended that courts should be able to make a public interest costs order.[52]

9.46 The potential, broader use of O 62A of the *Federal Court Rules* to limit the cost of discovery may be a considerable departure from the original intended use of O 62A for 'commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute', as suggested by the then Chief Justice.[53] Furthermore, the complexity of cases in which discovery costs may be unreasonably high may mean that estimating reasonable costs in advance (for the purpose of capping costs to that reasonable estimate) may be prohibitively difficult.

9.47 Care must also be taken to ensure that the processes of discovery and, more broadly, justice are not compromised by the Court imposing a limit on discovery costs. Fair outcomes might not be achieved if parties fail to spend the funds needed to discover relevant documents, because they know the cost will not be recovered. There is a risk that a court-imposed cap could be read to imply that relevant and important documents need not be discovered, if discovering them requires funds over the cap.

9.48 However, despite these concerns, the ALRC considers that capping discovery costs in appropriate cases may focus the scope of discovery and maintain proportionality to the issues in dispute. For example, where the importance of an issue in dispute may be readily quantified, a court may be less reluctant to cap the cost of discovery in advance.

---

49 A Cannon, 'Discovery Show and Tell Notes' (Paper presented at AIJA Discovery Seminar, Melbourne, 2007).

50 Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation*, Report 75 (1995), Rec 39, 129. The ALRC also recommended that an amount that a party is ordered to pay pursuant to a disciplinary costs order is in addition to the maximum amount specified by the court or tribunal: ibid.

51 Ibid, 128.

52 Ibid, 128.

53 Quoted by Beazley J in *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 511.

9.49 The ALRC therefore concludes that the *Federal Court of Australia Act* should be amended to provide expressly that the Court or judge may make an order that specifies the maximum cost that may be recovered for giving discovery or taking inspection. Practitioners should also be prepared to address the Court on when such an order may be appropriate. Accordingly, the ALRC also recommends that Federal Court of Australia practice notes outline relevant circumstances the practitioners might address in relation to this order, and an order for advance payment of discovery costs discussed earlier in this chapter.

Recommendation 9–2 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that, without limiting the discretion of the Court or a judge in relation to costs, the Court or judge may make an order that:

(a) some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery;

(b) a party requesting discovery give security for the payment of the cost of discovery; and

(c) specifies the maximum cost that may be recovered for giving discovery or taking inspection.

Recommendation 9–3 Federal Court of Australia practice notes should provide that practitioners may be expected to address whether an order in Recommendation 9–1 should be made. The practice notes should outline relevant circumstances the practitioners may be asked to address, including:

(a) the parties' financial resources;

(b) the likely cost of retrieving relevant documents;

(c) the proportionality of the likely cost to the importance and complexity of the matters in dispute; and

(d) the potential for the order to focus the scope of discovery.

Costs as between lawyer and client

9.50 This section considers whether and, if so, when, lawyers, rather than their clients, should bear the costs of discovery or be prohibited from charging more than the actual costs they incurred in conducting discovery.

9.51 In Chapter 12, the ALRC considers a number of potentially unethical discovery practices and argues that these may sometimes amount to professional misconduct. Sometimes, however, lawyers may perform costly, inefficient and unnecessary discovery work that, on any reasonable assessment, should not have been done, but this may not amount to professional misconduct. Unreasonableness, of itself, is not necessarily misconduct. A similar distinction was made by Ipp J in *D'Allesandro v Legal Practitioners Complaints Committee*:

> The standards applied under the court's duty to monitor the taxation of bills of costs and costs agreements, and the court's duty to supervise the disciplining of legal practitioners are not necessarily the same and do not serve identical purposes. A fee that a solicitor may seek to charge by way of a bill of costs may, upon taxation, be found to be unreasonable and therefore subject to appropriate reduction. It does not, however, necessarily follow that the fees so charged by the bill of costs are so excessive as to constitute a breach of ethics.[54]

9.52 The high cost of discovery is often attributed to the army of junior solicitors, paralegals and clerks required to work through a request for discovery of documents. The plight of 'discovery soldiers' conscripted in *Trade Practice Commission v Santos Limited & Sagasco Holdings Limited*[55] was later remarked upon extra-curially by the trial judge, the Hon Justice Peter Heerey:

> Practitioners were recruited into a burgeoning army engaged in discovery, inspecting, filing, listing, copying, storing, carrying about and otherwise dealing with 100,000 documents which had been accumulated for the purposes of the litigation. An expression that developed amongst junior practitioners who had been ensnared in the discovery process was 'I have been Santossed'.[56]

9.53 Law firms have been criticised for using this army of employees to generate profits from the discovery process. In its *Civil Justice Review*, the Victorian Law Reform Commission (VLRC) singled out for criticism the fees charged for certain discovery work:

> In some instances, clerks or law students may be engaged to assist in connection with document review. They may be paid at a relatively low hourly rate (eg, $30 per hour) but charged to clients at significantly higher hourly rates (eg, between $150 and $250 per hour). It has been suggested that this is one of the major reasons for the very large costs associated with discovery.[57]

9.54 The Hon Chief Justice James Spigelman of the NSW Supreme Court has noted that the difficulty with legal costs is that a lawyer 'does not have a financial incentive' to complete the legal work as quickly as possible. However, he argued, 'the control is of course, the practitioner's sense of professional responsibility'.[58]

Disallowing costs

9.55 Section 43(3) of the *Federal Court of Australia Act* provides that the Court or judge may, among other things, 'make different awards of costs in relation to different parts of the proceeding' and 'order a party's lawyer to bear costs personally'. As noted above, s 43(3) codifies powers in relation to costs formerly prescribed by the Rules or at law.[59] The relevant rule concerning awarding costs against a lawyer personally is O 62 r 9 of the *Federal Court Rules*, which provides that the Court may disallow costs

---

54 *D'Allesandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 209–212.

55 *Trade Practices Commission v Santos* (1992) 38 FCR 382.

56 P Heerey, 'Some Lessons from Santos' (1994) 29 *Australian Lawyer* 24.

57 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), ch 6, 473.

58 J Spigelman, *Opening of the Law Term* (2004), Opening of the Law Term Dinner speech, 2 February 2004. Professional and ethical discovery is considered in Ch 12.

59 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), [39].

as between a lawyer and his or her client where the costs are 'incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court that a lawyer is responsible'.[60] The Court may also 'direct the lawyer to repay to the client, costs which the client has been ordered to pay to another party' or 'direct the lawyer to indemnify any party other than the client against costs payable by the party indemnified'.[61]

9.56 The power in O 62 r 9 should be 'exercised with care and in clear cases only in which there has been conduct on the part of the solicitor which amounts to a serious dereliction of duty'.[62] The Full Court of the Federal Court has summarised the relevant principles as follows:

> in a claim under Order 62 rule 9, it is necessary for a client to demonstrate a serious dereliction of duty by the legal practitioner or a failure on the part of the legal practitioner to fulfil a duty owed to the Court to aid in promoting, in the practitioner's own sphere, the cause of justice. It will often be difficult for a court to know all of the details and circumstances of a legal practitioner's instructions. Further, the Court must be concerned about the risk of a practice developing whereby legal practitioners endeavour to brow beat their opponents into abandoning clients, or particular issues or arguments, for fear of a personal costs order being made.
>
> Nevertheless, it is equally important to uphold the right of the Court to order a legal practitioner to pay costs wasted by the practitioner's unreasonable conduct of a case. What constitutes unreasonable conduct will depend upon the circumstances of the particular case. However, unreasonable conduct must be more than acting on behalf of a client who has little or no prospect of success. There must be something akin to an abuse of process. Using a proceeding for an ulterior purpose or conducting a proceeding without any, or any proper, consideration of the prospects of success in the proceeding would be sufficient to justify an order against a legal practitioner who was responsible for that conduct.[63]

9.57 Where a party to Federal Court proceedings has concerns about the amount charged by lawyers for discovery, the client may also apply for taxation of the lawyer's fees under the Legal Profession Act of the relevant jurisdiction.[64]

Not acting consistently with the overarching purpose

9.58 The need to demonstrate a 'serious dereliction of duty' may suggest that O 62 r 9 can rarely be applied to discovery practices that are wasteful and unnecessarily costly. However, since the enactment of s 37N of the *Federal Court of Australia Act*, this rule may apply more broadly, particularly considering that a note to O 62 r 9 now refers to s 37N. Section 37N has been discussed earlier in this chapter in

---

60 *Federal Court Rules* (Cth) O 62 r 9.

61 Ibid O 62 r 9(1).

62 *Ex Christmas Islanders Association Inc v Attorney-General (Cth)* [2006] FCA 671, [11], citing *De Sousa v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544, 548.

63 *Macteldir Pty Ltd v Roskov* [2007] FCAFC 49, [56]–[57].

64 *Legal Profession Act 2004* (NSW) pt 3.2, div 11; *Legal Profession Act 2007* (Qld) pt 3.4, div 7; *Legal Practitioners Act 1981* (SA) pt 3, div 8; *Legal Profession Act 2007* (Tas) pt 3.3, div 7; *Legal Profession Act 2004* (Vic) pt 3.4, div 7; *Legal Profession Act 2008* (WA) pt 10, div 8; *Legal Profession Act 2006* (ACT) div 3.2.7; *Legal Profession Act 2006* (NT) pt 3.3, div 8.

relation to awarding costs between parties, but the section also concerns when a lawyer may be ordered to bear costs.

9.59 Section 37N(2) provides that a party's lawyer must take account of the duty imposed on the party to conduct the proceeding in a way that is consistent with the overarching purpose in s 37M and assist the party to comply with the duty. Section 37N(4) provides that, in exercising the discretion to award costs, the Court or a judge 'must take account of any failure to comply with the duty imposed by subsection (1) or (2)'. Section 37N(5) provides that if the Court or a judge orders a lawyer to bear costs personally, because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client. The purpose of s 37N(5) is 'to ensure that lawyers take responsibility for their own failure to comply with their duty under subsection 37N(2)'.[65]

Limiting costs to actual costs

9.60 Short of disallowing costs entirely, courts may make other orders to limit the costs charged by lawyers to their clients for discovery work. For example, the VLRC recommended that Victorian courts be given the power to limit the costs charged for discovery to the actual cost to the law practice of such work, including a reasonable allowance for overheads, but excluding a mark-up or profit component.[66] Order 62 of the *Federal Court Rules* arguably equips the Federal Court to make orders for actual costs, and in the Consultation Paper, the ALRC asked whether the Federal Court should be given explicit statutory powers to make such orders.[67]

9.61 Most submissions that addressed this question opposed the introduction of this power.[68] The existing regulation was said to be sufficient: practitioners must inform their clients of likely costs under the legal profession legislation and it was said that the *Federal Court of Australia Act* and the various state and territory costs and professional discipline regimes 'are capable of dealing with instances where law firms engage in inappropriate charging practices'.[69]

9.62 A group of large law firms argued that discovery was important work needing 'legal input and oversight' and the fees for this work were 'legitimate costs incurred in the course of resolving a dispute'.[70] It was submitted that capping costs treated discovery as 'a minor administrative process', which was inconsistent with 'a policy of

---

65 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth).

66 Ibid, Rec 90. This recommendation was not adopted in the *Civil Procedure Act 2010* (Vic).

67 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 3–10.

68 Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

69 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; M Legg, *Submission DR 07*, 17 January 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011.

70 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

reinforcing the professional and ethical responsibility of lawyers and their duties to their clients and the Court':[71]

> Solicitors owe significant and weighty obligations to the Court and their clients. Solicitors are charged with the duty of advising their clients on the nature of discovery, scoping the discovery and obtaining and reviewing the material required to be discovered … It is a legitimate expense and fundamental to the adversarial system of litigation that is adopted in Australia.[72]

9.63 It was observed that the market for legal services was, in any event, highly competitive and clients involved in large-scale litigation (and their in-house counsel) were generally 'commercially astute', 'litigation savvy', and in a position to negotiate legal fees and costs and monitor work.[73]

9.64 Concern was also expressed that creating an additional costs order power would give rise to litigation about what constitutes 'actual' or 'reasonable' costs.[74]

9.65 Cost capping might encounter some of the other objections noted above with respect to orders requiring parties to pay costs in advance, namely, that the costs of litigation, and particularly discovery, may be difficult to estimate, and there was no evidence of widespread overcharging for discovery anyway.

9.66 One submission expressed support for cost reforms on the basis that early, cost-effective discovery should:

> be considered an aid to early dispute resolution and so long as discovered documents are truly relevant, full discovery is best, and a presumption of advance payment and statutory powers to limit costs must be of value. Such a proposal would reduce the view of lawyers that discovery means 'billable hours' and the obvious abuse, and focus on the role of discovery as an aid to disputes resolution.
>
> The only education relevant here is to promote early resolution of disputes in the most cost-effective manner. The lawyers' financial interests should not be promoted over those of parties and clients with legitimate causes of action and defences. Obviously some clients are well resourced, have no legitimate claim and will fight no matter what. Some see litigation as a negotiating or business tool. In those cases lawyers can justify full fees. Not so the often poor 'innocent' on the other side of that type of dispute.[75]

ALRC's views

9.67 The ALRC has insufficient evidence suggesting that legal practices make an unreasonable profit from discovery work to justify the introduction of a statutory power limiting any profit from discovery work. The amount charged to clients for discovery is generally a matter for cost assessment or review under existing legal profession legislation.

---

71 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
72 Ibid.
73 Ibid; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.
74 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
75 I Turnbull, *Submission DR 05*, 15 January 2011.

9.68 However, the ALRC considers that it is open to the Federal Court to disallow discovery costs between lawyers and their clients on the grounds that the discovery costs were incurred without sufficient regard to the need to resolve disputes quickly, inexpensively and efficiently and at a cost proportionate to the importance and complexity of the matters in dispute. Indeed, this appears to be the clear intention of s 37N of the *Federal Court of Australia Act*: failing to comply with the duty is a matter the Court 'must' consider when awarding costs. Further amendments to the *Federal Court of Australia Act* or the *Federal Court Rules* are therefore unnecessary to empower the Court to make orders that reflect any failure of a lawyer to assist the parties to conduct litigation properly in accordance with the overarching purpose.

9.69 The ALRC notes that taking compliance with s 37N into account when awarding costs may present real difficulties to the Court where it involves intervening in the client-lawyer relationship. Further, any assessment of a lawyer's compliance with s 37N of the *Federal Court of Australia Act* might itself be a costly exercise that the Court may be reluctant to undertake. However, the judicial training and education that the ALRC recommends in Chapter 7 should not only encourage judges to be alert to this requirement, but also provide broad guidance on how to reflect compliance with s 37M of the Act in costs orders.

9.70 Practitioners should also be prepared to address the Court on this matter. Accordingly, the ALRC recommends that Federal Court practice notes should provide that the Court will expect practitioners to ensure that they have complied with their duty to assist the parties to give discovery and take inspection in accordance with the overarching purpose in s 37M of the *Federal Court of Australia Act*. The ALRC considers that the relevant practice note should also provide that practitioners should be prepared to address the Court on how they have complied with their duty, and on reasonable consequences for any failure to comply with that duty.

9.71 However, the ALRC considers that the Court should not necessarily rely on practitioners to apply for these orders. There may be little incentive for lawyers to challenge the proportionality of discovery costs, and their clients may not know to instruct them to do so. Where, based on the information before the Court, the costs of discovery appear disproportionately high, those costs should be interrogated and practitioners should be asked to show why the costs are reasonable. This would be consistent with the robust judicial case management the ALRC recommends in Chapter 7.

Recommendation 9–4 Federal Court of Australia practice notes should provide that the Court will expect practitioners to ensure that they have complied with their duty to assist the parties to give discovery and take inspection in accordance with the overarching purpose in s 37M of the *Federal Court of Australia Act 1976* (Cth). The practice notes should also outline how the court, when awarding costs, may take into account a failure to comply with the duty.

Costs must be fair and reasonable

9.72 Discovery costs can be limited by requiring law practices to charge only costs for discovery that are fair and reasonable. Under legal profession legislation in most jurisdictions, lawyers are under various obligations to provide to the client a written disclosure of costs containing, among other things, an estimate of the total legal costs and, in litigious matters, the range of costs the client may be ordered to pay, if unsuccessful.[76] Legislation across jurisdictions also provides that professional misconduct includes 'charging of excessive legal costs in connection with the practice of law'.[77] As noted above, courts have jurisdiction to supervise legal costs charged by lawyers to their clients, as well as to supervise the ethical conduct of lawyers.[78] However, existing legal professional legislation does not require expressly that the fees be reasonable. In many jurisdictions where there is no costs agreement or applicable scale of costs legal costs are only recoverable according to the 'fair and reasonable value of the legal services provided'.[79] However, mandatory criteria included for determining what is fair and reasonable only apply to costs assessors making a costs assessment.[80]

9.73 Although, generally, professional rules do not explicitly require that lawyers charge their clients reasonable fees, jurisdictions vary in relation to the obligations owed by lawyers with respect to costs. In Victoria, for example, the overarching obligations of the *Civil Procedure Act 2010* (Vic) include the obligation to ensure that costs are reasonable and proportionate.[81]

9.74 In Western Australia, under the *Legal Profession Conduct Rules 2010* (WA):

> A practitioner must not charge costs which are more than is reasonable for the practitioner's services having regard to the following—
>
> (a) the complexity of the matter;
>
> (b) the time and skill involved in dealing with the matter;
>
> (c) any scale of costs that might be applicable to the matter;
>
> (d) any agreement as to costs between the practitioner and the client.

---

76 See, eg, *Legal Profession Act 2004* (NSW) pt 3.2, s 309; *Legal Profession Act 2007* (Qld) pt 3.4, s 308; *Legal Profession Act 2004* (Vic) s 3.4.9; *Legal Profession Act 2008* (WA) s 260; *Legal Profession Act 2006* (ACT) s 269.

77 See, eg, *Legal Profession Act 2004* (NSW) s 498; *Legal Profession Act 2007* (Qld) s 420; *Legal Profession Act 2007* (Tas) s 422.

78 See, eg, *Judiciary Act 1903* (Cth) s 26; *High Court Rules 2004* (Cth) O 71, r 1; *Federal Court of Australia Act 1976* (Cth) s 43.

79 See, eg, *Legal Profession Act 2004* (NSW); *Legal Profession Act 2007* (Qld) s 319(1)(c); *Legal Profession Act 2007* (Tas) s 30; *Legal Profession Act 2004* (Vic) s 3.4.19; *Legal Profession Act 2008* (WA) s 271; *Legal Profession Act 2006* (ACT) s 279.

80 See, eg, *Legal Profession Act 2004* (NSW) s 363; *Legal Profession Act 2007* (Qld) s 341; *Legal Profession Act 2007* (Tas) s 327; *Legal Profession Act 2008* (WA) s 301; *Legal Profession Act 2006* (ACT) s 300. The inclusion of criteria is in line with Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 27.

81 *Civil Procedure Act 2010* (Vic) s 24.

9.75 In Queensland, commentary included in the professional rules states that, in agreeing to act for a client, a lawyer 'should not take steps or perform work in such a manner as to unnecessarily increase costs to the client'.[82] In South Australia, the professional rules provide that, in relation to contingency fees:

> A practitioner or firm of practitioners shall not charge fees which are unfair or unreasonable or enter into a costs agreement the terms of which are unfair or unreasonable.[83]

9.76 In considering whether the fees or the terms of a costs agreement are unfair or unreasonable, the South Australian professional rules provide that regard must be had to a range of matters, including: the nature of the matter; the amount at stake; jurisdiction; the client; and the experience and reputation of the lawyer.[84]

9.77 In its report, *Managing Justice: A Review of the Civil Justice System* Report 89 (2000) (*Managing Justice*), the ALRC said that the fairness and reasonableness of costs

> will be affected by factors such as size of the firm, the resources available, the value lawyers place on their skill and expertise and the urgency of the client's needs. Fee scales can provide an appropriate, objective starting point as to whether fees charged are reasonable. Evidence of fees charged by other practitioners in the jurisdiction is also relevant.[85]

Draft National Law

9.78 Under the *Legal Profession National Law* (Draft National Law),[86] a law practice must 'charge costs that are not more than fair and reasonable in all the circumstances' and that, in particular, are 'proportionately and reasonably incurred' and 'proportionate and reasonable in amount'.[87] In considering whether legal costs are fair and reasonable, regard must be had, among other things, to whether the legal costs:

- reasonably reflect the 'level of skill, experience, specialisation and seniority of the lawyers concerned';
- reasonably reflect 'the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest'; and
- conform to any applicable requirements of pt 4.3 of the National Laws (which concern legal costs), the National Rules and fixed costs legislative provisions.[88]

9.79 The Draft National Law also imposes an obligation on law practices to avoid increased legal costs. Specifically, a 'law practice must not act in a way that

---

82 *Legal Profession (Solicitors) Rule 2007* (Qld) guidelines to r 2.1.
83 *Rules of Professional Conduct and Practice* (SA) r 42.2.
84 Ibid.
85 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), 342 (citations omitted).
86 For a short background, see Ch 11.
87 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010), s 4.3.4.
88 Ibid, s 4.3.4(2), (3).

unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs'.[89]

Submissions and consultations

9.80 In the Consultation Paper, the ALRC proposed that legal profession legislation or professional conduct rules should provide that a law practice can only charge costs for discovery that are fair and reasonable.[90] The ALRC also asked how lawyers should determine what are fair and reasonable costs in the context of discovery.[91]

9.81 Some submissions that addressed this proposal expressed similar concerns to those they expressed in relation to a new court power to limit costs to actual costs, noted above.[92] Allens Arthur Robinson, for example, submitted that:

> Provided the costs of discovery are reasonable, there is no reason why the traditional loser-pays rule should not continue to apply. The costs assessment process ensures the reasonableness of party-party costs.[93]

9.82 The Law Society of WA supported 'the legal profession legislation and/or professional conduct rules providing that a law practice can only charge costs which are reasonable', but argued that this limit should 'not be linked to any particular activity' such as discovery, because there was no evidence that discovery 'is more susceptible to overcharging'.[94]

9.83 The NSW Law Society also submitted that it

> does not support a proposal which would require the legal profession to cap or limit legal costs associated with discovery. The Committee considers that provided the legal costs of discovery are *reasonable* there is no reason why the ordinary rules should not apply to the recovery of those legal costs.[95]

9.84 The Law Council submitted that 'lawyers should be entitled to recover the legitimate cost of the work properly and reasonably undertaken in relation to discovery':

> 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.[96]

9.85 If the cost of discovery were high, NSW Young Lawyers submitted, this was 'a product of the time-intensive nature of the process which is a result of the onerous

---

89 Ibid, s 4.3.5.
90 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 4–2.
91 Ibid, Question 4–12.
92 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
93 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
94 Law Society of Western Australia, *Submission DR 26*, 11 February 2011.
95 Law Society of NSW, *Submission DR 22*, 28 January 2011 (emphasis in original).
96 Law Council of Australia, *Submission DR 25*, 31 January 2011 (emphasis in original).

obligations placed on both parties and practitioners to discover all relevant documents'. Reforms should therefore be directed at 'reducing the scope of the obligations on parties rather than the practitioner-client relationship'.[97]

ALRC's views

9.86 The ALRC considers that overcharging should be capable of constituting unsatisfactory professional conduct or professional misconduct. This accords with recommendations made in *Managing Justice* and subsequently incorporated into professional rules.[98]

9.87 The ALRC also supports the move to include in the National Law a provision to the effect that a law practice must 'charge costs that are not more than fair and reasonable in all the circumstances'. The success of such a provision might largely turn on what, in practice, is considered reasonable. Submissions did not address how lawyers, regulators and others should determine what is fair and reasonable. Standard practice among law firms may not be a useful guide in this regard, but suggested indicators in the Draft National Law appear to provide useful guidance. One indicator that has an obvious application to discovery is whether the costs reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned.

97 NSW Young Lawyers, *Submission DR 19*, 21 January 2011. See also Law Council of Australia, *Submission DR 25*, 31 January 2011.

98 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 27.

10. Pre-trial Oral Examinations

Contents

Summary

10.1 The Terms of Reference direct the ALRC, in conducting its Inquiry, to have regard to alternatives to discovery.[1] The ALRC is also to consider issues to limit the overuse of discovery and to ensure key documents relevant to the real issues in dispute are defined as early as possible. One of the 'alternatives' to discovery that was discussed in the ALRC's Consultation Paper was pre-trial oral examinations.

10.2 This chapter explains what pre-trial oral examinations are, including perceived advantages and disadvantages. It outlines the use of oral depositions in the United States (US) and Canada as well as oral deposition-like processes in Australia. In particular, the chapter explores existing powers in the *Federal Court of Australia Act 1976* (Cth) and in the *Federal Court Rules* (Cth). It notes the uncertainty as to whether these provisions may be interpreted in such a way as to facilitate pre-trial oral examination for discovery. The chapter then analyses comments made in submissions about whether there is a need for a new procedure in Federal Court civil practice and about perceived advantages and disadvantages—including likely costs. The ALRC concludes that there is sufficient evidence to support the use of pre-trial oral examination for discovery in specific cases, such as where it would not be cost prohibitive.

10.3 The ALRC's initial proposal was for a new pre-trial procedure to be introduced for oral examination of any person who has information relevant to the matters in

1 See the Terms of Reference at the front of this Report.

dispute. However, after noting concerns raised in submissions that the ALRC was proposing an 'alternative' to the current case management system rather than an additional discovery 'tool', and considering the uncertainty of the interpretation of the relevant provisions in the *Federal Court of Australia Act* and the *Federal Court Rules*, the ALRC has decided not to make a recommendation in the form of its initial proposal. Rather, it considers that the *Federal Court of Australia Act* should be amended to provide expressly that the Federal Court or a judge may order pre-trial oral examination about discovery. As the ALRC is of the view that such a procedure should only be by leave of the Court, the ALRC's second recommendation in this chapter is that the *Federal Court Rules* should be amended to provide expressly the limited circumstances in which the Court or a judge may order pre-trial oral examination about discovery.

Pre-trial oral examinations

10.4 Pre-trial oral examinations are used predominantly in US jurisdictions as a means of recording the evidence of parties and witnesses. One definition of a pre-trial oral examination is 'an out-of-court question and answer session under oath, conducted in advance of a lawsuit as part of the discovery process'.[2] This definition implies that a pre-trial oral examination must be conducted out-of-court and also that it should be 'in advance of a lawsuit', which suggests that it is before the issuing of civil proceedings. However, the ALRC takes a broader view of pre-trial oral examinations in this chapter. The ALRC's recommendations are focused on the possible use of oral examinations for discovery after the issuing of civil proceedings but before the trial and when conducted by an officer of the Court. Pre-trial oral examinations are also referred to as oral depositions, oral discovery, examinations for discovery and depositions on oral examinations. The terms pre-trial oral examinations, oral depositions, and oral discovery are used interchangeably in this chapter.

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

- discover evidence and the identity of documents;
- discover how a witness will testify at trial and commit that witness to a version of testimony prior to trial;
- assess the credibility and suitability of the witness;
- preserve testimony in a case where witnesses are unable to testify at trial; and
- test out the strengths or weaknesses of a party's case so as to encourage earlier settlement negotiations.[3]

---

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

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

10.6 Generally speaking, pre-trial oral examinations do not replace the need for oral evidence to be given at trial.[4] However, the content of the oral examinations may be relevant in corroborating the testimony and credibility of witnesses at trial.

10.7 The procedure outlined above can be seen as an alternative to the current Australian discovery process, as it provides that parties could seek disclosure of information and documents without any orders from the court or the necessity of an interlocutory process.[5] That is, the procedure envisages pre-trial oral examinations in a slightly different way from the ALRC's focus in this Inquiry.

10.8 It is useful to recall the discussion in Chapter 1 of this Report where the ALRC observed that the central focus of this Inquiry is the disclosure of documents for inspection by one party to another party in proceedings for substantive relief conducted in a federal court and not:

- preliminary discovery—that is, orders that facilitate a would-be-applicant to identify potential respondents to a proceeding;
- discovery from non-parties;
- procedures that assist a party to obtain admissions from an opposing party prior to trial; and
- the use of the subpoena process to compel the attendance of persons to give evidence at the trial or to produce documents either before or at the trial.

10.9 As will become clear in this chapter, the practice of using oral depositions—in particular in the US—may encompass some or all of these procedures. While these various procedures may be ancillary to this Inquiry, the ALRC considers it necessary to mention them in this context to give a more complete description of the use of oral depositions in various jurisdictions.

Oral depositions in the United States

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

> the factual battleground where the vast majority of litigation actually takes place. ... The significance of depositions has grown geometrically over the years to a point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial—assuming there is a trial, which there usually is not. The pre-trial tail now wags the trial dog.[6]

---

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

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

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

Framework for oral depositions

10.11 The framework for discovery, including oral depositions, in civil litigation in the US is governed by the *Federal Rules of Civil Procedure 2009* (US) (FRCP).[7] '[A]s soon as practicable' after the start of litigation, the FRCP require that parties meet at a pre-trial conference[8] and make initial disclosures,[9] which are meant to ensure the exchange of 'certain basic information' deemed necessary for parties to prepare for settlement or trial.[10] At the pre-trial conference, parties either make these disclosures or determine the logistics for making them,[11] discuss any issues about preserving information,[12] and develop a discovery plan, which addresses the timing and scope of discovery, privilege issues, and issues around electronically stored information.[13] After the pre-trial conference, parties generally have 14 days to make their initial disclosures and file a report outlining the discovery plan.[14]

10.12 The court must limit the scope of discovery whenever it determines that:

- discovery will be 'unreasonably cumulative or duplicative' or can be obtained from a 'more convenient, less burdensome, or less expensive' source;
- the requesting party has already had the opportunity to obtain the information in discovery; or
- the burden of the proposed discovery outweighs its likely benefit.[15]

10.13 The court can make this determination on its own or in response to a motion from a party.[16] Where requested by a party, the court may also issue a protective order.[17] Protective orders are meant to protect persons from 'annoyance, embarrassment, oppression, or undue burden or expense' by, for example, prescribing a particular method of discovery, limiting the scope of discovery or requiring steps to protect a party's privacy.[18]

---

7 *Federal Rules of Civil Procedure 2009* (US) rr 26–37.
8 Ibid r 26(f)(1).
9 Ibid r 26(a)(1)(C).
10 *Advisory Committee Notes to the 1993 Amendments to Federal Rules of Civil Procedure Rule 26 (US)* (2011). Parties must provide contact information for all individuals likely to have discoverable information; copies or descriptions of items and documents that the party may use to make its case; computations and supporting documentation for damages claims; and any insurance agreement relevant for indemnification or reimbursement of payments under the judgement: *Federal Rules of Civil Procedure 2009* (US) r 26(a)(1)(A). For some of these items, the party need not produce the material, but only make it available to the other party for inspection and copying: rr 26(a)(1)(A)(iii)–(iv). Initial disclosure provisions do not apply to certain proceedings, including some administrative review proceedings, habeas corpus proceedings, proceedings commenced by a person in custody, or arbitration award enforcement proceedings: r 26(a)(1)(B).
11 *Federal Rules of Civil Procedure 2009* (US) r 26(f)(2).
12 Ibid.
13 *Federal Rules of Civil Procedure 2009* (US) r 26(f)(3).
14 Ibid rr 26(a)(1)(C), 26(f)(2).
15 Ibid r 26(b)(2)(C).
16 Ibid r 26(b)(2)(C).
17 Ibid r 26(c)(1).
18 Ibid r 26(c)(1).

Who may be examined

10.14 Generally, after the initial pre-trial conference, a party to the proceedings may depose 'any person' without leave of the court.[19] Leave is required, however, if the parties do not stipulate to the deposition, and the deposition would result in more than ten depositions, the deponent has already been deposed, or the party is seeking the deposition before the pre-trial conference.[20]

10.15 A deponent's attendance at a deposition may be compelled by a subpoena specifying the time and place of the deposition.[21] If the subpoena is directed at an organisation, then the organisation's name may be used generally and the subpoena must describe the subject of the deposition with 'reasonable particularity' so the organisation can identify an appropriate employee to testify on its behalf.[22]

Procedural requirements

10.16 A party conducting a deposition must provide 'reasonable written notice' of the deposition to all other parties; the notice should include the time and place of the deposition and certain identifying information about the deponent.[23]

10.17 Presumptively, no deposition should be longer than seven hours, although it may run longer by court order or the agreement of the parties.[24] The court must allow an extension where the deposition has been impeded or delayed, or where it is necessary 'to fairly examine the deponent'.[25]

10.18 A deposition must be conducted in the presence of someone with the authority to administer oaths.[26] The authorised officer is responsible for swearing in the deponent[27] and ensuring that the record of the deposition is accurate and complete.[28] In more complex matters, depositions are usually conducted before special masters or magistrates so that a judicial officer can rule on objections and questions.[29]

Examination and objections

10.19 Generally, examination and cross-examination of deponents proceed as they would at trial under the *Federal Rules of Evidence 2009* (US) (FRE), although the character of a deposition is generally less formal than giving evidence in court.[30]

---

19 Ibid rr 30(a)(1), 30(a)(2)(A)(iii), 26(d).
20 Ibid r 30(a)(2). Leave is also required if the deponent is in prison. Ibid r 30(a)(2)(B).
21 Ibid rr 30(a)(1), 45(a).
22 Ibid r 30(b)(6).
23 Ibid r 30(b)(1).
24 Ibid r 30(d)(1).
25 Ibid r 30(d)(1).
26 Ibid rr 28(a)(1), 30(b)(5)(A).
27 Ibid rr 30(b)(5)(A)(iv), 30(f)(1).
28 Ibid rr 30(b)(5)(C), 30(f)(1).
29 J Moore, *Moore's Federal Practice* (3rd ed, 1997), § 30.2[3].
30 *Federal Rules of Civil Procedure 2009* (US) r 30(c)(1). *Federal Rules of Evidence 2009* (US) r 103 (dealing with objections and court rulings on evidence) and r 615 (governing sequestration of witnesses) do not apply at a deposition.

10.20 Objections may be raised in the course of the examination of witnesses giving oral depositions. Objections are noted on the record, and must be stated succinctly and in a non-argumentative and non-suggestive manner.[31] Generally, after an objection has been recorded, the examination continues and the deponent must answer the question.[32] Counsel may instruct the deponent not to answer 'only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)' of the FRCP.[33]

10.21 Under r 30(d)(3), a party or deponent may apply to a court to cease or limit the deposition on the ground that 'it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party'.[34]

Sanctions

10.22 Rule 37 of the FRCP provides for sanctions for discovery violations, including for breaches of deposition obligations. A party can file a motion to compel if a deponent fails to answer a question[35] or gives an 'evasive or incomplete' answer.[36] The deposition may be suspended for the purposes of the motion.[37] In considering a motion to compel, the court must have regard to, among other things, whether the information sought is relevant and whether it is protected under privilege.[38]

10.23 If a party does not comply with a court order compelling discovery or disclosure, the court may impose a range of sanctions, including:

- directing that 'designated facts be taken as established for purposes of the action';
- limiting the party's claims or defences;
- striking all or part of the pleadings;
- staying or dismissing the proceedings;
- entering a default judgement, or
- holding the party in contempt of court.[39]

10.24 The court may also order the offending party or deponent to pay reasonable costs associated with the motion.[40]

---

31 *Federal Rules of Civil Procedure 2009* (US) r 30(c)(2).
32 Ibid r 30(c)(2).
33 Ibid r 30(c)(2).
34 Ibid r 30(d)(3)(A).
35 Ibid rr 37(a)(1), 37(a)(3)(B)(i).
36 Ibid r 37(a)(4).
37 Ibid r 37(a)(3)(C).
38 J Moore, *Moore's Federal Practice* (3rd ed, 1997), § 37.22.
39 *Federal Rules of Civil Procedure 2009* (US) rr 37(b)(1)–(2) .
40 Ibid r 37(a)(5)(A).

Oral depositions in Canada

10.25 Oral depositions are also used in Canada,[41] although they are not permitted in Prince Edward Island, New Brunswick and Saskatchewan.[42] The Victorian Law Reform Commission (VLRC) conducted a detailed review of the use of oral examinations for discovery in Canada and observed that '[t]here are significant inter-jurisdictional variations between the relevant rules of court'.[43]

10.26 Under the Canadian *Federal Courts Rules*, a party may depose an adverse party, but must request leave to examine any person who is not a party to the action.[44] Deponents must answer any questions 'relevant to an unadmitted allegation of fact' and provide the name and address of any person who may have relevant knowledge.[45] There is no time limit on the length of depositions,[46] and where a deponent is unable to answer a question, he or she may be required to provide the information later, either in a continuation of the oral examination or in writing.[47]

10.27 Deponents may object to questions on the basis that the question seeks privileged information, is irrelevant to an unadmitted allegation, is unreasonable or unnecessary, or would require an unduly onerous inquiry.[48] Upon a motion from a party, the court may limit an examination that it considers 'oppressive, vexatious or unnecessary'.[49]

Advantages and disadvantages

10.28 There is scant empirical evidence as to the effectiveness of oral depositions in the US. However, a survey of the experience of 828 plaintiff attorneys and 715 defendant attorneys of federal civil cases that had terminated in the last quarter of 2008, suggested that each non-expert deposition was associated with approximately 5% higher costs, all other things being equal.[50]

10.29 With respect to Canada, the VLRC outlined the findings of a number of reviews on the use of oral examinations in that jurisdiction.[51] The most recent of those reviews

---

41 The ALRC acknowledges the research undertaken by the Monash Law Students' Society 'Just Leadership' Program Participants. Just Leadership Program, *Submission DR 01*, 7 October 2010.

42 C Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007), prepared for Ontario Ministry of the Attorney General, 26.

43 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 400.

44 *Federal Courts Rules 1998* SOR/98-106 (Canada) r 238.

45 Ibid r 241.

46 However, recently Ontario limited depositions to seven hours except with the parties' consent or leave from the court. It introduced a further limitation for those cases where the total of the monetary or property (real or personal) claim is for $100,000 or less (exclusive of interest and costs), namely that the oral examination not exceed a total of two hours, regardless of the number of parties or other persons to be examined. *Rules of Civil Procedure 1990* O Reg 575/07 s 6(1) (Ontario) rr 31.05.1, 76.04.2.

47 *Federal Courts Rules 1998* SOR/98-106 (Canada) r 244.

48 Ibid r 241.

49 Ibid r 243.

50 E Lee and T Willging, *Litigation Costs in Civil Cases: Multivariate Analysis: Report to the Judicial Conference Advisory Committee on Civil Rules* (2010), prepared for the Federal Judicial Center, 5–7.

51 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 407–409.

was the report released in November 2007 commissioned by the Ontario Ministry of the Attorney General.[52] Mr Coulter Osborne QC, who led the review, remarked:

> Many with whom I met expressed ... concerns about oral discoveries being fishing expeditions, unfocused or conducted by poorly prepared counsel who are unduly concerned about overlooking potential facts and issues. A few also noted lawyers' self-interest in prolonging examinations to achieve billing targets.[53]

10.30 His report also noted that difficulties and delays in scheduling discoveries had been identified as another problem with oral discovery.[54] However, he did not recommend abandoning the practice in that Canadian province, but rather recommended measures to address particular problems.[55]

10.31 Commentators broadly agree, in principle, on the advantages and disadvantages of oral depositions. Those who champion oral depositions argue that they can be the most effective device available to litigators, and the most influential to case development and outcomes.[56] It is argued that oral depositions promote efficiency by facilitating settlement and, where no settlement is achieved, narrowing the issues in dispute if a trial is required.[57]

10.32 On the other hand, the principal disadvantage of oral depositions relates to cost.[58] Parties incur the cost of having a lawyer defend a deposition and preparing affidavits for each of their witnesses, as well as examining the opposing party's witnesses. Where the amount in dispute is small, the expense of conducting a deposition may not be reasonable, proportional or affordable, especially for individuals and the self-represented. Also, depositions can be particularly costly for large corporations or governments where the number of possible deponents is large.[59]

10.33 Others highlight that oral depositions are vulnerable to egregious abuse without court supervision.[60] Abuses may extend to the scheduling of depositions for 'mere witnesses', or those with only peripheral involvement in the dispute. Lawyers may frame questions in a manner to create costs and seek informational advantage over the other party.[61] Concerns have also been raised that lawyers have coached witnesses,

---

52 C Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007), prepared for Ontario Ministry of the Attorney General.

53 Ibid, 59.

54 Ibid, 86–87.

55 Ibid, 59, 65.

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

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

58 Ibid, 158.

59 Ibid, 160.

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

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

adopted obstructive behaviour in depositions, and used insulting and discriminatory language.[62]

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

Advantages of oral depositions

- Helping to define the issues in dispute efficiently and focusing the parties' attention on the real issues.
- Preventing ambush tactics of producing surprise evidence or witnesses in a trial. Oral depositions ensure that any relevant issues or persons are identified and can be explored prior to trial.
- Reducing the cost of discovery—including undue financial burdens placed on requesting parties who have no knowledge of where key documents are held, and on respondent parties to categorise or synthesise vast quantities of information.
- Reducing cost in relation to obtaining witness statements, which may be very costly in large scale litigation.
- Enabling parties to test the strengths and weaknesses of their case before the hearing. This may lead to earlier settlement of the dispute, or if settlement does not occur, matters in dispute may be significantly narrowed.
- Ensuring a version of the witness' testimony is locked into place. Where it is inconsistent at trial, the deposition can serve as evidence to challenge the witness' credibility.
- Witness testimony can be a substitute for giving evidence where the witness cannot attend court or has passed away.

Disadvantages of oral depositions

- Potential for increased cost and delay by adding an extra interlocutory step in relation to contested oral depositions.
- Potential for the process to be used as a 'fishing expedition'—oral discovery could lead to more abuse than if merely relying on documents alone. Parties may depose persons with only peripheral involvement in the dispute, or examine topics beyond those in issue.
- The informality of an examination could exacerbate power imbalances between the parties and/or witnesses. Depending on how the deposition is conducted, witnesses may be more or less cautious and subsequently have their versions of events discredited in court.

---

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

- The financial outlay required to conduct an oral deposition—including payment of witness expenses, transcription costs in addition to counsel fees—may not be met by some litigants.
- The potential for oppressive tactics to be used against vulnerable witnesses, including preventing a witness from answering, threats of physical violence, insults and discriminatory language.

Pre-trial oral examinations in the Australian context

Oral deposition-like processes in the Commonwealth

10.35 A few legislative provisions and court rules in Australia allow a court or a government agency to make orders for, or to compel a person to be subject to, oral examination. For example, the *Family Law Rules* (Cth) gives power to a court with jurisdiction under the *Family Law Act 1975* (Cth) to request, at any stage in a case, the examination on oath of any person before a court or court officer, or to authorise a person to conduct an examination.[63]

10.36 In particular, there are a number of existing powers affecting the Federal Court of Australia (Federal Court). However, the width of these powers is somewhat unclear.

The Federal Court of Australia Act

10.37 A broad provision is to be found in s 46 of the *Federal Court of Australia Act 1976* (Cth), which empowers the Court to make orders and commissions for the examination of witnesses. The section relevantly provides:

> The Court or a Judge may, for the purposes of any proceeding before it or him or her:
>
> (a) order the examination of a person upon oath or affirmation before the Court, a Judge, an officer of the Court or other person, at any place within Australia; ...
>
> ...
>
> and the Court or a Judge may:
>
> (c) by the same or a subsequent order, give any necessary directions concerning the time, place and manner of the examination; ...[64]

10.38 This provision—which has been part of the Act in largely the same form since the original enactment—does not appear to have been subject to specific judicial consideration.[65] However, a few general observations may be made. The provision is in pt VI of the Act which relates to 'General' matters so it need not be confined to particular proceedings. While the section is headed 'Orders and commissions for examination of witnesses', the word 'witness' is not used in the text of the provision.

---

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

64 *Federal Court of Australia Act 1976* (Cth) s 46. Note reference is not made here to a 'commission to examine a witness' as that relates to the situation where a witness is outside the territorial jurisdiction of the court or whose personal presence can be dispensed with. See LexisNexis, *Encyclopaedic Australian Legal Dictionary*, entry for 'commission to examine witness' (as at 28 February 2011).

65 For example, see the absence of commentary in LexisNexis, *Practice and Procedure: High Court and Federal Court of Australia* (2011), [35,265] (as at 21 February 2011).

As the heading is not to be taken as part of the Act,[66] the concept of 'witnesses' should not be used to narrow the interpretation of the provision.

10.39 The real question is whether a discovery application could come within the ambit of the expression 'for the purposes of any proceeding before [the Court or the Judge]'. Arguably, a discovery application could come within the ambit of the expression, given that the term

> *proceeding* means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding.[67]

10.40 However, there is one authority characterising an application for preliminary discovery as 'not itself a "proceeding"',[68] but rather 'an antecedent step'.[69] While that case was concerned with an application under O 15A r 3 of the *Federal Court Rules*—that is, for preliminary discovery to identify a respondent, rather than consideration of s 46 of the *Federal Court of Australia Act*—it is possible that the section could be interpreted narrowly so as not to apply to discovery that is obtained before a proceeding for substantive relief is commenced. However, as explained in Chapter 1 of this Report, in this Inquiry the ALRC is primarily concerned with the disclosure of documents for inspection by one party in proceedings for substantive relief conducted in a federal court. Order 15A r 3 was identified in that chapter as being one of the matters outside the Inquiry.

10.41 There are two other provisions in the *Federal Court of Australia Act* which should be mentioned. While neither specifically mentions pre-trial oral examinations, they are drafted in sufficiently broad terms that they leave room for possible argument that the Federal Court could make orders for oral discovery when the Court considers it necessary.

10.42 The first—s 33ZF—was mentioned by the ALRC in its 2000 report, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report 89). The ALRC noted that:

> the judge may order depositions to be taken if it is considered necessary in a particular case, pursuant to the general discretion in s 33ZF of the *Federal Court Act* to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'.[70]

10.43 Section 33ZF appears in pt IVA of the *Federal Court of Australia Act* which concerns representative proceedings. Accordingly, the provision is confined to representative proceedings—that is, class actions.

---

66 *Acts Interpretation Act 1901* (Cth) s 13(3).

67 *Federal Court of Australia Act 1976* (Cth) s 4. Note 'proceeding' is also defined to include an appeal but that is not presently relevant.

68 *Telstra Corporation v Minister for Communications, Information Technology and the Arts* [2007] FCA 1331, [15].

69 Ibid, [16].

70 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.102].

10.44 The second provision—s 37M—is the 'overarching purpose' provision, that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.[71] Essentially, the Court is expected to interpret and apply the *Federal Court of Australia Act*, the *Federal Court Rules*, and any other Act—so far as they relate to civil proceedings—in the way that best promotes the overarching purpose.[72]

Federal Court Rules

10.45 There are three rules of the *Federal Court Rules* that may be relevant to a consideration of pre-trial oral examinations in the discovery context—O 24 r 1; O 33 r 13; and O 15 r 8.

10.46 These provisions are discussed in turn, in order of relevance.

10.47 Order 24 r 1(1)(a) provides:

> The Court may, for the purpose of proceedings in the Court, make orders:
>
> (a) for the examination of any person on oath or affirmation before a Judge or before such other person as the Court may appoint as examiner at any place whether in or out of Australia.

10.48 Currently this provision is entitled 'Evidence taken in Australia or abroad or evidence taken under Part 2 of the *Foreign Evidence Act 1994*' (the latter part of this heading relates to O 24 r 1(1)(b)). However, the original title was 'Evidence by Deposition'.[73]

10.49 The breadth of this provision—particularly the extent to which it could be used in the context of pre-trial oral examination—is unclear.

10.50 The ALRC heard in consultations that there is a view that the purpose of O 24 is to facilitate the taking of evidence in a trial. Some commentators have observed that O 24 r 1(1)(a) '*is used* ... where a witness is in Australia, but is unable because of age, health or imminent departure from Australia to attend the trial'.[74] For example, the Federal Court has relied on s 46 of the *Federal Court of Australia Act* and O 24 r 1(1)(a) of the *Federal Court Rules* to hear evidence relating to Aboriginal law so as to preserve that evidence for the hearing of an application for the determination of native title under the *Native Title Act 1993* (Cth).[75]

10.51 In *Martin v Tasmania Development & Resources*, Heerey J refused to make an order under O 24—as requested by the applicant's counsel—for the pre-trial oral examination of potential witnesses where there had been no subpoena of the persons.

---

71 *Federal Court of Australia Act 1976* (Cth) s 37M(1).
72 Ibid s 37M(3), (4).
73 *Federal Court Rules* (Cth) O 24. Reference is made here to the Rules as dated 16 July 1979.
74 LexisNexis, *Practice and Procedure: High Court and Federal Court of Australia* (2011), [42,920.5] (as at 21 February 2011). Emphasis added.
75 *Eringa No 1 Native Title Claim Group v South Australia* [2007] FCA 182, [1].

His Honour stated that such an order would be 'quite unprecedented' in Australia and that:

> O 24 is designed for circumstances where it is not practical or convenient for a witness to attend court and give evidence in the ordinary way. The making of an order such as is sought would have the practical effect of introducing an American-style oral deposition. This would be a fundamental change to the way litigation is conducted in this Court and indeed, all courts in Australia that I am aware of, and if such a change is to be made it should be made by statute.[76]

10.52 A few years later, in September 2002, a Federal Court User Group Liaison Committee meeting in New South Wales (NSW) minuted:

> There was discussion about whether there was merit in considering the US system of oral depositions, that is cross-examining witnesses away from the Court with objections able to be made but all questions having to be answered and with the whole process usually videotaped. US lawyers claim that this system often results in earlier settlements and limits what is an issue. Justice Branson suggested that the Federal Court Rules might currently provide enough flexibility to allow such a process to be ordered in an appropriate case if sought.[77]

10.53 This comment provides very limited support for the proposition that O 24 r 1 may be interpreted to support the use of oral discovery. First, arguably it is an extra-curial comment and, secondly, Branson J did not specify an exact part of the *Federal Court Rules*.

10.54 In light of Heerey J's strong curial statement it seems that O 24 r 1 cannot be used to order the appearance of persons for oral examination in relation to discovery as the judiciary may be of the view that O 24 r 1 does not have that purpose.

10.55 The second provision in the *Federal Court Rules* which is possibly relevant to this discussion is O 33 r 13(1)—headed 'Evidence: general' and the rule 'Attendance and production'—which provides:

> The Court may make orders for:
>
> (a) the attendance of any person for the purpose of being examined; or
>
> (b) the attendance of any person and production by him of any document or thing specified or described in the order.

10.56 Order 33 r 13(2) provides that an order under O 33 r 13(1)

> may be made for attendance of any person before, and production by him to, the Court or any officer of the Court, examiner, or other person authorized to take evidence, on any trial, hearing or other occasion.[78]

---

76 *Martin v Tasmania Development & Resources* [1999] FCA 71, [2].

77 Federal Court User Group Liaison Committee NSW, *Minutes, 5 September 2002* <www.fedcourt.gov.au> at 15 March 2011.

78 *Federal Court Rules* (Cth) O 33 r 13(2).

10.57 In its *Final Report in Relation to Possible Innovations to Case Management*, the Federal Court Liaison Committee of the Law Council of Australia (Law Council) noted the 'very interesting recommendation' that had been made by the Trade Practices Committee of the Business Law Section of the Law Council.[79] It reported:

> The Trade Practices Committee suggested that practitioners should make greater use of the power of the Court [under O 33 r 13] to make Orders for the attendan[ce] of any person for the purpose of being examined prior to trial.[80]

10.58 That is, in the context of the report, the Trade Practices Committee appeared to consider that O 33 r 13 could be used to order oral discovery.

10.59 This provision in the *Federal Court Rules* does not appear to have been subject to much judicial consideration,[81] and certainly not in the context of discovery.[82] However, some commentators have observed that '[t]he object of the rule is to enable an order in the nature of a subpoena to be made at any stage of the proceedings'.[83] The ALRC heard in consultations that usually this would be at a trial. Commentators have also noted that '[i]t does not permit an order in the nature of discovery against a non-party'.[84] While neither subpoenas nor discovery from non-parties are the central focus of this Inquiry, it is unclear whether the provision could be used in the way the Trade Practices Committee advocated.

10.60 In its report, the Federal Court Liaison Committee noted that the Trade Practices Committee had 'suggested an enhancement' of the provision '[t]o put the matter beyond doubt'.[85] The Federal Court Liaison Committee noted that the Trade Practices Committee's submission

> had suggested that Order 33 Rule 13 should be amended or supplemented to make it clear that such an examination can extend to cross examination and the rules attendant on examination in chief not be applied to such examinations.
>
> The Committee made further suggestions that consideration be given to the Court amending Order 33 Rule [1]3 to add:
>
> (a) 'The Court may make orders contemplated by sub rule (1) at any time, including prior to trial or the hearing of an interlocutory application, and where the order is sought for the purpose of seeking discovery against a party or a non party.[86]

---

79 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), [128].

80 Ibid, [129].

81 For example, the ALRC was unable to find any results from Noteup on Austlii and found 2 results from LexisNexisAU and 1 result from Legal Online.

82 See *Brown v Forestry Tasmania (No 3)* [2006] FCA 469; *Sellar v Lasotav Pty Ltd* [2008] FCA 1612.

83 LexisNexis, *Practice and Procedure: High Court and Federal Court of Australia* (2011), [44,365.5] (as at 21 February 2011).

84 Ibid, [44,365.5] (as at 21 February 2011).

85 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), [128]–[129].

86 Ibid, [129]–[130].

10.61 In its final report, proposing that the Federal Court 'be at liberty to permit oral depositions, limited by number, witness, length and subject matter',[87] the Federal Court Liaison Committee recommended that:

> The Court introduce, on a trial basis, an entitlement for parties to examine on oath individual[s] employed by or on behalf of a party or witnesses proposed to be relied upon by that party.[88]

10.62 Further, it recommended that:

> The trial be undertaken either by amendment of Order 33 Rule 13 with the following variations or by adoption of rules analogous to Rule 30 of the United Stated Federal Rules of Civil Procedure.[89]

10.63 The recommendation adopted paragraph (a)—extracted earlier—in full as one of the possible modifications of O 33 r 13. However, the Federal Court Liaison Committee's proposal has not been implemented.

10.64 The final provisions in the *Federal Court Rules* that should be mentioned in this context are O 15 rr 8 and 9. Order 15 concerns discovery and the inspection of documents and r 8 concerns an order for particular discovery. This rule provides a separate right of discovery—a right to discovery to a particular document or class of document.[90] If it appears that a party has a certain document, then the court can order the party to explain the situation by affidavit. Specifically, it provides that:

> Where, at any stage of the proceeding, it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for a belief that some document or class of document relating to any matter in question in the proceeding may be or may have been in the possession, custody or power of a party, the Court may order that party:
>
> (a) to file any affidavit stating whether that document or any document of that class is or has been in his possession, custody or power and, if it has been but is not this in his possession, custody or power, when he parted with it and what has become of it; and
>
> (b) to serve the affidavit on any other party.[91]

10.65 Order 15 r 9—headed 'Deponent'—outlines, in sub-rule 1, who may depose an affidavit pursuant to an order under O 15 r 8 or an affidavit verifying a party's list of documents.

10.66 There is an old general rule that an affidavit of discovery must be regarded as conclusive, unless it evidently misrepresents the facts.[92] Further, the case law requires

---

87 Ibid, [106].
88 Ibid, [147].
89 Ibid, [148].
90 *Clifford v Vegas Enterprises Pty Ltd* [2009] FCA 1204, [37] citing *Murex Diagnostics Australia Pty Ltd v Chiron Corporation (No 2)* (1995) 62 FCR 424, 430.
91 *Federal Court Rules* (Cth) O 15 r 8.
92 *Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co* [1897] 2 QB 62, 64; see also *Chowood Ltd v Lyall* [1929] 2 Ch 406; *Brookes v Prescott* [1948] 2 KB 133; *Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359, 363.

a high threshold of proof before the affidavit can be called into question.[93] Because of this general respect for the contents of an affidavit of discovery, judges have been very reluctant to order the cross-examination of a deponent.[94]

10.67 However, it is now generally accepted that an affidavit of discovery may be challenged,[95] although only in limited circumstances.[96] Where cross-examination has been allowed, the judges making the orders have routinely acknowledged that such a step was 'unusual'[97] or 'exceptional'.[98]

10.68 Generally an order for cross-examination will only be made if there are serious concerns of abuse of process or a view that there is no other way of preventing an injustice.[99]

Corporations Act 2001 (Cth)

10.69 Under ss 596A and 596B of the *Corporations Act 2001* (Cth), 'eligible applicants'[100] are able to request that a court issue a summons for the examination of a

93 *Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359, 363 citing *Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co* [1897] 2 QB 62, 64–5. See also *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1, 20 (reasonable suspicion that the deponent had more documents in possession); *Hall v Truman, Hanbury & Co* (1885) 29 Ch D 307, 319–21 (a presumption or prima facie case that the deponent had more documents in their possession); *British Association of Glass Bottle Manufacturers, Ltd v Nettlefold* [1912] AC 709, 714 (reasonable grounds for being fairly certain that there are other relevant documents); *Mulley v Manifold* (1959) 103 CLR 341, 343 ('the insufficiency might appear not only from the documents but also from any other source that constituted an admission of the existence of a discoverable document. Furthermore, it is not necessary to infer the existence of a particular document; it is sufficient if it appears that a party has excluded documents under a misconception of the case. Beyond this, the affidavit of discovery is conclusive'); *Beecham Group Ltd v Bristol-Myers Co* [1979] VR 273 (discussion of authorities).

94 *Procter v Kalivis* [2009] FCA 1518 which referred to many authorities; see also *Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359, 363 citing E Bray, *The Principles and Practice of Discovery* (1885), 211 and *British Association of Glass Bottle Manufacturers Ltd v Nettlefold* [1912] 1 KB 369, 374; *Birmingham & Midland Motor Omnibus Co, Ltd v London & North Western Railway Co* [1913] 3 KB 850, 858.

95 *National Crime Authority v S* (1991) 29 FCR 203, 211.

96 See, eg, the reservations of Mansfield J in *Brookfield v Yevad Products Pty Ltd* [2002] FCA 1376, [21] that: 'Although that position has been relaxed to some extent, the principle that a verified list of documents is generally conclusive of its contents has not been abolished. The Court will only order a further affidavit or permit cross-examination of a deponent of an affidavit verifying a list of documents in limited circumstances'. See also *Fig Tree Developments Ltd v Australian Property Custodian Holdings Ltd* [2008] FCA 1041, [15]; *Auspine Ltd v H S Lawrence & Sons Pty Ltd* [1999] FCA 1749, [102].

97 *IO Group Inc v Prestige Club Australasia Pty Ltd* [2008] FCA 1147, [50]; *Olympic Airways SA v Alysandratos* (Unreported, Supreme Court of Victoria, Harper J, 26 May 1997).

98 *Australian Securities Commission v Zarro (No 2)* (1992) 34 FCR 427, 431.

99 *Procter v Kalivis* [2009] FCA 1518, [41]; *IO Group Inc v Prestige Club Australasia Pty Ltd* [2008] FCA 1147, [50]; *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2000] FCA 1389, [31]; *Olympic Airways SA v Alysandratos* (Unreported, Supreme Court of Victoria, Harper J, 26 May 1997).

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

person concerning 'examinable affairs'.[101] While this is not a discovery process—rather, it enables liquidators and other administrators to access information which they would not otherwise have because they were appointed after the events into which they are inquiring— nevertheless the ALRC considers it useful to mention it as an example of another oral deposition-like process in the Commonwealth.

10.70 During the examination, the court may give directions concerning, among other things: matters to be inquired into; the procedure of the examination; the presence of any other persons at an examination; and access to the records of the examination.[102] The court also has power to consider whether questions put to the summoned person are 'appropriate'.[103] Generally, the examination should be held in public, unless the court considers that there are special circumstances.[104]

10.71 The purpose of such examination has been described as:

> not in the nature of legal proceedings before a court; [the proceedings] are more in the nature of investigative procedures where the Court has a presence for the purpose, basically, of seeing fair play between the persons interrogating and the persons being interrogated.[105]

Government agencies

10.72 A number of government agencies—largely regulatory and investigatory bodies—have powers to compel a person to appear for examination under oath in a setting other than in court at trial.[106] For example:

- the Australian Securities and Investment Commission (ASIC), in investigating suspected breaches of the *Corporations Act 2001* (Cth), can compel a person to appear before an ASIC member for examination on oath if ASIC 'on reasonable grounds, suspects or believes that a person can give information relevant to a matter';[107]
- the Commissioner of Taxation can give notice compelling a person to give oral evidence on oath or affirmation, in connection with the administration of the *Income Tax Assessment Act 1936* (Cth);[108]

---

101 Defined in s 9 of the Ibid as the promotion, formation, management, administration or winding up of the corporation; any other affairs of the corporation; or the business affairs of an entity connected with the corporation that appear to be relevant.

102 Ibid ss 597B, 596F.

103 Ibid s 597(5B).

104 Ibid s 597(4).

105 *Re Monadelphous Engineering Associates (NZ) Ltd (in liq); ex parte McDonald* (1988) 7 ACLC 220, 223. In this case Northrop J discussed the predecessor to s 596B, namely *Companies (Vic) Code* s 541.

106 This is not an exhaustive list of agencies that have such powers. For a more a detailed consideration of agencies with deposition-like powers, see Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 392–394.

107 *Australian Securities and Investment Commission Act 2001* (Cth) s 19(2).

108 *Income Tax Assessment Act 1936* (Cth) s 264.

- the Commonwealth Ombudsman may, in the course of conducting an investigation, require a person to appear before him or her or an appointee for the purposes of answering relevant questions;[109]
- the Australian Commission for Law Enforcement Integrity can summon a person to give evidence (including to produce documents or things) as part of a 'hearing' directed either to investigating a 'corrupt issue' or conducting a public inquiry;[110] and
- the Australian Communications and Media Authority may require a person to appear before its delegate for examination on oath or affirmation in connection with an investigation it is conducting.[111]

Oral deposition-like processes in the states and territories

10.73 All states and territories provide for oral examinations outside of trial in certain narrowly-defined circumstances. For example, every jurisdiction allows a party to be examined for the purpose of giving evidence that will be used at trial,[112] although the use of such evidence may be contingent on the party's consent or the deponent being deceased, infirm or otherwise unavailable during the trial.[113] Most states and territories also allow for oral examination where a party's answers to interrogatories are deemed insufficient.[114]

10.74 Only Victoria and the Northern Territory, however, specifically provide for oral discovery.[115] In these jurisdictions, oral depositions may be used in place of written interrogatories when the party being examined gives consent,[116] or, in the Northern Territory, by court order.[117]

10.75 Even though they are available, the VLRC observed that oral examinations are 'rarely, if ever, conducted', because the court does not often permit interrogatories and because the examinee's permission is required.[118] Although some states grant judges

---

109 *Ombudsman Act 1976* (Cth) s 9(2).

110 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 82(4).

111 *Broadcasting Services Act 1992* (Cth).

112 *Uniform Civil Procedure Rules 2005* (NSW) reg 24.3; *Uniform Civil Procedure Rules 1999* (Qld) rr 396–409; *Supreme Court Civil Rules 2006* (SA) rr 184–186; *Supreme Court Rules 2000* (Tas) r 472; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 40.07, 41.01; *Rules of the Supreme Court 1971* (WA) O 36, r 7; *Court Procedures Rules 2006* (ACT) rr 1401(4)(g), 6813; *Supreme Court Rules* (NT) s 40.07.

113 See, eg, *Supreme Court Rules 2000* (Tas) r 464; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 40.07(b); *Rules of the Supreme Court 1971* (WA) O 36, r 7(1); *Supreme Court Rules* (NT) s 40.07(1)(b).

114 *Uniform Civil Procedure Rules 2005* (NSW) reg 22.4; *Uniform Civil Procedure Rules 1999* (Qld) r 236; *Supreme Court Civil Rules 2006* (SA) r 165(1); *Supreme Court Rules 2000* (Tas) r 410(3); *Rules of the Supreme Court 1971* (WA) O 27, r 7; *Court Procedures Rules 2006* (ACT) r 632.

115 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 31; *Supreme Court Rules* (NT) O 31.

116 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 31.02; *Supreme Court Rules* (NT) s 31.02(2)(a).

117 *Supreme Court Rules* (NT) ss 31.02(2)(b), 31.03(9).

118 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 387. See also Just Leadership Program, *Submission DR 01*, 7 October 2010;Monash University Law Students' Society 'Just Leadership' Program, 7 October 2010 citing a telephone interview with solicitor Jude Lee of Jude Lawyers in the Northern Territory on 31 August 2010.

broad case management powers that could conceivably be interpreted to include the power to order oral depositions for the purposes of discovery,[119] the ALRC is unaware of these powers being used in such a manner.

A case for depositions in Australia?

10.76 The possibility of adopting US-style deposition into the Australian civil justice system has been raised in reports by the Law Council, the VLRC, the litigation funder IMF,[120] as well as by some academic commentators.[121]

10.77 As discussed earlier, oral depositions were considered in the Federal Court Liaison Committee of the Law Council's *Final Report in Relation to Possible Innovations in Case Management*. The Federal Court Liaison Committee proposed that 'the Court be at liberty to permit oral depositions, limited by number, witness, length and subject matter'.[122]

10.78 The Federal Court Liaison Committee commented that:

> This proposal proved very controversial. A widespread reaction to it was adverse on the grounds that it would be likely to be productive of unnecessary expense and even that it would constitute a reversal of the current policy of discouraging interrogation. Most practitioners opposed the proposal with support coming primarily from those with practical experience of both US depositions and trial practice.[123]

10.79 However, it also noted that:

> based on the American experience, it would seem clear that, potentially, in addition to any function which oral depositions may perform in promoting settlement, they may have a valuable role in relation to discovery and the limitation on evidence and dealing with experts.[124]

10.80 The report continued:

> [In particular,] oral depositions offer an alternative to interminable document discovery ... in relation to certain documents, issues can be quickly dealt with by some questions of a witness which would otherwise be difficult to track through a paper trail.[125]

---

119 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 367; *Supreme Court Civil Rules 2006* (SA) r 116; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 1.14; *Court Procedures Rules 2006* (ACT) r 1401; *Supreme Court Rules* (NT) r 34.01.

120 IMF Australia, *Submission by IMF to Victorian Law Reform Commission Civil Justice Review* (2007) <http://www.imf.com.au/pdf/20070411_SubmissionToVictorianCivilJusticeReview.pdf> at 24 October 2010.

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

122 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), Proposal 5(e).

123 Ibid, [107].

124 Ibid, [114].

125 Ibid, [127].

10.81 The Federal Court Liaison Committee concluded that:

> Depositions would not be appropriate in many cases. Where cases are complex and the evidence of key witnesses may be significant, they may be, however, a very effective case management tool.[126]

10.82 Accordingly, the Federal Court Liaison Committee recommended that:

> the Court introduce, on a trial basis, an entitlement for the parties to examine on oath individuals employed by or on behalf of a party or witnesses proposed to be relied upon by that party.[127]

10.83 As noted earlier, this proposal has not been implemented.

10.84 In its 2008 *Civil Justice Review*, the VLRC undertook detailed analyses of systems of oral depositions in Canada, the US and UK.[128] The VLRC concluded that, subject to appropriate safeguards to curb potential abuse of the process and the escalation of costs, provisions ought to be made for pre-trial oral examinations.[129] In particular, it recommended that pre-trial examinations only be permitted with leave of the court. This would give the court an opportunity to determine whether examination is necessary or desirable in a given case and, if so, allow the court to set the conditions for the examination to ensure that the process is not abused, control costs and protect vulnerable witnesses.[130]

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

- examinations would only be possible by consent, with leave of the court;
- parties would be expected to attempt to agree on the details of the examinations;
- the court would have the power to make directions limiting the number and duration of examinations;
- it should not be necessary to require examinations to be conducted before an independent third party in most instances, but in appropriate cases, examinations may be held before an examiner who is not a judicial officer (including an independent legal practitioner);
- there would be a process for identifying appropriate corporate deponents;[131]

---

126 Ibid, [124].
127 Ibid, Rec 5.4.
128 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 394–410.
129 Ibid, 415.
130 Ibid, 415.
131 In consultations the ALRC's attention was drawn to the matter of written interrogatories that are delivered to a corporation and the need for the answers to be provided by the company secretary or other proper officer of the corporation. The longstanding case law establishes that prima facie the secretary is the proper person to make the affidavit and that they must make their affidavit after having made all due and proper enquiries. The point was made that this procedure is at odds with oral examination as the latter is directed at questioning those persons with the requisite knowledge. Accordingly, if oral examinations are used there is a need for a process for identifying appropriate corporate deponents.

- examinees would be entitled to refuse to answer questions on the ground of legal professional privilege, and protected against disclosure or future use of self-incriminating information revealed in response to a question;
- objections to particular questions asked during the course of an examination would be noted on the record for determination by the court in the event that the answer is later sought to be introduced into evidence;
- the transcript of the examination would be able to be introduced into evidence at trial in a number of circumstances; and
- subject to certain limits, the costs of examinations should be recoverable as costs of the proceedings.[132]

10.86 The VLRC's recommendations for pre-trial oral examinations were not implemented in the *Civil Procedure Act 2010* (Vic). Rather, s 57 of the *Civil Procedure Act* provides for cross-examination regarding discovery obligations:

> Unless a court orders otherwise, any party to a civil proceeding may cross-examine or seek leave to conduct an oral examination of the deponent of an affidavit of documents prepared by or on behalf of any other party to that proceeding if there is a reasonable basis for the belief that the other party may be—
>
> (a) misinterpreting the party's discovery obligations; or
>
> (b) failing to disclose discoverable documents.

10.87 The grounds for application for leave are similar to a broad construction of O 15 r 8 of the *Federal Court Rules*.

10.88 Legg has argued that the use of depositions in Australia would aid in promoting settlement or, if no settlement occurs, the narrowing of the issues in dispute:

> The deposition is an opportunity for a party to test its view of the facts with opposing witnesses. Consequently, the opposing witness will be required to say which facts they agree with and why. In a complex case, those points of disagreement may be numerous but there will be many points of agreement which do not need to be dealt with before the court. The trial can therefore focus on the key issues and be conducted more efficiently.[133]

10.89 The introduction of depositions, Legg notes, would result in 'a major transformation of civil procedure in Australia',[134] as affidavit evidence would be substantially reduced or replaced by depositions. This has both practical and cultural implications for the profession:

> Legal practitioners would need to move from drafting affidavits with only the witness present to the adversarial deposition. ... The deposition requires practitioners to have a skill-set that is often split between solicitors (witness preparation) and barristers

---

132 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 415.

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

134 Ibid, 167.

> (witness examination) which will likely need to be reconciled ... This may impact law school and professional qualification curricula.[135]

Submissions and consultations

10.90 In the Consultation Paper, the ALRC proposed that a new pre-trial procedure should be introduced to enable parties to a civil proceeding in the Federal Court, with leave of the Court, to examine orally, on oath or affirmation, any person who has information relevant to the matters in dispute in the proceeding.[136] The ALRC asked for stakeholder views on whether cost issues in proceedings before federal courts could be controlled by limiting pre-trial oral examinations to particular types of disputes.[137] The ALRC also asked what mandatory considerations, if any, a court should take into account in granting leave for oral examination.[138]

10.91 Of those submissions that addressed the ALRC's proposal, the majority did not support it.[139] Overall, only two submissions clearly supported the ALRC's proposal[140] and another advocated one like it.[141] A number of submissions responded to these issues by querying the need for a new procedure at all.[142] Some who held this view were not intrinsically opposed to the use of oral depositions but rather considered that the Federal Court was already empowered to order pre-trial oral examination for discovery.[143] However, one stakeholder who queried the need for a new procedure was opposed to the use of oral depositions.[144] Many views were expressed on possible disadvantages of using oral depositions,[145] a common complaint being that they are

---

135 Ibid, 167.

136 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 5–2.

137 Ibid, Question 5–6.

138 Ibid, Question 5–7.

139 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; Just Leadership Program, *Submission DR 01*, 7 October 2010. The submissions from the Australian Government Solicitor and the Law Council of Australia were somewhat equivocal. See Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011.

140 M Legg, *Submission DR 07*, 17 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011. The Department of Immigration and Citizenship's submission is somewhat equivocal as it did not oppose the proposal in principle. See Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

141 C Enright and S Lewis, *Submission DR 03*, 12 January 2011.

142 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

143 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011. As noted earlier, the Department of Immigration and Citizenship's submission is somewhat equivocal as it did not oppose the proposal in principle.

144 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

145 Law Council of Australia, *Submission DR 25*, 31 January 2011; Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011; Just Leadership Program, *Submission DR 01*, 7 October 2010.

costly.[146] Those who supported the proposal advocated the need for appropriate safeguards such as the need for leave of the Federal Court.[147] These issues are dealt with in turn.

The necessity of a new procedure?

10.92 The Law Society of Western Australia pointed to the fact that the Federal Court and many other courts are already empowered to authorise oral examination before trial and that there may be cases where the use of such depositions would be an effective case management tool:

> The point is, however, that machinery already exists in order to facilitate that process in such cases and they are best administered on a case-by-case basis by the Judge who has an understanding of the particular case, as is currently the case.[148]

10.93 Contributors from a group of large law firms made a similar point and argued that a broad view may be taken of O 24 r 1 of the *Federal Court Rules*. They submitted that while the power conferred by O 24 r 1(1)(a) historically has been used where a witness is ill or otherwise unable to attend trial, 'it is clear that the power extends much further than this'.[149] They suggested that '[t]he power conferred ... is broad in scope and gives the Court flexibility to depose witnesses in a broad range of circumstances'.[150]

10.94 The group explained:

> Our primary submission is that the Court already has clear power to order the deposition of witnesses to obtain evidence about the identity of potentially discoverable documents. An order by the Court made under Order 24 rule 1 could reduce the costs of discovery in circumstances where parties have:
>
> (a) no knowledge of the location of key categories of documents and/or the volume of documents to retrieve; and
>
> (b) there is the potential for parties to have to review vast quantities of documents (including both hard and soft copy material).
>
> Oral depositions could take place in order to refine potential discovery categories and obtain information from corporate employees about the location, type and potential relevance of documents.
>
> A discovery deposition under Order 24 rule 1 could also be used when there is a dispute as to the adequacy of discovery.[151]

---

146 Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.

147 Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011; M Legg, *Submission DR 07*, 17 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.

148 Law Society of Western Australia, *Submission DR 26*, 11 February 2011.

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

150 Ibid.

151 Ibid.

10.95 Further, they considered that O 24 r 1 could 'complement' O 15 r 8 and 'provide further certainty' as it could:

> prevent overuse [of O 15 r 8] in circumstances where a company officer has already given evidence about whether particular documents were in the possession of a specific party.[152]

10.96 They concluded:

> [O]n balance, it is our view that oral depositions under [O] 24 [r] 1 could, in appropriate cases and subject to control of the Court, play a narrow role in limiting the scope of the discovery process in the Court. The critical question is whether judges are prepared to use the power conferred.[153]

10.97 By contrast, Allens Arthur Robinson argued that oral depositions—rather than a specific new procedure for them—were unnecessary because procedures already exist to facilitate the exchange of practical information about a party's document management system:

> Practical questions about a party's document management system (for example, questions about the scope and location of document collections) can be informally addressed at a pre-discovery conference. Prima facie, there is no need for such questions to be answered on oath. If, for whatever reason, such a need arises in a particular case, the existing rules are adequate to meet that need.[154]

10.98 Further, they submitted that the pleadings should define the issues in dispute so it would be unnecessary—moreover 'inappropriate'—for oral depositions to seek to do so.[155]

10.99 For the Department of Immigration and Citizenship, 'it [was] not entirely clear what could be gained from pre-trial examination procedures that is not already possible through interrogatories and the submission of affidavits'.[156]

Opposition to the use of oral depositions

10.100 Some reasons that were advanced opposing the use of oral depositions were that they:

- would increase costs;[157]
- would cause further delay[158] and more time to be expended;[159]

---

152 Ibid.
153 Ibid.
154 Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
155 Ibid.
156 Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.
157 Law Society of NSW, *Submission DR 22*, 28 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
158 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
159 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

- would increase the complexity of the proceedings,[160] for example, by possibly leading to the discovery of more documents rather than less;[161]
- may be abused for the purpose of 'fishing expeditions';[162]
- may encourage 'satellite' litigation in relation to contested oral depositions;[163] and
- could have a disproportionate impact upon the Federal Court.[164]

10.101 For a group of law students:

> [The] advantages [of oral depositions] do not compensate for the many disadvantages such as lengthy examinations induced by unprepared or self-motivated counsel, difficulties in convening parties and, particularly for complex technical matters, the infeasibility of extracting information from memory, or the need to orally examine many people within an organisation.[165]

10.102 Concern was also expressed in some submissions about the lack of empirical evidence as to the effectiveness of oral depositions in the US:[166]

> The use of depositions does not appear to have assisted in the United States of America in the goal of reducing the need for discovery, as the American legal system is frequently criticised for its expensive discovery processes. For example, Brad Brian, a past chair of the American Bar Association, has said that pre-trial discovery is where most money is wasted in litigation in America (including depositions). The International Bar Association has criticised the American discovery system as one of the most expensive and wasteful private litigation systems in the world.[167]

10.103 A group of large law firms submitted that

> the [US] oral deposition process is prone to be used as a tool to justify requests for further categories of documents, rather than as a device to focus and limit the document production exercise.[168]

10.104 However, for this group, the potential increase in costs was 'the principal factor' weighing against pre-trial oral examinations.[169] The Civil Litigation Committee of the Law Society of New South Wales Young Lawyers (NSW Young Lawyers) argued that the introduction of such a measure could significantly increase the costs of litigation, because:

- it is an additional step in the litigation process;

---

160 Law Society of NSW, *Submission DR 22*, 28 January 2011.
161 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
162 Ibid; Allens Arthur Robinson, *Submission DR 10*, 19 January 2011.
163 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
164 Law Council of Australia, *Submission DR 25*, 31 January 2011.
165 Just Leadership Program, *Submission DR 01*, 7 October 2010.
166 Law Society of NSW, *Submission DR 22*, 28 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
167 NSW Young Lawyers, *Submission DR 19*, 21 January 2011 citing B Brian, 'Have a Plan in Litigation — It Works and It's Cheaper' (2006) 32 *Litigation Magazine* 2 and International Bar Association, European Union Private Litigation Working Group, *IBA Private Litigation—Discovery* (2005).
168 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
169 Ibid.

- it forces clients to engage counsel at an earlier stage of the litigation process than might otherwise be the case;
- it forces costs to be incurred in preparing witnesses that would otherwise not be incurred until shortly before trial; and
- pre-trial oral examinations take longer than cross-examinations during a hearing because irrelevant questions can be asked.[170]

Possible options to control costs

10.105 Only two submissions directly answered the ALRC's question about whether cost issues in proceedings before federal courts could be controlled by limiting pre-trial oral examinations to particular types of dispute.[171]

10.106 NSW Young Lawyers submitted that:

> [P]re-trial oral examinations would only be appropriate where the quantum of damages being claimed is large enough to justify the additional cost being incurred by the oral examination. Pre-trial oral examinations could also be limited to expert witnesses where the witnesses could be 'hot-tubbed' in an effort to narrow the difference of opinion between each party's expert witness.[172]

10.107 By contrast, Legg argued that:

> [I]t would be appropriate to allow for a deposition to be requested in any case that came before the court subject to the party requesting it being able to explain the necessity for its use i.e. it will save cost or produce information not available through other forms of discovery.[173]

10.108 He also referred to an example that Justice Ray Finkelstein had originally identified as a type of dispute for which the Federal Court might be inclined to allow depositions, namely:

> where the volume of documents discovered is large and the use of depositions to clarify the meaning of those documents is likely to reduce the number of documents to be placed before the court (or into evidence at trial), the number of witnesses to be called, or the subjects on which witnesses will need to be cross-examined.[174]

Support for the use of oral depositions

10.109 A reasonable number of submissions recognised that there were likely to be advantages from the use of pre-trial oral examinations as an adjunct to the current Australian discovery process.[175] For example, one submission stated, '[t]here are

---

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

171 Ibid; M Legg, *Submission DR 07*, 17 January 2011.

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

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

174 Ibid citing the proposal put forward by Justice Finkelstein at the joint Federal Court of Australia and Law Council of Australia Case Management Workshop in May 2008.

175 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011; C Enright and S Lewis, *Submission DR 03*, 12 January 2011; Just Leadership Program, *Submission DR 01*, 7 October 2010.

without doubt advantages to oral discovery, being that it may encourage an earlier settlement and it may allow for quicker and timelier follow-up questions'.[176]

10.110 A group of large law firms submitted:

> A discovery deposition process, within a wider discovery regime, could assist in some cases to narrow the issues or number of documents in dispute, by helping to resolve disputes over the existence or otherwise of specific categories of documents, obtaining an explanation of the scope of the envisaged discovery exercise, and obtaining evidence about the potential meaning and relevance of specific documents.
>
> ...
>
> Drawing on the current use of depositions in Australia, when implemented with appropriate safeguards, and with the leave of the Court, oral depositions could assist parties and the Court to:
>
> (a) resolve any dispute over the existence or otherwise of specific categories of documents;
>
> (b) in complex cases involving large corporations (often with an overseas parent) obtain an explanation of the scope of the discovery exercise that is envisaged to ensure that a proportionate approach is achieved;
>
> (c) obtain evidence about the potential meaning and relevance of specific documents (although in certain cases this might be reserved for trial); and
>
> (d) in turn, narrow the issues and number of documents in dispute.[177]

10.111 The Australian Government Solicitor also acknowledged that pre-trial oral examinations may assist the discovery process:

> Depositions may allow a party who is considering seeking discovery to better assess what documents the other party has in its possession and whether it is relevant to a material issue in dispute. This could assist in reducing speculative discovery. One potential advantage of depositions is that answers are given on oath which may give a party seeking discovery the confidence to be more precise in targeting documents to be discovered without fear that potentially relevant documents or classes of documents might be missed.[178]

10.112 This submission concluded that:

> If discovery depositions are adopted we consider that they should be part of the overall 'toolkit' of case management techniques available to judges and, when utilised, closely controlled as to scope, time and costs. Consideration would need to be given to whether depositions might occur only with leave.[179]

10.113 The two submissions most clearly in favour of the ALRC's proposal thought that such a new procedure should be undertaken on a trial basis first.[180] In addition, the

---

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

177 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011. Original footnote within quote omitted.

178 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

179 Ibid.

180 M Legg, *Submission DR 07*, 17 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.

Commercial Bar Association of Victoria was keen to stress the need for safeguards to prevent the abuse of the process,[181] while for Legg 'there needs to be clear guidance to parties in the court rules as to the procedures for the deposition'.[182] Those in favour of the ALRC's proposal stressed the need for the procedure to be discretionary, that is, by leave of the Federal Court.[183]

Possible conditions for granting leave for pre-trial oral examination

10.114 A number of submissions provided a specific response to the ALRC's question in the Consultation Paper about which, if any, mandatory conditions a court should take into account in granting leave for oral examination.[184]

10.115 The group of large law firms focused on largely practical procedural issues:

> The following factors could be considered by the docket judge before ordering a discovery deposition:
>
> (a) the number of depositions which could be involved. This could be limited to a small maximum number per party (say two) with liberty to apply for further depositions if necessary;
>
> (b) the potential length of the discovery deposition and thus the cost to the parties;
>
> (c) the requirement for objections and/or arguments about admissibility issues; and
>
> (d) whether the discovery deposition has a realistic prospect of assisting the parties to narrow the categories for discovery or the issues in dispute.[185]

10.116 By contrast, NSW Young Lawyers focused on broader threshold issues:

> [A] court should require the party seeking an oral examination to explain:
>
> - how the party expects the oral examination to assist in narrowing the dispute and/or narrowing discovery required;
> - that the witness being examined is closely connected to the proceedings;
> - that the costs of the oral examination would be in proportion to the probative value of the evidence to be obtained through the oral examination; and
> - that the oral examination will not unduly delay the proceedings.

---

181 The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011.

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

183 Ibid; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011. Note the Department of Immigration and Citizenship was also of this view although it is unclear whether they supported the ALRC's proposal. See Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011. While the Contributors from the Large Law Firm Group did not support the ALRC's proposal, they did advocate the use of the Federal Court's current powers to allow pre-trial oral examinations for the purpose of assisting the discovery process. They too were of the view that such a procedure 'should only be allowed by order of the Court.' Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

184 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 5–7; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

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

> The Committee also considers that if oral examinations were to be introduced in the federal courts then the number of witnesses who can be examined and the number of hours a witness can be examined should be limited.[186]

10.117 Legg's submission was broadly similar:

> The court should consider the following matters in granting leave for an oral examination:
>
> - whether the requesting party has described with reasonable particularity the matters for examination at the deposition and the person to be deposed;
> - the cost of the deposition relative to the significance of the information sought through the deposition; and
> - whether the information sought through the deposition cannot be obtained from another source more cheaply or efficiently.[187]

An alternative to discovery or an additional discovery tool?

10.118 It should also be noted that a few submissions were keen to ensure or stress that what the ALRC was proposing was an additional discovery tool rather than an alternative to discovery.[188] For example, the group of large law firms submitted that, '[a]n oral discovery deposition process could not and should not replace the current requirements imposed on parties to discover documents':[189]

> [T]here is a very real distinction between the use of depositions as a further discovery device and replacing the modern case management approach which has seen greater reliance on affidavits and witness statements exchanged prior to trial for the purpose of evidence in chief. ... [A]ny proposal to change the existing procedures for affidavit evidence in favour of the use of depositions would be a fundamental change, which would need to be the subject of careful and explicit consultation and consideration.[190]

10.119 Perhaps due to a concern that what was being proposed was an alternative to existing discovery procedures, some submissions foresaw the proposed change as 'a very substantial change to Australian court practice',[191] which would 'have a significant impact on the legal culture in Australia',[192] and 'would likely be met with doubt within the legal profession'.[193] Following such comments, the Law Council further submitted that, before implementing such a recommendation, there should be detailed consultation with relevant stakeholders about the issue.[194]

---

186 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
187 M Legg, *Submission DR 07*, 17 January 2011.
188 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; The Commercial Bar Association of Victoria, *Submission DR 04*, 13 January 2011. Perhaps this was a natural concern given that the Consultation Paper discussed pre-trial oral examinations in the context of alternatives to discovery. Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Ch 5.
189 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
190 Ibid.
191 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.
192 Law Council of Australia, *Submission DR 25*, 31 January 2011.
193 Just Leadership Program, *Submission DR 01*, 7 October 2010.
194 Law Council of Australia, *Submission DR 25*, 31 January 2011.

10.120 Both the Law Council and the Australian Government Solicitor thought there was a need for analysis of the American experience,[195] the Law Council advancing the need for 'empirical and qualitative data'. The Australian Government Solicitor also submitted that:

> it would be desirable to undertake a detailed investigation of the likely advantages of depositions and whether these outweigh the potential for this sort of process to increase costs.[196]

ALRC's views

10.121 The ALRC is mindful that this chapter has discussed the use of pre-trial oral examinations in a broader context than just discovery. For example, the discussion of the use of pre-trial oral examinations in the US noted that that they are used in that jurisdiction with the aim of achieving a number of objectives—for example, assessing the credibility and suitability of a witness. Further, their use in that jurisdiction encompasses a number of aspects of civil procedure that are outside the scope of this Inquiry—for example, in assisting to obtain admissions prior to trial. The ALRC acknowledges that its original proposal was drafted in reasonably wide terms, which prompted some concern that what was proposed was a broad change to Australian legal practice. This broad discussion and the width of the ALRC's proposal accounts for the concern expressed in some submissions that pre-trial oral examinations should not replace the current case-management approach in Australia. The ALRC acknowledges that any proposal to adopt oral depositions in the broad way that they are used in the US would be a significant change to Australian legal practice.

10.122 Pre-trial oral examinations may assist the discovery process by facilitating the discovery of evidence and the identity of documents, and by promoting settlement and the narrowing of issues in dispute. The ALRC has heard uniformly in consultations that narrowing the issues in dispute is essential to limiting the cost of litigation. The ALRC agrees with the VLRC that the primary object of oral examinations is not preparation for trial, but the narrowing of issues in dispute in order to facilitate settlement.

10.123 While pre-trial oral examinations may assist in reducing the cost of discovery—in that they may lead to increased efficiency which implies fewer costs or because they may assist in achieving earlier settlement—the ALRC acknowledges that the use of oral depositions has been criticised because they are costly. It is possible that complaints of excessive costs may arise from the abuse of oral depositions—for example, the Canadian evidence of lawyers who prolonged examinations in order to achieve their billing targets. It is also possible that some of these complaints are directed to the use of oral depositions in a context wider than discovery. The ALRC is not advocating the use of pre-trial oral examinations at large.

---

195 Australian Government Solicitor, *Submission DR 27*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011.

196 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

10.124 The ALRC is also not advocating the use of pre-trial oral examinations in all discovery matters. Rather, the ALRC considers that there may be a few, limited cases where the use of pre-trial oral examinations for discovery would not be cost prohibitive. The two submissions that addressed the costs question—that is, whether cost issues in proceedings before federal courts could be controlled by limiting pre-trial oral examinations to particular types of dispute—appear to take different views. However, both argue that the costs likely to be expended need to be justified—in the case of one submission, by the quantum of damages and, in the other submission, by an explanation that use of a pre-trial oral examination would actually save costs or would produce information not otherwise available through other forms of discovery.

10.125 The ALRC considers that there may be real value in the Federal Court being able to order oral examination in the discovery stage—albeit only in a few, limited cases. The ALRC considers that the Federal Court should be well equipped with a broad range of tools in its 'toolkit' of case management techniques,[197] so as to manage all the various procedural stages of a particular case as the Court sees fit to facilitate the just resolution of the dispute according to law in the way it considers will be as quick, inexpensive and efficient as possible, consistent with the overarching purpose provision.[198] The ALRC takes the view that there is sufficient evidence to support the use of pre-trial oral examination *for discovery* in specific cases.

10.126 The ALRC considers that such a procedure should only be conducted within the framework of the Federal Court—that is, the ALRC is not advocating that persons external to the Federal Court preside over pre-trial oral examinations about discovery. The use of such external persons would be a novel development in Australia. Such a move is unwarranted given that officers of the Federal Court have experience with oral examinations—including pre-trial oral examinations under ss 596A and 596B of the *Corporations Act 2001* (Cth). Further, by keeping the process within the Federal Court, parties would not be put to the expense of paying for an external person to preside over the oral examination.

10.127 There is uncertainty as to whether the Federal Court has the power to order pre-trial oral examination in respect of discovery. For example, the text of s 46 of the *Federal Court of Australia Act* and the text of O 24 r 1 seem to provide the Federal Court with broad powers that could be used to order pre-trial oral examination to assist with the discovery phase. However, the only case of which the ALRC is aware that discusses O 24 r 1 in terms of oral discovery, interprets it narrowly.[199] It is possible that the Federal Court may interpret the provision more broadly in light of the overarching purpose provision—however, it is uncertain.

10.128 In Chapter 2 of this Report, the ALRC explained that issues of uncertainty may lead to inconsistency in application of the rules of civil procedure and may hinder accessibility. The ALRC considers that the principle of certainty is a significant framing principle for law reform recommendations in this Inquiry. Therefore the

197 Ibid.
198 *Federal Court of Australia Act 1976* (Cth) s 37M(1).
199 *Martin v Tasmania Development & Resources* [1999] FCA 71.

ALRC considers that the *Federal Court of Australia Act* should be amended to provide expressly that the Court or a judge may order pre-trial oral examination about discovery. The ALRC is of the view that the Court or a judge should be empowered to direct a Registrar of the Court, rather than the judge, to conduct the pre-trial oral examination. The ALRC considers that the general power of delegation in the *Federal Court of Australia Act* and in the *Federal Court Rules* could be employed for this effect so there is no need to make a specific recommendation for legislative change in this respect.

10.129 The ALRC considers that a necessary safeguard for the use of pre-trial oral examinations about discovery is that they only be allowed with leave of the Federal Court. The ALRC envisages that such a procedure would be subject to the threshold outlined in proposed r 20.11 of the *Federal Court Rules*—namely, that '[a] party may apply for discovery only if it is necessary for the just determination of issues in the proceedings'.[200] Further, the Court should set the limits and determine the parameters in which such pre-trial oral examinations take place. The Federal Court may find it useful to reflect on the views expressed in submissions on the possible mandatory considerations that the Court should take into account in granting leave for oral examination. Accordingly, the ALRC recommends that the *Federal Court Rules* should be amended to provide expressly the limited circumstances in which the Court or a judge may order pre-trial oral examination about discovery—for example, to discover evidence about the identity and location of potentially discoverable documents, to assess the reasonableness and proportionality of a discovery plan, and to resolve any disputes about discovery.[201]

Recommendation 10–1 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide expressly that the Court or a judge may order pre-trial oral examination about discovery.

Recommendation 10–2 The *Federal Court Rules* (Cth) should be amended to provide expressly the limited circumstances in which the Court or a judge may order pre-trial oral examination about discovery, for example to:

(a) identify the existence and location of potentially discoverable documents;

(b) assess the reasonableness and proportionality of a discovery plan;

(c) resolve any disputes about discovery.

200 Federal Court Rules (Cth) [Draft 2010] r 20.11.

201 In Recommendation 7–2 (e), the ALRC recommends that a continuing judicial education and training program dealing with judicial management of the discovery process in Federal Court proceedings should include the circumstances in which it might be appropriate to order pre-trial oral examination for discovery.

11. Pre-action Protocols and Other Alternatives to Discovery

Contents

Summary

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

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

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

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

What are pre-action protocols?

11.4 Pre-action protocols—a series of procedural requirements that are a pre-requisite to commencing litigation—are generally aimed at encouraging settlement, and where settlement is not achieved, narrowing the issues in dispute to facilitate a more efficient and cost-effective trial process.[3]

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

- the need to disclose information or documents in relation to the cause of action;

---

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

2 Ibid, Questions 5–8 and 5–9.

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

- the need to correspond, and potentially meet, with the person or entity involved in the dispute;
- undertaking, in good faith, some form of alternative dispute resolution (ADR); and
- conducting genuine and reasonable negotiations with a view to settling the matter, without recourse to court proceedings.[4]

11.6 Pre-action protocols may be prescribed in legislation or in court practice rules. For example, the UK *Civil Procedure Rules* require a prospective claimant in a personal injury proceeding to send a letter to a prospective defendant, containing a clear summary of the facts on which a prospective claim is based, along with a description of the nature of the injuries and the financial loss incurred.[5] The prospective defendant is then required to send a reply within 21 days, and to ensure that a copy of the letter is sent to the insurer (if any is identified).[6] The prospective defendant is then required to formulate a position on liability and send a reply to the prospective claimant within three months.[7]

Advantages and disadvantages of pre-action protocols

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

Advantages of pre-action protocols

11.8 In many instances, pre-action protocols place obligations on parties to disclose relevant information and documents with the aim of facilitating settlement. Where no settlement is reached, the procedures aim to narrow the issues in dispute between the parties in a manner that expedites the trial process.[9] In principle, this should assist in reducing the need for, and cost of, any subsequent discovery of documents.

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

> Pre-action protocols represent a philosophical shift in the way litigation is commenced and conducted ... towards a full consideration of alternative means of resolving

4 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 109; M Legg and D Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 39.
5 *Civil Procedure Rules, Pre-action Protocol for Personal Injury Claims* (UK), [2.7].
6 Ibid, [2.6].
7 Ibid, [2.7].
8 See, eg, R Byron, 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (2001) 75 *Tulane Law Review* 1297, 1311.
9 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 109.

> differences. Pre-action protocols do this by forcing parties to fully investigate the merits of their claims and defences as a condition precedent to filing a law suit.[10]

11.10 Many pre-action protocols also play an important role in encouraging parties to pursue ADR. Where ADR is successful, it results in cost savings both to individuals and to the public in terms of reduced burden on the courts. Alternatively, it has been argued that proper pre-action protocols should reduce the need for ADR.[11]

Disadvantages of pre-action protocols

11.11 A major concern with pre-action protocols relates to the 'front-loading' of costs by requiring parties to spend more resources at an early stage of the process. For example, in complex cases where the parties are unlikely to reach early settlement, imposing onerous pre-action requirements may do no more than add to delay and costs for both parties in complying with the pre-action protocols.[12]

11.12 Pre-action protocols also raise a number of access to justice issues, especially for individual litigants—that is, litigants who are natural persons. For example, individuals may not necessarily have the monetary resources to comply with relevant protocols, or may be pressured into settlement for fear of having adverse cost orders made against them for non-compliance with the protocols.[13]

11.13 Additionally, pre-action protocols may open up a battlefield for 'satellite litigation', by way of interlocutory applications as to whether a party has or has not complied with the relevant protocol.[14] This becomes more likely if parties risk adverse cost orders for not complying with the protocol, and has an obvious impact for courts and the judiciary, as well as adding to delay and the cost of litigation.[15]

11.14 Finally, some have argued that pre-action protocols may be challenged on human rights grounds, if their effect is to impede an individual's right of access to the courts.[16]

---

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

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

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

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

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

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

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

Pre-action protocols in the United Kingdom

Specific pre-action protocols

11.15 Pre-action protocols were introduced in the UK in 1999, following Lord Woolf's *Access to Justice* report in 1996, in which he identified a need to enable

> parties to a dispute to embark on meaningful negotiations as soon as the possibility of litigation is identified, and ensure that as early as possible they have the relevant information to define their claims and to make realistic offers to settle.[17]

11.16 Lord Woolf recommended that:

- pre-action protocols should set out codes of sensible practice which parties are expected to follow when faced with the prospect of litigation;
- when a protocol is established for a particular area of litigation, it should be incorporated into a relevant practice guide;
- unreasonable failure by either party to comply with the relevant protocols should be taken into account by the court, for example in the allocation of costs or in considering any application for an extension of the timetable; and
- the operation of protocols should be monitored and their detailed provisions modified as far as is necessary in light of practical experience.[18]

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

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

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

11.18 These specific pre-action protocols vary from imposing mandatory procedural obligations on parties, to simply acting as a general guide to good practice. In its 2008 report, *Civil Justice Review*, the Victorian Law Reform Commission (VLRC) noted that the more detailed and lengthy protocols in the UK have, in some ways, constituted their own procedural code.[19] For example, the Pre-action Protocol for Personal Injury Claims sets out steps that must be taken by both parties, and includes draft templates that can be tailored to meet the circumstances of the particular claim.[20] On the other hand, the Pre-action Protocol for Disease and Illness Claims provides that:

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

General pre-action protocol

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

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

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

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

11.22 The Practice Direction also recognises that there are some types of applications where pre-action protocols 'clearly cannot and should not apply'.[26] These include, but are not limited to:

- applications for consent orders;
- applications where there is no other party for the applicant to engage with;

---

19 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 113.
20 *Civil Procedure Rules, Pre-action Protocol for Personal Injury Claims* (UK), Annex A.
21 *Civil Procedure Rules, Pre-action Protocol for Disease and Illness Claims* (UK), [4].
22 *Civil Procedure Rules, Practice Direction: Pre-action Conduct* (UK), [2.1].
23 Ibid, [6.1]. While ADR is not compulsory, the Practice Direction gives some options for resolving disputes through discussion and negotiation, mediation, early neutral evaluation by an independent person or expert, and arbitration.
24 Ibid, Annex A.
25 *Civil Procedure Rules, Practice Direction: Pre-action Conduct* (UK), [9.2].
26 Ibid, [2.2].

- most applications for directions by a trustee or other fiduciary; and
- applications where telling the other potential party in advance would defeat the purpose of the application (for example, an application for an order to freeze assets).[27]

Compliance and enforcement

11.23 The *Civil Procedure Rules* (UK) enable the court to take into account compliance (or non-compliance) with the Practice Direction and applicable protocols when giving direction on the management of proceedings and when making orders as to costs.[28] The protocols are not intended to be exhaustive, but rather:

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

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

- the extent to which the parties have complied in substance with the relevant principles and requirements, rather than minor or technical shortcomings;
- the proportionality of the steps taken compared to the size and importance of the matter; and
- the urgency of the matter.[30]

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

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

- staying the proceedings until the steps that ought to have been taken, have been taken;
- an order that the party at fault pay the cost of the proceedings, or part of those costs of the other party;
- an order that the party at fault pay those costs on an indemnity basis;

---

27 Ibid, [2.2].
28 Ibid, [3.1].
29 Lord Justice Waller (ed), *The White Book Service 2009* (2009), 2308.
30 *Civil Procedure Rules, Practice Direction: Pre-action Conduct* (UK), [4.3].
31 Ibid, [4.4].

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

Implementation issues

Front-loading of costs

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

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

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

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

---

32 Ibid, [4.6].
33 H Genn, *Judging Civil Justice (The Hamlyn Lectures)* (2009), 56.
34 P Fenn, N Rickman and D Vancappa, 'The Unintended Consequences of Reforming Civil Procedure: Evidence from the Woolf Reforms in England and Wales' (Paper presented at 26th Annual Conference of European Association of Law and Economics, Rome, 2009), 28.
35 M Zander, 'Where Are We Heading with the Funding of Civil Litigation?' (2003) 22 *Justice Quarterly* 23, 23–25.
36 Ibid.
37 R Byron, 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (2001) 75 *Tulane Law Review* 1297, 1312.

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

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

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

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

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

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

> what constitutes 'cost effective' [pre-action protocols] will vary greatly depending on the nature of the disputes and the parties involved. However, mandatory pre-action protocols will effectively increase the cost of litigation by adding another layer of costs to the litigation process ... Pre-action protocols are also inappropriate for low value claims because of the increased cost involved, and in many cases are completely unnecessary.[43]

11.34 Others argue that the front-loading of costs is justified where the protocols reduce the total cost of litigation.[44] For example, in cases where compliance with pre-action protocols successfully narrows the issues in dispute, there may be cost savings

---

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

39 P Abrams, T Goriely and R Moorhead, *More Civil Justice? The Impact of the Woolf Reforms on Pre-action Behaviour* (2002), prepared for the Law Society and Civil Justice Council, xiii.

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

41 Ibid, 345.

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

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

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

associated with a more expedited, less complex and shorter trial.[45] As Lord Woolf foreshadowed in his report:

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

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

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

Information exchange and narrowing the issues in dispute

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

11.37 There may be concerns that pre-action protocols governing information exchange cannot operate with sufficient flexibility to take account of the principle of proportionality. In cases where the issues are less complex and the number of relevant documents is small and easily identified, allocating resources to the disclosure of such documents may not be unduly burdensome. In larger, more complex cases, the extent of the obligations imposed on the parties by pre-action protocols might not take into consideration both the nature of the dispute and the usefulness of detailed information exchange, having regard to the front-loading of costs. A measure of flexibility may be necessary to ensure access to justice for all litigants.[48]

Compliance, enforcement and satellite litigation

11.38 Pre-action protocols have also been criticised for creating a battleground for satellite litigation,[49] arising from disputes as to whether a party has complied with the relevant protocol. It appears important, therefore, that courts play an active role in the enforcement of pre-action protocols, and for sanctions to be clear and effective.

---

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

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

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

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

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

11.39 Indeed, non-compliance with the protocols and the lack of proper enforcement of sanctions are among the chief criticisms of reforms introduced following Lord Woolf's report.[50] For example, it has been noted that while some courts are willing to strictly enforce compliance with the pre-action protocols, this is by no means universal.[51] As Gerber and Mailman note in relation to the Technology and Construction Court in England:

> There have been instances reported where courts have asked parties at case management conferences whether they have complied with the requirements of the relevant protocols, and the parties have responded 'yes' even when they have not. The courts in these cases did not look behind this, or seek details in compliance.[52]

11.40 John Peysner and Mary Seneviratne have identified that some practitioners in the UK, post-Woolf reforms, 'thought that the overriding objective gave too much discretion to the courts',[53] resulting in a lack of guidance and inconsistent interpretation of the rules. Views were also expressed that the certainty of the old system resulted in cost savings.[54] This may be a symptom of insufficient training of the judiciary and the legal profession on compliance with any proposed pre-action protocols, and the relative lack of case law in the area.

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

Australian developments

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

- the Access to Justice Taskforce of the Australian Government Attorney-General's Department in *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (*Strategic Framework*);[57]

---

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

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

52 Ibid.

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

54 Ibid, 16.

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

56 Ibid.

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

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

11.43 These reports have informed the development of a less prescriptive approach in Australia—culminating in recent and proposed reforms—that has instead focused on general pre-litigation steps, rather than specific pre-action protocols. For example, the Civil Dispute Resolution Bill 2010 (Cth) proposes that parties should take 'genuine steps' to resolve disputes before commencing litigation.

Civil Dispute Resolution Act 2011 (Cth)

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

- to change the adversarial culture often associated with disputes;
- to have people turn their minds to resolution before becoming entrenched in a litigious position; and
- where a dispute cannot be resolved and the matter proceeds to court, to ensure that the issues are properly identified, thereby reducing the time required for a court to determine the matter.[60]

11.45 The Act seeks to achieve these aims by requiring parties to file a 'genuine steps statement' at the time of filing the application to commence a civil proceeding.[61] The statement must specify the steps the party has taken to resolve the issues or, if no steps were taken, an explanation as to why.[62] Non-compliance with the requirement to file this statement is not a bar to commencing proceedings, but the court may, in the circumstance of non-compliance by any party, award costs in favour of the complying party.[63]

11.46 The 'genuine steps' formulation implemented a recommendation made by NADRAC that:

> The legislation governing federal courts and tribunals require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced.[64]

---

58 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).
59 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008).
60 Explanatory Memorandum, Civil Dispute Resolution Bill 2010 (Cth), 4.
61 *Civil Dispute Resolution Act 2011* (Cth) s 6(1).
62 Ibid s 6(2).
63 Ibid s 12(1).
64 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), 8, 30–35.

11.47 The 'genuine steps' formulation was preferred over other formulations, such as 'genuine effort' or 'good faith' requirements. NADRAC considered that the reference to 'effort' was a subjective concept that may be misinterpreted as applying a standard of conduct to some ADR processes that was inappropriate.[65] A further concern was that such formulations might 'open the door for satellite litigation about the conduct of the parties in costs hearings'.[66]

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

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

11.49 This definition is intended to offer guidance to litigants on the nature of the actions that they take which they wish to include in a genuine steps statement, as well guidance to a court in considering whether a litigant took genuine steps.[68] The non-prescriptive approach is intended to 'ensure that the focus is on resolution and identifying the central issue without incurring unnecessary upfront costs, which has been a criticism of pre-action protocols'.[69] As the Australian Government Attorney-General noted in his Second Reading Speech:

> The Bill does not introduce a mandatory alternative dispute resolution or prescriptive or onerous pre-action protocols, nor does it prevent a party from commencing litigation. It is deliberately flexible in allowing parties to tailor the genuine steps they take in the circumstances of the dispute.[70]

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

- 'notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute';[71]
- 'responding appropriately to such notification';[72] and
- 'providing relevant information and documents to other persons to enable the other person to understand the issues involved and how the dispute might be resolved'.[73]

---

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

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

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

- the form of genuine steps statements;
- the matters to be specified in genuine steps statements; and
- the time limits relating to the provisions of copies of genuine steps statements.[76]

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

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

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

---

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

75 Ibid s 12(3).

76 Ibid s 18.

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

78 Ibid, [3.4]–[3.15].

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

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

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

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

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

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

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

- a general pre-action protocol;
- specific protocols in relation to particular cases; and
- the incorporation of the main elements of pre-action protocols into guidelines that a court could take into account when asked to adjudicate a civil dispute,[85] and providing that serious failure to comply with the guidelines could result in an adverse costs order.[86]

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

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

---

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

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

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

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

85 Ibid, 16.

86 Ibid.

87 Ibid, 17.

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

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

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

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

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

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

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

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

- 'notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute';[97]

---

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

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

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

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

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

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

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

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

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

11.69 Further, the Attorney General explained:

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

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

11.71 New s 18L provides that, subject to div 5, or any court rules that provide to the contrary, the costs of compliance with pre-litigation requirements are borne by each party. This is notably different from the costs of discovery, which are typically borne by the party producing the documents (at least, at first instance) and not the requesting party.

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

Proposed repeal of pre-litigation requirements in Victoria

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

---

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

commencement of any civil proceeding in a court in relation to that dispute'.[112] The requirements are to take 'reasonable steps' to resolve the dispute by agreement or to clarify or narrow the issues in dispute.[113] The Act is less prescriptive than the VLRC's recommendations, in that it provides no guidance in relation to the content of letters of claims, responses and timeframes for response for the purposes of reasonable steps.[114]

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

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

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

---

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

113 Ibid s 34(1).

114 See Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 143–144 outlining matters to be included in such letters. It was also recommended that where a person in dispute makes an offer of compromise before any legal proceedings are commended the court may, after the determination of the court proceedings, take that into consideration on the question of costs in any proceedings.

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

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

11.76 The Explanatory Memorandum explained further that:

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

Queensland—personal injury claims

11.77 In Queensland, the majority of personal injury claims are now governed by pre-action procedures after the *Personal Injuries Proceedings Act 2002* (Qld) amended other legislation to provide a framework for pre-action protocols. The legislation is aimed at providing a speedy procedure for the resolution of claims and promoting settlement.[118] Parties are required—within a certain timeframe—to disclose information and documents,[119] join any contributors[120] and provide formal notification of claims.[121] A compulsory conference must be held on completion of the pre-action requirements,[122] and parties are to exchange final offers at the conclusion of the conference.[123]

11.78 In 2003, the Queensland Attorney-General appointed a stakeholder reference group to consider the possibility of common pre-action procedures for personal injury claims. The group proposed a revised general pre-action protocol that would apply to all cases of personal injury other than dust-related diseases, medical negligence and claims from minors.[124] The ALRC is not aware whether these recommendations in relation to a general pre-action protocol have been implemented.

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

---

117 Explanatory Memorandum, Civil Procedure and Legal Profession Amendment Bill 2011 (Vic), 1.
118 *Personal Injuries Proceedings Act 2002* (Qld) s 4(2).
119 Ibid ss 30–34.
120 Ibid ss 30–34.
121 Ibid ss 9–20J.
122 Ibid ss 36–38.
123 Ibid s 39.
124 Stakeholder Reference Group, *A Review of the Possibility of a Common Personal Injuries Pre-Proceedings Process for Queensland* (2004).
125 B Cairns, 'A Review of Some Innovations in Queensland Civil Procedure' (2005) 26 *Australian Bar Review* 158, 184.
126 Ibid. See also E Wright, *National Trends in Personal Injury Litigation: Before and After the IPP* (2006), prepared for the Law Council of Australia, 20–21. Figure 10 suggests that the combined number of personal injury actions commenced in Queensland Supreme and District Courts (Brisbane Registries) fell from 1176 to 293 for the period 2002–2003.

The need for a tailored approach?

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

11.81 Lord Woolf recognised the importance of targeted protocols, stating that pre-action protocols 'are not intended to provide a comprehensive code for all pre-action behaviour, but will deal with specific problems in specific areas'.[128] Indeed, Lord Jackson's review found that general pre-action protocols led to substantial delay and additional costs, and recommended that the general protocol be repealed, because 'one size does not fit all'.[129]

11.82 The Hong Kong Chief Justice's Working Party on Civil Justice Reform considered that pre-action protocols might have a bigger role to play in specialist lists, rather than general litigation in other courts.[130] The Working Party did not make any recommendations for the adoption of a general pre-action protocol, and concluded that any specific pre-action protocols introduced in specialist lists should be at the discretion of the courts.[131]

11.83 Similarly, the *Strategic Framework* cautioned that not all matters that appeared before courts would be suitable for pre-action protocols. For example:

> in the migration jurisdiction, claims have already been through an extensive merits review process, and there is a high volume of relatively simple proceedings ... Introducing additional pre-action steps in this process is likely to extend the process and increase costs.[132]

11.84 Rather, it considered that pre-action protocols might best be targeted at categories identified as complex and time consuming, such as: taxation, competition law, consumer protection law, human rights and intellectual property matters.[133]

11.85 The report cautioned that, in designing pre-action protocols, the challenges identified in the UK had to be taken into account, including: effective enforcement mechanisms and sanctions; avoiding excessive front-loading of costs; and safeguards to avoid their misuse as a litigation strategy to inconvenience or intimidate the other party.[134] The report recommended that the Australian Government Attorney-General's

---

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

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

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

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

131 Ibid, 73.

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

133 Ibid, 104.

134 Ibid, 104.

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

11.86 As Michael Legg and Dorne Boniface note:

> The task is to identify the appropriate categories of case and the pre-action steps that will be beneficial. It should also be noted that pre-action protocols may be the victim of their own success. If the role of the protocol in securing more speedy resolution of a dispute is not identified then it may be assumed that the dispute would have resolved without the protocol.[136]

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

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

11.88 The ALRC proposed that the Australian Government and the Federal Court, in consultation with relevant stakeholders, should work to develop specific pre-action protocols for particular types of civil dispute with a view to incorporating them in Practice Directions of the Court.[142]

Reducing front-loading of costs

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

---

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

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

11.91 Michael Legg explained:

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

Safeguards for access to justice

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

164 Ibid.

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

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

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

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

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

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

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

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

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

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

---

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

Maximising information exchange

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

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

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

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

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

---

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

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

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

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

Narrowing issues in dispute

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

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

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

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

Costs sanctions—an effective compliance mechanism?

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

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

---

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

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

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

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

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

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

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

Specific pre-action protocols

11.120 There was a general lack of support for the ALRC's proposal that the Australian Government and the Federal Court, in consultation with relevant stakeholders, should work to develop specific pre-action protocols for particular types of civil dispute with a view to incorporating them in Practice Directions of the Court.

---

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

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

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

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

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

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

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

203 Ibid.

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

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

11.123 The group of large law firms explained:

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

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

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

---

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

11.125 The group of large law firms concluded:

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

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

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

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

---

209 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ALRC's views

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

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

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

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

221 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Interim disclosure orders

11.145 In its *Civil Justice Review*, the VLRC recommended another alternative to traditional discovery—'interim disclosure orders'.[231] In order to reduce the delays and costs arising from discovery, the VLRC recommended that a court would have the discretion to order a party to provide another party with access to all documents in the first party's possession, custody or control that fall within a general category or general description of issues in dispute in the proceedings, subject to:

- the documents falling within a category of documents where such a category or description is approved by the courts;
- 'the documents are able to be identified and located without unreasonable burden or unreasonable cost to the first party';
- 'the cost to the first party of differentiating documents within such a general category or description which are (i) relevant or (ii) irrelevant to the issues in dispute between the parties are in the opinion of the court excessive or disproportionate';

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

- 'access to irrelevant documents is not likely to give rise to any substantial prejudice to the first party which is not able to be prevented by way of court order or agreement between the parties'; and
- 'access is to facilitate the identification of documents for the purpose of obtaining discovery of such identified documents in the proceedings'.[232]

11.146 Access does not allow the other party to copy, produce or make records of, photograph or otherwise use—either in connection with the proceedings or in any other way—documents or information examined as a result of such inspection.[233] However, there would be a practical exception to allow the other party to describe or identify an examined document for the purposes of obtaining discovery of such an identified document in the proceedings.[234] Other safeguards include access being limited to lawyers for a party, and any disclosure not giving rise to a waiver of privilege.[235]

11.147 The VLRC considered that such interim access would: facilitate access to documents quickly; avoid the party in possession spending time reviewing such documents prior to the determination of what documents should be produced by way of discovery and the necessity of preparing a list of documents; and transfer the cost of initially reviewing the documents to the party seeking the documents.[236]

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

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

---

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

Submissions and consultations

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

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

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

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

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

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

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

---

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

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

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

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

245 Ibid.

246 Ibid.

247 Ibid.

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

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

ALRC's views

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

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

Other possible alternatives

Civil jurisdictions

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

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

---

248 Ibid.

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

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

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

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

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

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

Ensuring other possibilities are considered

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

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

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

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

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

11.163 By contrast, Legg submitted:

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

---

254 See Terms of Reference at the front of this Report. Specifically, the ALRC is to 'have regard to the experiences of other jurisdictions, including jurisdictions outside Australia, provided there is sufficient commonality of approach that any recommendations can be applied in relation to the federal courts'.

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

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

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

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

259 Ibid.

260 Ibid.

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

262 Ibid.

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

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

12. Professional and Ethical Discovery

Contents

Summary

12.1 The professional and ethical obligations of lawyers, and how these obligations are exercised in practice, directly concern the practice and management of discovery of documents in litigation before federal courts. These obligations have a role to play in limiting the overuse, and reducing the cost, of discovery.

12.2 This chapter outlines the key sources of professional and ethical obligations concerning discovery and the existing and proposed disciplinary structures designed to monitor and enforce those and other professional and ethical obligations. The chapter then considers a range of potentially unprofessional or unethical discovery practices, with comments from submissions on their nature and extent in Australia. Broadly

speaking, the submissions argued that discovery was in fact not widely abused in Australian federal litigation—or at least that there was no evidence of widespread abuse. It was stressed that, on the whole, lawyers conducted discovery responsibly and professionally. However, in the ALRC's view, there is insufficient evidence to determine whether discovery is widely abused in federal litigation.

12.3 The chapter concludes by considering ways to foster professional and ethical discovery practices, and recommends: the development of discovery-specific commentary to professional conduct rules; and that providers of continuing legal education and in-house training provide training to legal practitioners on the law, practice and ethics of discovery. The chapter also suggests that law firms work to build work cultures that actively encourage and promote ethical and responsible discovery practices.

Ethical obligations

12.4 The professional and ethical rules and obligations are not less important than the 'legal' rules considered throughout this Report, nor are the two types of rules mutually exclusive. This chapter will focus on the more general professional and ethical duties placed on lawyers—duties or rules over and above those specifically developed to govern discovery practice. These ethical duties, and the enforcement mechanisms, are also more clearly directed to lawyers, as opposed to other parties.

12.5 In Australia, the key sources of lawyers' professional responsibilities are general law, statute and professional rules—sometimes collectively referred to as the 'law of lawyering'.[1] The statutory sources of ethical obligations in Australia include: the legal profession and civil procedure legislation in each jurisdiction; model laws; and other specific pieces of legislation.

Professional rules

12.6 The Australian legal profession is regulated on a state and territory basis. For most purposes, solicitors and barristers are regulated separately by professional bodies such as law societies and bar associations.[2] Lawyers practising in federal courts may be subject to regulation at a state and territory level. Legal profession rules are binding on Australian legal practitioners and Australian-registered foreign lawyers to whom they apply.[3]

12.7 While there are no national professional conduct rules in force, the professional conduct rules that apply to Australian legal practitioners are largely uniform. Most jurisdictions have now adopted some form of the *Model Rules of Professional Conduct*

---

1 See, eg, C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 4.

2 A person who is entitled to practise as a barrister or solicitor in the Supreme Court of a state or territory is entitled to practise in any federal court, provided his or her name also appears in the Register of Practitioners kept by the Chief Executive and Principal Registrar of the High Court: *Judiciary Act 1903* (Cth) ss 55B, 55C.

3 See, eg, *Legal Profession Act 2004* (NSW) s 711.

and Practice (Model Rules) developed by the Law Council of Australia (Law Council) in 2002.[4]

Legal profession legislation and the model laws

12.8 The legal profession legislation in each jurisdiction outlines general requirements for engaging in legal practice and obligations with respect to trust accounting and costs. The legislation also establishes regulatory bodies and processes for handling complaints against, and the discipline of, practitioners in the jurisdiction.[5]

12.9 The basis for legal profession legislation in all jurisdictions, except South Australia, is the *Legal Profession Model Laws Project Model Provisions* (Model Laws), developed by the Standing Committee of Attorneys-General (SCAG), with the Law Council.[6] The Model Laws were initially released in 2004 and revised in July 2006.

12.10 In February 2006, SCAG also released the *Legal Profession Model Laws Project Model Regulations* (Model Regulations), a revised edition of which was released in June 2007.[7]

12.11 The core provisions of the Model Laws and the Model Regulations that are relevant to this Inquiry relate to standards for legal education, definitions of misconduct,[8] costs disclosures and the regulation of legal practices.

Draft National Law and Rules

12.12 In early 2009, the Council of Australian Governments (COAG) embarked on the National Legal Profession Reform Project—a project to nationalise regulation of the legal profession in Australia. At the request of COAG, the Australian Government Attorney-General established a taskforce (the Taskforce) to consider options for the establishment of a 'national legal profession and national regulatory framework, while retaining state and territory involvement and engagement by professional

---

4 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002). The Model Rules form the basis for the following professional conduct rules: *Professional Conduct and Practice Rules 1995* (NSW); *Legal Profession (Solicitors) Rule 2007* (Qld); *Rules of Professional Conduct and Practice* (SA); *Professional Conduct and Practice Rules 2005* (Vic); *Legal Profession (Solicitors) Rules* (ACT); *Rules of Professional Conduct and Practice* (NT). The Tasmanian rules have yet to follow: *Rules of Practice 1994* (Tas). The *Legal Profession Conduct Rules 2010* (WA) commenced on 1 January 2011.

5 *Legal Profession Act 2004* (NSW); *Legal Profession Act 2007* (Qld); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2008* (WA); *Legal Profession Act 2006* (ACT); *Legal Profession Act 2006* (NT).

6 Standing Committee of Attorneys-General, *Legal Profession Model Laws* (2nd ed, 2006).

7 Standing Committee of Attorneys-General, *Legal Profession Model Regulations* (2nd ed, 2007).

8 Professional misconduct at common law is conduct by a lawyer in their 'professional capacity which would be reasonably regarded as disgraceful or dishonourable by [the lawyer's] professional brethren of good repute and competency': *Allinson v General Council of Medical Education and Registration* [1984] 1 QB 750, 763. Professional misconduct and unsatisfactory professional conduct is defined in Standing Committee of Attorneys-General, *Legal Profession Model Laws* (2nd ed, 2006) ss 4.2.1, 4.2.2. The statutory concepts are 'neither exhaustive nor intended to restrict the meaning and application of misconduct at common law': G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 523. In South Australia the distinction is made between 'unsatisfactory conduct' and 'unprofessional conduct': *Legal Practitioners Act 1981* (SA) s 5(1).

associations'.[9] In early 2011, the Taskforce released a draft *Legal Profession National Law* (Draft National Law) and draft *Legal Profession National Rules* (Draft National Rules).[10] These were lodged with COAG, and at its meeting on 13 February 2011**,** COAG 'agreed in principle to settle reforms to legal profession regulation by May 2011 (with the exception of Western Australia and South Australia)'.[11]

12.13 One of the objectives of the Draft National Law is to ensure 'lawyers are competent and maintain high ethical and professional standards in the provision of legal services'.[12]

Draft National Solicitors' Rules and Barristers' Rules

12.14 In line with a recommendation made by the ALRC in *Managing Justice—A Review of the Federal Civil Justice System*, Report 89, 2000 (*Managing Justice*)[13] and as part of the COAG National Legal Profession Reform Project, the Law Council and the Australian Bar Association (ABA) respectively have developed the *Legal Profession National Rules: Solicitors' Rules 2010* (Draft National Solicitors' Rules) and *Legal Profession National Rules: Barristers' Rules 2010* (Draft National Barristers' Rules).[14]

Other legislative obligations

12.15 There is also civil procedure legislation in some jurisdictions that regulates the conduct of participants in civil litigation and includes several provisions relevant to the discovery process.[15] For example, as discussed in earlier chapters of this Report, there is an obligation on lawyers to assist clients to act consistently with the overarching purpose of the *Federal Court of Australia Act 1976* (Cth).[16] There is a similar obligation under other legislation.[17]

---

9 National Legal Profession Reform Taskforce, *Regulatory Framework* (2009).

10 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010); National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010).

11 Council of Australian Governments, *COAG Communiqué, 13 February 2011* <http://www.coag.gov.au/coag_meeting_outcomes/2011-02-13/index.cfm> at 18 March 2011.

12 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010), s 1.1.3.

13 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 13.

14 Law Council of Australia, *Legal Profession National Rules: Solicitors' Rules* (2010); Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010). Section 9.1.6 of the Draft National Law provides that the Law Council of Australia may develop proposed Legal Practice Rules, Legal Professional Conduct Rules and Continuing Professional Development Rules for solicitors. The section also provides that the Australian Bar Association may do the same for barristers.

15 See, eg, *Civil Procedure Act 2005* (NSW); *Civil Procedure Act 2010* (Vic).

16 *Federal Court of Australia Act 1976* (Cth) ss 37M, 37N.

17 See, eg, *Family Law Rules 2004* (Cth) rr 1.04, 1.08(1); *Civil Procedure Act 2005* (NSW) s 56; *Civil Procedure Act 2010* (Vic) pt 2.2. *Uniform Civil Procedure Rules 1999* (Qld) r 5(1); *Civil Procedure Act 2005* (ACT) s 56(1). See also: J Spigelman, *Just, Quick and Cheap: A New Standard for Civil Procedure* (2000), Opening of Law Term address, 31 January 2000.

The Legal Services Directions

12.16 The *Legal Services Directions 2005* (Cth) are a set of binding rules issued by the Attorney-General under s 55ZF of the *Judiciary Act 1903* (Cth) about the performance of legal work for the Commonwealth. The *Legal Services Directions* were first issued in 1999 and were revised and reissued in 2005 as a statutory instrument. Appendix B of the *Legal Services Directions* outlines the obligation of the Commonwealth and its agencies—and by extension, lawyers working for the Australian Government—to behave as model litigants in the conduct of litigation.[18]

Common law

12.17 The statute law outlined above is drawn from, and complements, the common law—in particular the law of contract, torts and equity—that governs 'most incidents of lawyers' relationships with their clients, the court and third parties'.[19] For example, a lawyer's duty to his or her client arises in the context of the lawyer-client relationship, which is essentially a contractual relationship. Lawyers also owe a duty of care to their clients, which arises in tort, and a duty of confidentiality, arising in equity. This chapter will refer mainly to the statutory sources of law, outlined above, that complement this common law.

Disciplinary structures

12.18 Misconduct and breaches of ethical obligations by lawyers are largely dealt with by law societies or committees and bodies such as the legal services commissions or boards and the ombudsman in each state and territory. Significant reform, including to disciplinary structures, the ability of consumers of legal services to be involved in the complaints process, and the range of sanctions available, has occurred across jurisdictions in recent years.[20]

State and territory disciplinary structures

12.19 Legal professional disciplinary structures and processes vary across jurisdictions.[21] Currently, complaints about the conduct of practitioners can be made by a number of parties and are lodged with a central legal services commission, a practitioner's complaints committee or conduct board, or the relevant law society.[22] Generally, it is then open to the relevant body to dismiss, investigate or initiate disciplinary proceedings in relation to the complaint.[23] Complaints in some

---

18 *Legal Services Directions 2005* (Cth). At the time of writing, these Directions were under review.

19 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 15.

20 Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th ed, 2010), 217.

21 The ALRC welcomes the move towards harmonisation under the National Legal Profession Reform Project.

22 *Legal Profession Act 2004* (NSW) s 505; *Legal Profession Act 2007* (Qld) s 429; *Legal Practitioners Act 1981* (SA) s 76; *Legal Profession Act 2007* (Tas) ss 57, 58; *Legal Profession Act 2004* (Vic) s 4.4.8; *Legal Profession Act 2008* (WA) ss 410(2), 555; *Legal Profession Act 2006* (ACT) s 394(2); *Legal Profession Act 2006* (NT) s 472(1).

23 *Legal Profession Act 2004* (NSW) ss 513, 525, 526; *Legal Profession Act 2007* (Qld) s 429; *Legal Practitioners Act 1981* (SA) ss 77, 82; *Legal Profession Act 2007* (Tas) ss 58, 60, 65A, 65B, 65C; *Legal Profession Act 2004* (Vic) s 4.4.13; *Legal Profession Act 2008* (WA) ss 421(3)(a), 415(1)(a)(c);

jurisdictions may be referred to mediation. In some instances the complaint is referred directly to the relevant disciplinary tribunal in that jurisdiction.

12.20 Following a finding that a practitioner's conduct constitutes unsatisfactory professional conduct or professional misconduct, a range of sanctions may be imposed—from a caution to being struck off the roll of practitioners.[24] In most jurisdictions, at least one disciplinary body can impose any order that it considers appropriate.[25] The Supreme Court in each jurisdiction has inherent jurisdiction over all practising lawyers and hears appeals from the relevant disciplinary tribunals.

The National Legal Services Board and Commissioner

12.21 As part of the National Legal Profession Reform Project, the Australian Government has proposed a new national framework to regulate the profession. The proposed framework consists of a National Legal Services Board (the Board) and a National Legal Services Commissioner (the Commissioner). These bodies would 'operate within a delegated model, with many of the functions of the national bodies to be performed in practice by local representatives'.[26] The Board would be responsible for making National Rules to give effect to the National Law, including rules governing legal practice, conduct and continuing professional development.[27]

Court-imposed sanctions

12.22 A lawyer's primary duty to the court is supervised and enforced by the court, which 'retains an inherent supervisory jurisdiction over its officers, directed at preserving the proper administration of justice'.[28] In addition to this inherent jurisdiction of the court, jurisdiction is also conferred under statute by way of judicial appeal from disciplinary tribunals. Courts possess a range of discretionary powers to discipline parties and lawyers for breach of both procedural rules and ethical obligations. The Federal Court's power to sanction certain discovery conduct, and the question of whether such power should be articulated in greater detail in legislation, is discussed in Chapter 7. Costs orders, which may operate as a sanction, are discussed in Chapter 9.

Potentially unethical discovery practices

12.23 In *Managing Justice*, the ALRC commented that: 'in almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly

---

s 415(2)(b). See also: *Legal Profession Act 2008* (WA) ss 415(1)(d), 415(2)(a), 415(2)(c), 416(7), 417(1), 418; *Legal Profession Act 2006* (ACT) ss 399(1)(a),(g), 399(2), 401, 402, 406(1), 410(1)(a), 412; *Legal Profession Act 2006* (NT) ss 477, 478(1)(a), (h), 496(1)(a).

24 These sanctions are prescribed in state and territory legal profession legislation and were outlined in more detail in the Consultation Paper.

25 *Legal Practitioners Act 1981* (SA) s 89(e); *Legal Profession Act 2007* (Tas) ss 470(1), 485(2)(f), 487; *Legal Profession Act 2004* (Vic) ss 4.3.17(f), 4.4.19(n); *Legal Profession Act 2006* (ACT) s 425(1)(b); *Legal Profession Act 2006* (NT) ss 514, 525(2).

26 National Legal Profession Reform Taskforce, *Consultation Report* (2010), Executive Summary, 2.

27 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 9.1.1–9.1.4. As noted above, these rules would be developed by the Law Council and Australian Bar Association, subject to approval by the Board: s 9.1.6.

28 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 370.

and the most in need of court supervision and control'.[29] The ALRC is not aware of evidence of chronic unethical discovery practices, but understands there are concerns that discovery may sometimes be used as a tactical tool—for example, to exhaust the resources of the other party or encourage settlement. In its report, the Victorian Law Reform Commission (VLRC) noted the 'divergence of opinion about whether there is a significant problem' with abuse by legal practitioners:

> For example, on the one hand Slater & Gordon raised concerns about what it considers to be the widespread and serious abuse of legal professional privilege in connection with discovery. On the other hand, Allens Arthur Robinson argued that practitioners take their discovery obligations seriously and denied abuse was widespread.[30]

12.24 This section outlines six ways in which discovery has been said to have been misused and how these practices might breach the ethical professional duties discussed earlier in this chapter.[31] Submissions responding to questions in the Consultation Paper about the nature and extent of discovery abuse in Australia will then be considered.

'Trolley load litigation'

12.25 Concerns have been expressed about lawyers, when conducting discovery, unnecessarily providing their opponents with vast numbers of documents. This has been called 'trolley load litigation' and 'trial by avalanche'.[32] Former Chief Justice Black of the Federal Court has spoken of the need 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.[33]

12.26 Trolley load litigation has been attributed to several causes. First, computer technology now allows for the storage and more efficient retrieval of vast numbers of documents. Secondly, in an adversarial legal system, lawyers may pursue their clients' interests aggressively in pursuit of winning the case—including, for example, trying to 'wear down' the other party with masses of often irrelevant material. Finally, where the scope of discovery is unclear, too many documents may be discovered defensively, for fear of not fulfilling one's discovery obligations—and perhaps in fear of disciplinary action for professional misconduct. There may be other explanations for vast volumes of documents being unnecessarily discovered, but a combination of these reasons may well contribute to the problem.

---

29 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.67].

30 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 437.

31 These are examples; there may be other unethical discovery practices.

32 The phrase 'trolley load litigation' was used by Einstein J of the New South Wales Supreme Court in *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 669. 'Defensive legal practice' was another term used by a stakeholder in consultations. This section concerns discovery, rather than, for example, the filing of unnecessary material as exhibits to affidavits.

33 As cited in Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 434.

12.27 A trolley load of documents will not, of course, always signal discovery abuse, but excessive and wasteful discovery might conflict with a number of professional and ethical duties, including, for example, a lawyer's duty to:

- 'act with competence, honesty and candour' and be 'frank in their responses and disclosures to the court';[34]
- facilitate the 'just resolution' of disputes, 'according to law' as 'quickly, inexpensively and efficiently as possible';[35]
- act with fairness, in particular not abuse court processes;
- narrow the issues in dispute and identify relevant material and thereby reduce the volume of potentially discoverable documents;[36]
- appraise the case and exercise personal judgment about the existence and relevance of documents in the proceedings;[37]
- exercise reasonable competency and skill in the conduct of a matter—a duty arising from a lawyer's duty of care to the client;[38]
- advise—to 'seek to assist the client to understand the issues in the case and the client's possible rights and obligations ... sufficiently to permit the client to give proper instructions'.[39]

Destroying and withholding documents

12.28 To avoid discovering some documents, litigants or lawyers might be tempted to withhold or destroy them. If a lawyer were to do this, he or she would likely be in breach of a number of important professional obligations. As Professor Peta Spender has commented,

---

34 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 12. Under the Model Rules, a practitioner must not engage in conduct which is 'calculated, or likely to a material degree' to be 'prejudicial to the administration of justice' or to 'diminish public confidence in the administration of justice': r 30.1.

35 See, eg, *Federal Court of Australia Act 1976* (Cth) ss 37M, 37N; *Family Law Rules 2004* (Cth) rr 1.04, 1.08(1); *Civil Procedure Act 2005* (NSW) s 56; *Uniform Civil Procedure Rules 1999* (Qld) r 5(1); *Civil Procedure Act 2005* (ACT) s 56(1).

36 The obligation is owed under Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 13.2.1, as well as by all parties under the *Civil Procedure Act 2010* (Vic) ss 23, 34(1). Conversely, only lawyers owe the obligation under: *Professional Conduct and Practice Rules 1995* (NSW) r 23–A.15A; *New South Wales Barristers' Rules* r 42; *Civil Procedure Act 2010* (Vic) ss 34(1), 34(2); *Civil Procedure Act 2010* (Vic) s 23. The obligation under the *Civil Procedure Act 2010* (Vic) to take 'reasonable steps' is discussed in Ch 11.

37 For an illustrative discussion of a disciplinary proceeding in which a lawyer was disciplined for inadequate discovery, see: M Costello, 'The Legal Practitioners Disciplinary Tribunal: A Solicitor's Duty Regarding Discovery' (1996) 23(10) *Brief* 26.

38 *Rogers v Whitaker* (1992) 175 CLR 479. The preamble to the 'Relations with Clients' section of the Model Rules states that practitioners 'should serve their clients competently and diligently ... Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law': Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), 5.

39 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 12.2.

> although a good document management policy may involve the destruction of documents, at some point the routine destruction of corporate documents rises to the level of spoliation of evidence. The trick is to determine at what point this convergence takes place.[40]

12.29 Professional rules variously provide that lawyers must not knowingly make false or misleading statements to a court or opponent, must correct misleading statements, and must not 'deceive or knowingly or recklessly mislead the court'.[41] This duty encompasses an obligation not to mislead the court with respect to the facts of the case or to misinterpret the law, to be aware of the applicable rules and procedure as well as to draw the court's attention to authorities which support or act against their client's case.[42]

12.30 The Model Rules provide that a practitioner must not engage in dishonest conduct.[43] There is also a duty—in legislation, professional rules, and at common law—to act with candour, which includes not misleading the court.[44]

12.31 Some jurisdictions deal explicitly with the destruction of documents. Under reg 177 of the *Legal Profession Regulations* (NSW)—a breach of which is professional misconduct—a legal practitioner is prohibited from destroying or wrongfully moving documents, and from advising a client to do the same, if legal proceedings are likely.[45]

---

40 P Spender, 'McCabe: Unresolved Questions about Truth and Justice' (2004) 12 *Torts Law Journal* 1, 10. The case of *McCabe v British American Tobacco Australia Service Ltd* [2002] VSC 73 illustrates the tension in practice between appropriate and legitimate destruction of documents in accordance with a document management system, and the deliberate destruction of documents aimed at removing 'documents from the jurisdiction of the court': A Lamb and J Littrich, *Lawyers in Australia* (2007), 260. On appeal it was found that 'there was no evidence to justify the finding that, in giving advice as requested [the lawyers involved] "devised a strategy" by which the defendant might destroy damaging documents while pretending to innocent intention': *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, [98].

41 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) rr 14.1, 14.2. See also: Solicitors rules—Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) rr 14.1, 14.2; *Professional Conduct and Practice Rules 1995* (NSW) rr 23–A.21, 23–A.22; *Legal Profession (Solicitors) Rule 2007* (Qld) rr 14.1, 14.2; *Rules of Professional Conduct and Practice* (SA) rr 14.1, 14.2; *Professional Conduct and Practice Rules 2005* (Vic) rr 14.1, 14.2; *Legal Profession Conduct Rules 2010* (WA) s 34; *Rules of Professional Conduct and Practice* (NT) r 17.6, 17.7; *Legal Profession (Solicitors) Rules* (ACT) rr 18.1, 18.2. Barristers rules—Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) rr 26, 27; *New South Wales Barristers' Rules* rr 21, 22, 51, 52; *Barristers Rule 2007* (Qld) rr 23, 24; *Barristers' Conduct Rules 2010* (SA) rr 26, 27, 48, 49; *Victorian Bar Practice Rules* (Vic) rr 19, 20; *Legal Profession Conduct Rules 2010* (WA) s 34; *Legal Profession (Barristers) Rules 2008* (ACT) rr 21, 22.

42 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 14.6. Solicitors Rules—*Professional Conduct and Practice Rules 1995* (NSW) r 23–A.25; *Legal Profession (Solicitors) Rule 2007* (Qld) r 14.6; *Rules of Professional Conduct and Practice* (SA) r 14.6; *Professional Conduct and Practice Rules 2005* (Vic) r 14.5; *Legal Profession (Solicitors) Rules* (ACT) r 18.6; *Rules of Professional Conduct and Practice* (NT) r 17.11; Barristers Rules—Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 31; *New South Wales Barristers' Rules* r 25; *Barristers Rule 2007* (Qld) r 27; *Barristers' Conduct Rules 2010* (SA) r 31; *Victorian Bar Practice Rules* (Vic) r 24; *Legal Profession Conduct Rules 2010* (WA) pt 6; *Legal Profession (Barristers) Rules 2008* (ACT) r 25. See also *Rondel v Worsley* [1969] 1 AC 191, 227–228.

43 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 30.1.

44 For example, in Victoria there is a duty to act honestly at all times in relation to a civil proceeding: *Civil Procedure Act 2010* (Vic) s 17.

45 *Legal Profession Regulations 2005* (NSW) reg 177.

The wrongful destruction of documents is also an offence under the *Crimes Act 1958* (Vic).[46]

12.32 In the United States (US), the duty to preserve documents of potential relevance to anticipated litigation—particularly in the context of electronically-stored information—has led to the development of what is referred to as a 'legal hold'. Legal holds are implemented by interrupting a company's ordinary document management system—which, for example, might delete emails after 30 days—to ensure relevant material is preserved.[47] The expectation of US courts is that lawyers should be actively involved in the implementation of a legal hold, including taking 'affirmative steps' to ensure the hold is being correctly implemented.[48]

Delay

12.33 As outlined above, there is increasing legislative articulation of the duty owed by lawyers to facilitate the just, quick, efficient and inexpensive resolution of proceedings.[49] This reflects judicial criticism of practitioner conduct causing unreasonable expense or delay. For example, in *White Industries (Qld) Pty Ltd v Flower & Hart*, Goldberg J of the Federal Court commented that:

> It is not proper ... to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the court from achieving an expeditious and timely resolution of a dispute. Court resources are finite and so are the resources of most litigants and the court should not countenance a deliberate strategy of obstruction and delay. If a party instructs its legal advisers to adopt such a strategy the legal adviser should inform the party that it is not proper to do so and if the party insists, then the legal adviser should withdraw from acting for that party.[50]

12.34 With respect to delay, the Model Rules provide that:

> A practitioner will not have breached the practitioner's duty to the client ... simply by choosing ... to exercise the forensic judgments called for during the case so as to ... present the client's case as quickly and simply as may be consistent with its robust advancement.[51]

---

46 *Crimes Act 1958* (Vic) pt I, div 5.

47 Legal holds have developed through the common law. For a key articulation see: The Sedona Conference, 'Commentary on Legal Holds: The Trigger & The Process' (2010) 11 *Sedona Conference Journal* 265, 277, 282, 283, 286.

48 *Zubulake v UBS Warburg*, 229 FRD 422 (SDNY, 2004), 432.

49 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37N; *Civil Procedure Act 2005* (NSW) s 56. There is a specific obligation to minimise delay under the *Civil Procedure Act 2010* (Vic) s 25.

50 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169.

51 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 13.2.2. See also: Law Council of Australia, *Legal Profession National Rules: Solicitors' Rules* (2010) r 17.2.2; Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 42(b); *Professional Conduct and Practice Rules 1995* (NSW) r 23–A.15A(e); *New South Wales Barristers' Rules* r 19(b); *Legal Profession (Solicitors) Rule 2007* (Qld) r 13.2.2; *Barristers Rule 2007* (Qld) r 21(b); *Rules of Professional Conduct and Practice* (SA) r 13.2.2; *Barristers' Conduct Rules 2010* (SA) r 42(b); *Professional Conduct and Practice Rules 2005* (Vic) r 13.2.2; *Victorian Bar Practice Rules* (Vic) r 17(b); *Legal Profession (Solicitors) Rules* (ACT) r 17.2(b); *Legal Profession (Barristers) Rules 2008* (ACT) r 19(b); *Rules of Professional Conduct and Practice* (NT) r 17.4(b).

12.35 The Draft National Laws impose an obligation on law practices to 'act reasonably to avoid unnecessary delay resulting in increased legal costs'.[52] Under the National Barristers' Rules, barristers are required to complete work in sufficient time to comply with orders, directions, rules or practice notes of the court.[53]

12.36 In Victoria, Western Australia and Tasmania, the professional rules make specific reference to the duty of practitioners to use their best endeavours to: 'complete legal work as soon as reasonably possible';[54] provide their services 'in a timely manner';[55] and 'complete a clients business within a reasonable time'.[56] In NSW, both the *Professional Conduct and Practice Rules* and the *Barristers' Rules* require lawyers to complete work in sufficient time to comply with court rules and orders.[57] The *Civil Procedure Act 2010* (Vic) contains overarching obligations, including the specific obligation to 'disclose the existence of documents which the person reasonably considers are critical to the proceedings, at the earliest possible time after becoming aware of their existence'.[58]

12.37 Under legal rules there is a duty to complete work in sufficient time to comply with court timetables and to act consistently with the overarching purpose of specific legislation. Accordingly, where the conduct of lawyers or other parties unduly delays discovery, or the progress of litigation more broadly, such conduct may be in breach of legal rules and lawyers may be subject to personal costs orders.[59]

12.38 Delay may arise in part as a result of other forms of alleged discovery abuse, for example, where 'trolley load litigation' delays proceedings while parties examine large volumes of discovered documents. However, delay itself may also constitute a form of discovery abuse. The primary causes and means of delay in the context of discovery in Australia include:

- the failure to disclose the existence of documents at the earliest possible time;
- delay in responding to requests or orders for discovery;
- delay arising as a result of parties questioning the scope of discovery requests or orders; and

---

52 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.5.

53 Australian Bar Association, *Barristers' Conduct Rules* 2010 r 56(a).

54 *Professional Conduct and Practice Rules 2005* (Vic) r 1.2.

55 *Legal Profession Conduct Rules 2010* (WA) s 17(2).

56 *Rules of Practice 1994* (Tas) r 10.

57 *Professional Conduct and Practice Rules 1995* (NSW) r 23–A.15(a); *New South Wales Barristers' Rules* r 41. This is also a requirement under the *Barristers' Conduct Rules 2010* (SA) r 56.

58 *Civil Procedure Act 2010* (Vic) s 26.

59 See, eg, *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 249 affirmed in *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134; *Supreme Court Rules 1970* (NSW) pt 52 r 66; *Supreme Court Act 1970* (NSW) s 76C(1).

- other forms of satellite litigation about matters such as the assertion of legal professional privilege over documents.[60]

Delegating to junior lawyers and paralegals

12.39 The ALRC understands that there are concerns about the practice of delegating responsibility for reviewing and categorising documents for discovery to junior lawyers and paralegals. This may mean that more senior lawyers only check a small sample of documents and might not provide adequate supervision. While such practice may be regarded as a sensible management of a large and challenging task where there are vast numbers of documents, the practice might also cause unnecessary and costly duplication of work.

Outsourcing discovery work overseas

12.40 A related question, also raised in the Consultation Paper, is how outsourcing parts of the discovery process overseas affects discovery.[61] In January 2011, the Hon Chief Justice James Spigelman of the New South Wales Supreme Court spoke of 'dozens of websites offering various forms of legal services by electronic means':

> Many of them are in India, a low cost jurisdiction—with hourly billing rates about one tenth of those in the USA—and with a high level of legal expertise and high level English language capacity. ...
>
> I repeat what I said a few years ago when I was informed that for any significant commercial dispute the flagfall for the discovery process was something of the order of $2 million. That level of expenditure is not sustainable. Outsourcing through the use of Indian based support services—such as digital dictation transcription and document management for discovery and due diligence—is an available way of containing such costs.[62]

12.41 Among the potential issues such outsourcing might raise include the security of documents sent overseas and the application to persons working on discovery outside Australia of Australian lawyers' professional and ethical duties.

Submissions and consultations

12.42 In the Consultation Paper, the ALRC asked a series of questions about the nature and extent of any discovery abuse in Australian federal litigation. The ALRC asked about: the wrongful destruction of documents;[63] the use of discovery as a delaying

---

60 See, eg, G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010); Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th ed, 2010); Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008); A Lamb and J Littrich, *Lawyers in Australia* (2007). For discussion of privilege in the context of federal investigations, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (2008).

61 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–6.

62 J Spigelman, 'Global Engagement by Australian Lawyers' (Speech at Opening of Law Term Dinner, Sydney, 31 January 2011).

63 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–7.

strategy;[64] and the use of discovery to increase legal costs (for example for the profit of law firms or to exhaust the resources of opposing parties).[65] Relatively few submissions addressed these questions, but most of those that did considered the rarity of misconduct; the importance to lawyers and legal practices of maintaining their professional reputations; and the issues of delegation and outsourcing.

Misconduct is rare

12.43 A number of submissions stressed that lawyers generally act ethically in relation to discovery discovery, and that abuse was rare and that there was no convincing evidence of discovery abuse.[66] A group of large law firms submitted:

> In general, our experience is that lawyers are diligent and conscientious in ensuring that they, and their clients, do not abuse the discovery process. Instances of parties or lawyers deliberately abusing the process for improper purposes are extremely rare … It is our view that concerns about deliberate abuse of the discovery process are overstated and, in large part, unsupported by evidence.[67]

12.44 The Law Council said 'there is no evidence of systemic problems across discovery generally':

> [L]egal 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.[68]

12.45 The Queensland Law Society considered that 'the vast majority of its members act ethically in relation to discovery and the conduct of litigation generally'.[69] The Department of Immigration and Citizenship was 'not aware of widespread misuse of the discovery process by legal practitioners':

> While there may be some instances where the conduct of the discovery process by lawyers could be characterised as an abuse of process, in our experience such instances are rare. Disproportionate discovery requests, onerous discovery orders, and inefficiencies in the discovery process, are usually the result of inadequate pleadings, rather than misuse of the process itself.[70]

---

64 Ibid, Question 4–3.
65 Ibid, Question 4–4.
66 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.
67 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
68 Law Council of Australia, *Submission DR 25*, 31 January 2011 (emphasis in original).
69 Queensland Law Society, *Submission DR 28*, 11 February 2011.
70 Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

12.46 Others argued more specifically that the deliberate destruction of discoverable documents in anticipation of, or during, litigation was rare,[71] and that destroying data without a trace was difficult and, in any event, fear of detection minimised such abuse.[72]

12.47 Concerning costs, NSW Young Lawyers submitted that 'it is often not a practitioner's intention to increase legal costs unnecessarily,' but 'more often than not little regard is had to the financial burdens imposed on another party by discovery'.[73]

12.48 Very few submissions argued that discovery abuse was common. However, one barrister submitted that he had 'little doubt that all the kinds of abuses by lawyers referred to in these questions occur not infrequently in litigation':

> There is no doubt that lawyers engage in conduct that blurs the ethics/money boundary. Discovery is wide open for abuse and is abused.[74]

Professional reputations

12.49 Some submissions stressed the importance of a lawyer's professional reputation. A group of large law firms submitted that, in a highly competitive legal market:

> good reputations of individual lawyers and law firms with substantial litigation practices are a valuable asset ... and operate as an added incentive to comply with best practice, and so maintain the confidence of the Court, other law firms and of current and potential clients.[75]

12.50 This sentiment was echoed by the Law Council:

> 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.[76]

Delegation to junior lawyers and paralegals

12.51 In the Consultation Paper, the ALRC asked how the delegation of responsibility for reviewing and categorising documents relevant to the discovery process affected the practice of discovery in litigation before federal courts.[77]

---

71 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

72 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

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

74 I Turnbull, *Submission DR 05*, 15 January 2011.

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

76 Law Council of Australia, *Submission DR 25*, 31 January 2011. Emphasis in original.

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

12.52 NSW Young Lawyers submitted that this was 'standard practice' and was done to save time, minimise cost, and 'because the majority of discoveries do not require special experience or expertise for the majority of documents'.[78] A group of large law firms submitted that 'exceptional', very large discoveries

> are usually conducted by deploying more junior lawyers to perform the initial review of potentially discoverable documents, with appropriate oversight and supervision by more experienced lawyers, who also conduct reviews of documents which might involve more difficult decisions, for example about the existence of legal professional or other privilege.[79]

12.53 Though such delegation was usually effective, NSW Young Lawyers submitted, the junior lawyers and paralegals may only have 'a shallow understanding of the matters in dispute', particularly in 'very large commercial discoveries, where many extra reviewers must be used, and contract lawyers may even be engaged'.[80] However, most junior lawyers in the large law firms that contributed to one submission were said to be given 'carefully designed, internally conducted training to ensure that they are familiar with the relevant discovery obligations and duties' and are

> properly inducted into matters to ensure that they have a good appreciation of the issues in the proceedings, and so can make informed judgments about the relevance of issues and documents. These measures ultimately make the discovery process more efficient and cost-effective.[81]

12.54 The group of large law firms submitted that a balance must be struck between the overall costs of the process and the need for senior lawyers to make judgements about certain things:

> The more senior and experienced the lawyer, the greater the cost. On the other hand, the use of non-lawyers or lawyers who are unfamiliar with the issues in any given matter may give rise to a false economy which diminishes the effectiveness of the discovery process by necessitating a degree of double handling by lawyers required to review and correct decisions taken on an initial review. …
>
> In our view, provided the persons conducting the initial review are familiar with the issues in the proceedings and are familiar with the rules and principles that govern discovery, the approach described above and currently in use represents an appropriately cost-effective and responsible model of conducting large-scale discovery reviews.[82]

12.55 The Law Council submitted that, while delegating and outsourcing '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'.[83]

---

78 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
79 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
80 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
81 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
82 Ibid.
83 Law Council of Australia, *Submission DR 25*, 31 January 2011.

Outsourcing

12.56 In the Consultation Paper, the ALRC also asked how outsourcing discovery overseas affects the practice, including the cost and efficiency, of discovery.[84] Two submissions suggested the practice was not widespread in Australia,[85] but one of these, a group of large law firms, submitted that concerns about whether 'outsourcing discovery processes to a service provider is consistent with the obligations owed to the Court by the Legal practitioner on the record' should be monitored.[86] The Office of the Legal Services Commissioner (NSW) (OLSC) suggested to the ALRC that in fact legal outsourcing was becoming more widespread and that they were developing research around this issue.[87]

ALRC's views

12.57 The nature and extent of discovery abuse in Australia remains unclear. The ALRC agrees with the Law Council, when it says that information about 'the prevalence of improper conducts and of the associated risk factors … is required to inform any decision governments might make about whether or not further regulation is necessary or desirable'.[88]

12.58 A few preliminary points may, however, be made. The ALRC recognises that it may not be possible for senior lawyers to review and categorise all documents in a large-scale discovery. The cost might in any event be prohibitive. In many discovery processes, therefore, this would neither be efficient nor cost-effective. Delegating some of the discovery work to more junior lawyers and trained paralegals, particularly in large scale litigation, appears inevitable and a sensible way to manage the task, so long as the process is carefully managed and the junior lawyers and paralegals are properly trained and supervised.

12.59 Though outsourcing discovery work overseas may bring some advantages and opportunities, professional and ethical responsibilities will need to be maintained. Suitably trained and experienced senior lawyers, accountable to Australian courts and regulators, will need to continue to make key decisions about how a discovery process is managed.

12.60 That the existence or extent of discovery abuse is unclear need not, in the ALRC's view, preclude discussion of how ethical discovery practices might best be fostered and improved. This is the topic of the following section.

---

84 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–6.

85 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011.

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

87 Office of the Legal Services Commissioner (NSW), *Consultation*, By telephone, 18 March 2011.

88 Law Council of Australia, *Submission DR 25*, 31 January 2011. The need for further empirical research into discovery is considered in Ch 3.

Fostering ethical discovery practice

12.61 The implementation of recommendations made elsewhere in this report should improve the general conduct and efficiency of discovery, and so reduce the likelihood of discovery abuse. However, it remains useful to consider how ethical discovery practice might best be fostered. This section will consider a number of methods to encourage high professional standards in the conduct of discovery. However, it may be useful first to consider whether lawyers know of their ethical obligations concerning discovery.

12.62 In the Consultation Paper, the ALRC asked whether lawyers and litigants were properly informed about their professional and legal responsibilities in relation to discovery.[89] If they were not, the ALRC asked, what were the best ways of ensuring that lawyers and litigants were properly informed?[90]

12.63 Some submissions argued that the obligations on lawyers and parties were already substantial and sufficient.[91] A submission from a group of large law firms argued that

> the existing framework of professional conduct rules, Court rules, Practice Directions and the common law impose appropriate obligations on lawyers and gives significant but appropriate powers to the Court.[92]

12.64 The Law Council submitted that the 'substantial ethical obligations relating to discovery'

> 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. …
>
> 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.[93]

12.65 It was submitted that discovery is often the topic of continuing legal education (CLE),[94] although NSW Young Lawyers suggested that CLE seminars on the issue would help improve awareness.[95] The OLSC (NSW) has stated that most regulators of the legal profession deal with discovery in the broader context of the ethical duties of lawyers, stressing that lawyers should not see themselves as 'hired guns', but have a duty to the court.[96] Lawyers are also informed of their ethical duties at university, but

---

89 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–9.

90 Ibid, Question 4–9.

91 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.

92 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011. However, this submissions proposed the introduction of solicitor certifications, discussed below.

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

94 Ibid. CLE is discussed later in this chapter.

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

96 Office of the Legal Services Commissioner (NSW), *Consultation*, By telephone, 18 March 2011.

ethical obligations concerning discovery 'may not be emphasised within the law firm environment and during the day-to-day practice of law'.[97] NSW Young Lawyers also argued for 'greater industry awareness through each state's law society—either via email or through industry magazines'.[98]

Commentary on professional conduct rules

12.66 Professional conduct rules, as the primary site of articulated ethical obligations, fulfil a number of important roles within the Australian civil justice system. In particular they provide

> a base for education, practical guidance to practitioners, and an agreed standard of behaviour to which disciplinary bodies can refer. For professional practice rules to be useful, the rules should represent attainable aims and be useful in dealing with the continuing ethical dilemmas of professional life, command respect and be enforceable.[99]

12.67 However, professional conduct rules have been criticised for being too general and for not placing sufficient positive obligations on lawyers.

Too general

12.68 One criticism of the professional conduct rules is that they do not provide educators, practitioners, courts and disciplinary bodies with sufficiently specific and practical guidance on matters such as discovery practice. The ethical obligations in professional rules do not explicitly concern discovery. Rather, the obligations are general, and include: facilitating the administration of justice; not abusing court processes; narrowing the issues in dispute; properly advising clients; completing work as soon as possible; not misleading the court; and not destroying documents. Lawyers may be uncertain how to apply broad concepts to the specific scenarios that arise in everyday practice.

12.69 There appear to be two ways to approach this problem. The first is to amend professional conduct rules to include specific obligations concerning discovery. Such an approach would draw together existing broad obligations and make them more relevant to the discovery process. It might also impose new obligations, such as an obligation to disclose the existence of all documents considered relevant to the proceedings at the earliest practicable time.[100]

12.70 Alternatively, commentary could be developed as part of, or to supplement, professional rules. This was the approach favoured by the ALRC in *Managing Justice*.[101] Such commentary could provide 'practical interpretations of the rules and

---

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

98 Ibid.

99 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), [5.2].

100 This was one of the overarching obligations recommended by the VLRC and enacted in the *Civil Procedure Act 2010* (Vic).

101 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 14. To date, only the *Legal Profession (Solicitors) Rule 2007* (Qld) features commentary.

examples of application'.[102] A 'principle-rule-commentary approach', the ALRC argued:

> combines appropriate features of these varied publications in one document, provides a more accessible and authoritative guide to professional conduct and improves the relevance of professional practice rules to the daily work of practitioners.[103]

12.71 This second approach is also more aligned with the Draft National Law and National Rules, which have been described as 'outcomes-based regulation'. The OLSC (NSW) has described 'outcomes-based regulation' as 'moving away from reliance on detailed, prescriptive rules and relying more on high level, broadly stated rules or principles'. Outcomes-based regulation has been said to mean less red-tape and should avoid a narrow 'box-ticking' approach to ethics; principles have a broad application and can apply to a range of circumstances; principles are flexible and can respond to market innovations and other developments.[104] Steve Mark, Legal Services Commissioner (NSW), has also said that:

> Outcomes-based regulation can provide a basis for open dialogue between regulator and regulated firm, facilitating a co-operative and educative approach to supervision, particularly with respect to firms who are well-intentioned, but either ill informed, or simply confused as to what the regulatory provisions require.[105]

Positive obligations

12.72 Professional conduct rules also often do not contain a positive or specific duty. For example, to the extent that the Model Rules provide that by choosing to confine a matter to the issues in dispute a lawyer will not have breached their duty to the client, the Model Rules have been criticised for not imposing a positive duty. This may be particularly relevant to the practice of trolley load litigation.[106]

12.73 Similarly, with respect to delay, the Model Rules provide that a lawyer will not have breached their obligation to the client where they exercise forensic judgment so as to present the client's case as quickly and simply as is consistent with its robust advancement.[107] This rule has been criticised for not imposing a positive obligation on a lawyer to conduct a matter quickly and simply, but rather merely *allows* a lawyer to do so, operating in a 'passive, defensive role (primarily for the benefit of the advocate)

---

102 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [3.77].

103 Ibid, [3.78].

104 S Mark, 'Outcomes-based Regulation' (2010) 48 *Without Prejudice* 1, 2.

105 Ibid, 2.

106 See, eg, C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 89.

107 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 13.2.2. See also: Law Council of Australia, *Legal Profession National Rules: Solicitors' Rules* (2010) r 17.2.2; Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 42(b); *Professional Conduct and Practice Rules 1995* (NSW) r 23–A.15A(e); *New South Wales Barristers' Rules* r 19(b); *Legal Profession (Solicitors) Rule 2007* (Qld) r 13.2.2; *Barristers Rule 2007* (Qld) r 21(b); *Rules of Professional Conduct and Practice* (SA) r 13.2.2; *Barristers' Conduct Rules 2010* (SA) r 42(b); *Professional Conduct and Practice Rules 2005* (Vic) r 13.2.2; *Victorian Bar Practice Rules* (Vic) r 17(b); *Legal Profession (Solicitors) Rules* (ACT) r 17.2(b); *Legal Profession (Barristers) Rules 2008* (ACT) r 19(b); *Rules of Professional Conduct and Practice* (NT) r 17.4(b).

rather than in active support of the court's function'.[108] The *Legal Profession Conduct Rules 2010* (WA), however, provides that a practitioner must, among other things, 'confine the hearing of a matter to issues which the practitioner believes to be the real issues' and 'present the client's case as quickly and simply as is consistent with its robust advancement'.[109]

Submissions and consultations

Form and detail of professional obligations

12.74 In the Consultation Paper, the ALRC asked whether existing general legal ethical obligations in professional rules were sufficiently specific and clear so that lawyers were aware of their obligations concerning discovery and electronic discovery.[110] The ALRC also asked whether professional conduct rules should be amended to include specific legal ethical obligations concerning discovery,[111] or whether, as the ALRC proposed, these obligations should be expressed in commentary to the professional conduct rules.[112] Such commentary might also address electronic discovery, the ALRC proposed.[113]

12.75 A number of submissions argued that it was not necessary to introduce additional professional conduct rules specifically relating to discovery,[114] particularly, as one submission stressed, in 'the absence of any compelling evidence of wide-spread abuse'.[115] The Law Council was satisfied that

> 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.[116]

12.76 Some submissions agreed that the rules are expressed in general or abstract terms, which may make them more difficult to apply.[117] Accordingly, there was support of 'the development of a practically focused commentary on those rules and obligations, providing concrete examples of ethical and legal issues concerning

---

108 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 89.

109 *Legal Profession Conduct Rules 2010* (WA) s 32(2).

110 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Questions 4–10, 4–21.

111 Ibid, Question 4–11.

112 Ibid, Proposal 4–1.

113 Ibid, Proposal 4–3.

114 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; Department of Immigration and Citizenship, *Submission DR 13*, 20 January 2011.

115 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.

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

117 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011.

discovery' and electronic discovery.[118] The commentary would be 'an excellent point of reference for practitioners and would raise much needed awareness'.[119]

12.77 The Law Council also agreed that 'the principle-rule-commentary approach will enhance understanding and assist solicitors to interpret and comply with their ethical obligations' and said it was already developing commentary to the Australian Solicitors' Conduct Rules:

> 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 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.[120]

12.78 Concerning whether such commentary should also focus on ethical obligations with respect to electronic discovery,[121] the Law Council submitted that it intends to refer the ALRC's concerns to its Professional Ethics Committee for consideration in the development of commentary to the conduct rules.

Best practice notes

12.79 In the Consultation Paper, the ALRC proposed that legal professional bodies issue to their members 'best practice' notes about the legal ethical obligations of lawyers with respect to discovery. The Law Society of WA and a group of large law firms supported this proposal.[122] The group of law firms noted that the guidelines 'should be focused on the practical issues that arise in applying the obligations'.[123] The Australian Corporate Lawyers Association (ACLA) had 'no real objection' to such guidelines—they 'might serve as a warning/reminder'—but expressed concern about how often they would be issued, whether they would be properly maintained, and 'whether there is such frequency of problem in this area to warrant the proposal'.[124]

12.80 The Law Council repeated that its Professional Ethics Committee was charged with the development of commentary to support the Australian Solicitors Conduct Rules and noted that this committee

> has already identified that further 'Best Practice' or guidance product may be developed after the completion of the commentary to the Australian Solicitors

---

118 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
119 NSW Young Lawyers, *Submission DR 19*, 21 January 2011.
120 Law Council of Australia, *Submission DR 25*, 31 January 2011.
121 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Proposal 4–3.
122 Law Society of Western Australia, *Submission DR 26*, 11 February 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011. See also Queensland Law Society, *Submission DR 28*, 11 February 2011.
123 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
124 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.

> Conduct Rules. The ALRC's proposal in this regard will be referred to the Professional Ethics Committee for consideration.[125]

ALRC's views

12.81 The professional obligations of a lawyer with respect to discovery should be clear and explicit. This Report has not repeated the arguments for and against principles-based or outcomes-based regulation, but it seems clear that professional obligations concerning discovery should neither be so broadly expressed that they are vague and unhelpful, nor so precise and detailed that they become cumbersome, overly prescriptive, and of narrow application.

12.82 The ALRC sees no need to introduce new discovery-specific conduct rules. Specific rules for each element of a lawyer's work are likely to make professional conduct rules unwieldy and inflexible, and might imply that there are no ethical obligations for work that does not have its own specific set of duties. Instead, the ALRC favours the introduction of discovery-specific commentary to professional conduct rules. Most, if not all, general ethical obligations will apply to the discovery process. Commentary would give lawyers guidance on how to apply broad professional rules to real and concrete problems that arise when conducting discovery. Accordingly, the ALRC supports the Law Council's existing commitment to the development of commentary to the proposed Australian Solicitors' Conduct Rules and recommends that this commentary include an explanation of the application of the Rules to discovery, with practical examples. In the event that some states and territories do not adopt the proposed Australian Solicitors' Conduct Rules, or the commentary prepared by the Law Council, the ALRC directs its recommendation below to all legal professional associations.

12.83 The Professional Ethics Committee of the Law Council has noted that it may develop 'best practice' guidelines to supplement the commentary to the new professional conduct rules. The ALRC agrees that whether there is a need for such additional guidelines should become clearer when the commentary has been released. Any such practice notes would need to be updated regularly to respond to practitioners' questions or evolving technological developments.

> **Recommendation 12–1** Legal professional associations should address discovery in commentary to professional conduct rules. The commentary should explain the application of the rules to discovery, including electronic discovery and outsourced discovery, and should include practical examples.

Enforcing ethical obligations

12.84 One obvious way to deal with discovery abuse is to pursue misconduct more pro-actively and discipline lawyers and others who commit discovery abuse. Professor Christine Parker and Associate Professor Adrian Evans have commented that 'there are

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

still few cases of disciplinary action being taken against lawyers for breach of their duty to the court or the law' and that 'it is hard to believe that there really are so few cases in each of these categories where disciplinary action might be warranted'.[126]

12.85 A large proportion of disciplinary matters brought to the attention of relevant disciplinary bodies arise as a result of client complaints.[127] However, courts, costs assessors and other lawyers also have a role to play in reporting alleged misconduct.

12.86 Under professional rules in Victoria and South Australia, lawyers have an obligation to disclose conduct that is contrary to the general standards of conduct expected of lawyers—that is, conduct that is dishonest, or calculated or likely to a material degree to be prejudicial to the administration of justice or diminish public confidence in the administration of justice—and any conduct or event that may adversely affect a lawyer's ability to practise according to the professional rules.[128] Whether such an obligation applies to lawyers reporting the conduct of other lawyers is unclear. It is arguable, however, that the obligation is restricted to self-reporting.

12.87 In addition, courts both as guardians of the administration of justice and in upholding their obligations under various pieces of legislation—the purposes of which are to facilitate the just, quick and inexpensive resolution of disputes—are charged with responsibility for responding to alleged lawyer misconduct. However, the ALRC understands that courts rarely initiate enforcement action in response to alleged ethical misconduct, other than by imposing costs orders.

12.88 Finally, in some jurisdictions, where a matter is subject to a costs assessment or review and the costs assessor considers that the legal costs charged are grossly excessive, they are under an obligation to refer the matter to the Legal Service Commission, or an equivalent body, to consider whether disciplinary action should be taken against the lawyer.[129] Under the Draft National Law, a costs assessor:

> (a) may refer a matter to the Commissioner if the costs assessor considers that the legal costs charged are not fair and reasonable; and
>
> (b) must refer a matter to the Commissioner if the costs assessor considers that the legal costs charged, or any other matter raised in the assessment, may amount to unsatisfactory professional conduct or professional misconduct.[130]

12.89 The ALRC understands that this also only occurs rarely.

12.90 In New Zealand, the United Kingdom and the US, rules require lawyers to report where they consider another lawyer's conduct raises a 'substantial question as to that lawyers honesty, trustworthiness or fitness as a lawyer in other respects',[131]

---

126 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 47.

127 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 535.

128 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 31.

129 See, eg, *Legal Profession Act 2004* (NSW) s 393; *Legal Profession Act 2007* (Qld) s 343; *Legal Profession Act 2004* (Vic) s 3.4.46; *Legal Profession Act 2008* (WA) s 307; *Legal Profession Act 2006* (ACT) s 303.

130 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.32.

131 American Bar Association, *Model Rules of Professional Conduct* (2010) r 8.3(a).

constitutes 'serious misconduct',[132] or where there are reasonable grounds to suspect the other lawyer is guilty of misconduct.[133]

Submissions and consultations

12.91 In the Consultation Paper, the ALRC asked whether existing legal professional disciplinary structures were sufficient to deal with allegations of discovery abuse.[134] If they were not, the ALRC asked, how should lawyers be disciplined for:

- a failure to comply with discovery obligations; or
- conduct intended to delay, frustrate or avoid discovery of documents.[135]

12.92 The few submissions that directly addressed these questions argued that existing disciplinary structures were in fact sufficient and appropriate to deal with allegations of discovery abuse.[136] The group of large law firms submitted that the focus should not be on punishment, but on 'developing tools to help parties and their solicitors meet their discovery obligations as efficiently as possible':

> We agree with the views of his Honour Justice Finkelstein ... that a focus on misconduct is a distraction from the main aim which is to get to trial as efficiently and fairly as possible.[137]

12.93 One barrister submitted:

> Because the ethical issues relating to lawyers abusing the discovery process are fundamental legal ethics issues it follows that current legal profession practice and conduct rules and procedures should be, and probably are, adequate for that purpose. The obvious adjunct to them, for blatant and glaring abuse of the process, on either side, would be to order the costs paid by the lawyer personally.[138]

Whistle-blowing

12.94 In the Consultation Paper, the ALRC also asked about how best to ensure clients, lawyers and courts report allegations of lawyer misconduct.[139] The ALRC also asked whether professional conduct rules should provide that a practitioner must

---

132 Any conduct involving dishonesty or deception or a serious criminal offence: Solicitors Regulation Authority (UK), *The Guide to the Professional Conduct of Solicitors*, cl 20.06.

133 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) rr 2.8, 2.9.

134 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–18.

135 Ibid, Question 4–19.

136 Queensland Law Society, *Submission DR 28*, 11 February 2011; Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011; NSW Young Lawyers, *Submission DR 19*, 21 January 2011; I Turnbull, *Submission DR 05*, 15 January 2011.

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

138 I Turnbull, *Submission DR 05*, 15 January 2011.

139 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–14.

promptly report misconduct arising in the context of discovery[140] and, if so, what sort of conduct must they report.[141]

12.95 Only two submissions addressed these questions. They stressed that 'parties and their solicitors take their discovery obligations seriously'[142] and that 'legal practitioners generally discharge their obligations ethically and professionally and that acts of misconduct are rare'.[143] This view, the Law Council submitted,

> is supported by data contained in the reports produced by the independent legal services commissioners in Australian state/territory jurisdictions.[144]

12.96 Both the group of large law firms and the Law Council also argued that, in the words of the submission from the law firms,

> compliance with discovery obligations involves subjective decisions as to whether documents are relevant on which competent and reasonable lawyers may legitimately form different views, particularly in relation to documents of marginal relevance.[145]

12.97 Mandatory reporting of misconduct was also not necessary, the group of large law firms argued, because:

- the adversarial process allows for a party's compliance with its discovery obligations to be challenged and tested;
- the Court has the power to use cost sanctions against a party and its solicitors if they fail to observe their discovery obligations;
- a failure of a solicitor or barrister to properly perform his or her duties as an officer of the Court in relation to discovery may amount to professional misconduct that can be addressed by existing disciplinary processes; and
- it may be difficult for a practitioner to comply with a positive obligation to disclose misconduct. An allegation of misconduct not based on reasonable grounds could also be an abuse of process as the allegation being made may result in a party having to change its legal representation. It could lead to further interlocutory processes that extend the time and cost of the litigation process.[146]

12.98 Concerning the question of how often costs assessors refer lawyers to disciplinary bodies for suspected overcharging,[147] the Law Council submitted that in its view 'legal practitioners generally do not engage in acts of gross overcharging' and that

---

140 Ibid, Question 4–15.
141 Ibid, Question 4–16.
142 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
143 Law Council of Australia, *Submission DR 25*, 31 January 2011.
144 Ibid.
145 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
146 Ibid (citations omitted).
147 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–17.

> The data about findings in disciplinary proceedings contained in the reports of disciplinary authorities do not suggest that gross overcharging is a pervasive practice.[148]

12.99 However, OLSC has stated that it is not uncommon for lawyers to be referred to disciplinary bodies for overcharging.[149]

ALRC's views

12.100 Consumers of legal services as well as the courts, costs assessors and other lawyers should play an important role in reporting misconduct. The ALRC has insufficient evidence of discovery abuse to justify recommending mandatory reporting of such abuse, particularly if this were to mean that discovery abuse were the only misconduct lawyers would be obliged to report. (It is beyond the terms of reference for this inquiry to consider the mandatory reporting of all professional misconduct.) Furthermore, the types of discovery that this Report is primarily concerned with—excessive and disproportionate discovery—will often involve matters of judgment and may be more difficult to clearly identify as abuse. Accordingly, it may not be reasonable to demand that practitioners must always report excessive discovery to regulators, though this is not to say that in appropriate circumstances, they should not.

12.101 In Chapter 7, the ALRC recommends the introduction of judicial education and training concerning discovery. This training might usefully include a discussion of when courts might report unethical discovery practices to disciplinary bodies.

Cultural change

12.102 Like many professionals, lawyers are influenced by the culture in which they work—by how their colleagues make decisions and what they believe their supervisors and clients expect of them. The Queensland Legal Services Commissioner, John Britton, has commented on the role of law firm culture and the 'reality that individual lawyers conduct themselves in ways that are a function in part at least of the workplace cultures of the law firms within which they work'.[150] Britton has suggested that the system 'puts the spotlight on individual lawyers' and 'lets law firms almost entirely off the hook'.[151]

12.103 Similarly, in addressing the weaknesses of the current regulatory regime, Professor Parker and others have been vocal in recognising the difficulties associated with identifying individuals within firm structures who are responsible for misconduct,

---

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

149 Office of the Legal Services Commissioner (NSW), *Consultation*, by telephone, 18 March 2011.

150 J Britton, 'Rethinking the Regulation of Lawyer Conduct: The Centrality of Law Firm Management and Ethical Infrastructures' (Paper presented at Australian Legal Practice Management Association National Conference, Gold Coast, 2009), 7. See also: C Parker and others, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31(1) *University of New South Wales Law Journal* 158; C Parker and L Aitken, *The Queensland Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms* (2010), forthcoming in *Georgetown Journal of Legal Ethics*, 2011.

151 J Britton, 'The Business of Ethics' (Paper presented at University of Queensland Alumni Lunchtime Lecture, Brisbane, 2010).

particularly where potentially unethical or unprofessional behaviour may be an entrenched part of workplace culture.[152]

12.104 In some jurisdictions, regulatory bodies have undertaken a more proactive and educative role in the enforcement of ethical obligations. In NSW, the OLSC's approach is 'regulating for professionalism' within the framework of 'education towards compliance'.[153] The strategy involves working with lawyers to engender the development of an ethical legal culture, including requiring firms to 'self-assess and report on their implementation of appropriate management systems' as well as addressing individual misconduct and complaints.[154]

12.105 The growth of commercial alliances between firms and corporations and the public listing of law firms has also increased the importance of ensuring that regulatory structures are responsive to the role played by firms and third parties in shaping the behaviour of individual lawyers, particularly where such structures may create tension between lawyer's ethical obligations and those owed, for example, to a company's shareholders.

12.106 Parker and her colleagues have argued that, although the values of individual lawyers influence their behaviour, 'law firms and work teams structure and frame individual lawyer's ethical decisions and behaviours' and they do this in three main ways:

(a) limiting an individual lawyer's capacity to 'see' ethical issues;

(b) constraining or creating options and opportunities for individual lawyers to make ethical judgments and act on them; and

(c) creating internal incentives, or magnifying external ones, that pressure individual lawyers to choose certain ethical behaviours.[155]

12.107 Parker and her colleagues argue for 'organisational level bulwarks to counteract organisational level pressures for unethical conduct'. This is broadly described as an 'ethical infrastructure':

> A law firm ethical infrastructure means formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour. It might include the appointment of an ethics partner and/or ethics committee; written policies on ethical conduct in general, and in specific areas such as conflicts of interest, billing, trust accounting, opinion letters, litigation tactics and so on; specified procedures for ensuring ethical policies are not breached and to encourage the raising of ethical problems with colleagues and

---

152 See, eg, S Le Mire and C Parker, 'Keeping it In-house: Ethics in the Relationship between Large Law Firm Lawyers and their Corporate Clients through the Eyes of In-house Counsel' (2008) 11 *Legal Ethics* 201.

153 S Mark, 'Regulating for Professionalism: The New South Wales Approach' (Paper presented at American Bar Association Annual Meeting, San Francisco, 2010).

154 C Parker, T Gordon and S Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37 *Journal of Law and Society* 466, 468.

155 C Parker and others, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31(1) *University of New South Wales Law Journal* 158, 163.

> management; the monitoring of lawyer compliance with policies and procedures; and, ethics education, training and discussion within the firm.[156]

12.108 Others have proposed that firms could engage in various forms of 'ethical auditing':

> Departments and work-groups could be asked to formulate plans that would articulate standards or practice and propose mechanisms for ensuring compliance. On a rotating basis, departments, workgroups, and individual lawyers could be evaluated in terms of their performance with respect to these standards. ...
>
> It is time to begin to charge lawyers with responsibility for designing systems that regularly and actively analyse professional judgments.[157]

12.109 Legal Services Commissions in both NSW and Queensland have developed voluntary questionnaires to encourage consideration of ethical issues by lawyers and law firms.[158] A questionnaire about ethical discovery has been suggested in consultations.

Submissions and consultations

12.110 In the Consultation Paper, the ALRC asked how law firms might foster a culture of reasonable and ethical discovery practice.[159] The submissions that addressed this question stressed that the proposed commentary to the professional conduct rules, discussed above, should help.[160] This commentary 'would support the continued development of a culture of ethical discovery practice'.[161] NSW Young Lawyers also suggested that law firms could use this commentary to develop 'policies and guidelines as a point of reference for their practitioners involved in discovery litigation'.[162]

ALRC's views

12.111 Discovery processes could be further improved and potential discovery abuse minimised by law firms—if they are not doing so already—training their own lawyers, setting strict ethical and practice standards, closely monitoring compliance with those standards, and insisting that discovery is to be pursued honestly, ethically, and in accordance with the letter and spirit of professional conduct rules. Law firms might, in this way, foster a culture of responsible litigation, professionalism, and ethical discovery practice. Such a culture should affect how litigation is conducted and focus

---

156 Ibid, 172 (citations omitted).

157 R Nelson, 'The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation' (1999) 67 *Fordham Law Review* 773, 806–7.

158 See, eg, C Parker and L Aitken, *The Queensland Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms* (2010), forthcoming in *Georgetown Journal of Legal Ethics*, 2011.

159 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–13.

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

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

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

on real decisions rather than mere 'symbolic or formalistic ethics management initiatives that do not make any difference to everyday actions and behaviours'.[163]

12.112 Professional conduct rules and discovery-specific commentary will be an excellent resource and reference point for firms. They should also be a strong foundation for induction and continuing legal education programs. It may not even be necessary for firms to develop guidelines that further interpret and apply professional conduct rules. However, law firms will need to continue to engage actively with the rules. This may only become more necessary under the proposed National Law and National Rules. Commentary to these rules might provide guidance in some detail, but one of the supposed benefits of principles and outcomes-based regulation is that they require 'firms to think through how to comply' and can therefore be 'directly linked to management-based regulation'.[164]

12.113 By regularly and actively engaging with the professional conduct rules, and considering how they apply to every stage of litigation, law firms can work to temper the aggressive adversarialism that has often been blamed for costly discovery practices.

Imposing obligations on parties and other non-lawyers

12.114 Lawyers do not have sole control over the conduct of discovery. Litigants, insurers, litigation funders, electronic discovery service providers and others can also greatly affect how litigation is conducted. In a submission to the VLRC's *Civil Justice Review*, IMF Australia said that '[l]itigation funders, including insurers, have a greater capacity than most to systemically assist or retard the Court in achieving its Overriding Purpose'. IMF also stated:

> Insurers, like funders, determine which claims are prosecuted and defended, choose the lawyers, instruct the lawyers and pay them and indemnify the insured in respect of adverse cost orders. None of these activities are currently regulated, leaving insurers, like funders, currently unaccountable for these activities.[165]

12.115 The ALRC noted in its *Managing Justice* report that 'many of the conduct issues associated with litigation concern not lawyers, but the litigants themselves':

> The justice system would operate quite differently if all litigants were reasonable, prudent, cooperative and fair.[166]

12.116 Parties and other non-lawyers involved in federal litigation may be encouraged to play their part in facilitating an efficient and proportionate discovery process. Though the ALRC makes no formal recommendation about this topic, the chapter will now briefly note three ways in which this behaviour may be encouraged.

---

163 C Parker and others, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31(1) *University of New South Wales Law Journal* 158, 182.

164 S Mark, 'Outcomes-based Regulation' (2010) 48 *Without Prejudice* 1, 2.

165 IMF Australia, *Submission by IMF to Victorian Law Reform Commission Civil Justice Review* (2007) <http://www.imf.com.au/pdf/20070411_SubmissionToVictorianCivilJusticeReview.pdf> at 24 October 2010.

166 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [3.5].

Overarching obligations

12.117 As discussed throughout this report, s 37N of the *Federal Court of Australia Act* provides that parties to a civil proceeding before the Court must conduct the proceeding in a way that is consistent with the overarching purpose of the civil practice and procedure, as defined in s 37M of the Act. Where they do not, the Court or judge must take that into account in awarding costs.[167]

12.118 The VLRC considered in some detail the question of to whom its overriding obligations should apply, and its recommendation on this point was largely followed. The overarching obligations in the *Civil Procedure Act 2010* (Vic) apply to parties, lawyers, law practices, and 'any person who provides financial assistance or other assistance' to a party where that person exercises either direct or indirect control over the conduct of the civil proceeding or of a party, including, but not limited to insurers and litigation funders.[168] The court can make a range of orders where a participant contravenes the overriding obligations.[169]

Best practice guidelines for litigants

12.119 In a submission to this Inquiry, a group of large law firms recommended the development of best practice guidelines for litigants:

> It can be difficult to explain to clients the importance of and need to comply with a party's discovery obligations. While large law firms have developed standard memoranda that explain this to their clients, this can be onerous for small firms. We recommend that a standard set of guidelines reflecting parties' discovery obligations be developed, similar to that provided to all expert witnesses in the NSW Uniform Civil Procedure Rules. This could be set out in a Practice Note or Schedule to the Rules, and the Practice Note could also require the party's deponent verifying the list to verify that he or she has read and understood the discovery guidelines. This would give more confidence to the participants in the litigation process that discovery obligations, including in relation to the discovery of ESI, had been explained to the parties in a clear and consistent form.[170]

Model litigant rules

12.120 Model litigant rules are another way to impose duties and obligations on non-lawyers involved in litigation. As noted above, under the *Legal Services Directions*, the Commonwealth and its agencies must behave as model litigants in the conduct of litigation. This means the Commonwealth and its agencies, as parties to litigation, must act with complete propriety, fairly and in accordance with the highest professional standards.[171] They must also endeavour to avoid, prevent and limit the scope of legal proceedings and keeping costs to a minimum.[172] Indeed, the obligations contained in the *Legal Services Directions* go 'beyond the requirement for lawyers to

---

167 *Federal Court of Australia Act 1976* (Cth) s 37N(4). This is discussed in more detail in Ch 8.
168 *Civil Procedure Act 2010* (Vic) s 10(1).
169 Ibid ss 28, 29.
170 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
171 *Legal Services Directions 2005* (Cth), Appendix B, Note 2.
172 Ibid, Appendix B, ss 2(d), 2(e).

act in accordance with their ethical obligations' under the legal profession acts and professional rules.[173]

Legal education

12.121 There are concerns that current legal education with respect to ethical obligations may not fully equip lawyers to know 'how to put ethics into action in real-life ... contexts, or even to recognise ethical issues when they arise'.[174] The following section gives a short overview of how discovery is now taught to lawyers and law students, and then proposes how this might be improved.

Academic qualifications

12.122 In all Australian jurisdictions, admission to practise as a lawyer requires the study of 11 areas of knowledge (known as the 'Priestley Eleven').[175] These are the core subjects studied by law students in Australia. Discovery is usually taught in universities as part of civil procedure, one of these core subjects. Civil procedure in NSW, for example, includes the study of 'obtaining evidence—discovery of documents, interrogatories, subpoena and other devices'.[176]

12.123 Legal ethics is also taught at universities. For example, in NSW, law students must study professional and personal conduct in respect of a practitioner's duty to the law, the Courts, clients and fellow practitioners.[177]

Practical legal training

12.124 Civil procedure and ethics are studied again, with a different focus, as part of the practical legal training that must be completed before a person may be admitted to practice as a solicitor. To be admitted in NSW, for example, applicants must be competent in a set of skills, practice areas and values prescribed in the *Legal Profession Admission Rules 2005* (NSW). Applicants must have achieved competence in, among other things, 'civil litigation' and 'ethics and professional responsibility'.[178]

12.125 Civil litigation practice refers to the ability of an entry-level lawyer to 'conduct civil litigation in first instance matters in courts of general jurisdiction, in a timely and cost-effective manner'.[179] This involves the ability to identify the issues

---

173 Ibid, Appendix B, Note 3.

174 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 217.

175 In NSW for example, these subject are set out in the *Legal Profession Admission Rules 2005* (NSW) r 95(1)(b), sch 5. The Draft National Rules propose that approved areas of academic knowledge continue to reflect the Law Admissions Consultative Committee's prescribed areas of knowledge, and that the list of recognised tertiary academic courses continue to reflect existing recognised academic courses: National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010), ch 3, schs 1, 2.

176 *Legal Profession Admission Rules 2005* (NSW), sch 5.

177 Ibid, sch 5.

178 Ibid, sch 6. The Draft National Rules propose that the competency standards for entry level lawyers reflect the Law Admissions Consultative Committee's existing competency standards and that the list of recognised courses of study also reflect the existing recognised practical legal training courses: National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010), ch 3, schs 3, 4.

179 *Legal Profession Admission Rules 2005* (NSW), sch 6.

likely to arise in a hearing and gather the necessary evidence. One of the listed means of gathering evidence is discovery.[180]

12.126 Ethics and professional responsibility, the Rules state, includes:

- acting ethically;
- discharging the legal duties and obligations of legal practitioners;
- complying with professional conduct rules;
- complying with fiduciary duties;
- complying with rules relating to the charging of fees; and
- reflecting on wider issues.[181]

Continuing legal education

12.127 Following admission to practice, in order to retain a practising certificate legal practitioners are required to complete a course of continuing legal education (CLE) or continuing professional development (CPD) each year. In October 2007, the National Continuing Professional Development Taskforce issued a set of national CLE Guidelines,[182] which arose in part 'from a concern that legal practitioners were not receiving sufficient ongoing education in legal and practical ethics and professionalism'.[183]

12.128 The Guidelines recommend that practitioners be required to complete ten units[184] of CLE activity each year, including at least one unit in each of the following 'core areas':

- practical legal ethics;
- practice management and business skills;
- professional skills;[185] and
- substantive law (in some jurisdictions).[186]

12.129 The Guidelines include a non-exhaustive, illustrative list of topics, arranged by these core areas. Topics listed under the practical legal ethics core area include

---

180 Ibid, sch 6, Civil Practice, Explanatory Note.

181 Ibid, sch 6, Ethics and Professional Responsibility.

182 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), [3.5].

183 S Mark, *Competing Duties: Ethical Dilemmas in Practice* (presentation to Newcastle Law Society, 19 October 2009).

184 In some jurisdictions the current requirement is completion of seven units, which will increase to ten units for practising certificates commencing on or after 1 July 2011: ACT Law Society, *A Continuing Professional Development Scheme for Canberra's Solicitors (MCPD Guidelines)* (2009).

185 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), [3.5].

186 See, eg, Law Institute of Victoria, *Continuing Professional Development Rules* (2008) r 5.2; *Legal Profession Rules 2009* (WA) pt 2, div 2, r 10(2)(4).

'lawyer's duties to the court' and 'ethics within a technical legal context'.[187] While discovery is not specifically referred to in the list of examples of activities, in the ALRC's view, a suitable study activity related to discovery could count towards a unit in the practical legal ethics core area, the professional skills core area or be studied as substantive law.[188]

12.130 New South Wales, Queensland, Victoria and the ACT have either adopted the guidelines, or substantially based their scheme on the guidelines.[189] Western Australia also requires practitioners to complete courses on ethics and professional responsibility, and legal skills and practice.[190] Barristers in the ACT must also complete activities in 'ethics and regulation of the profession', and in substantive law and professional skills.[191] In the Northern Territory, practitioners are required to complete a certain number of activities related to developing substantive law and legal practice competencies, but does not require particular courses in ethics.[192]

Guidance from regulators of the legal profession

12.131 Guidance from regulators of the legal profession—in particular, state and territory bar associations, law societies and legal services commissioners—also plays a role in legal education. In addition to commentary to professional conduct rules and best practice guidelines (considered above), legal professional associations provide guidance through responses to individual inquiries,[193] published ethics committee rulings,[194] and online collections of articles and advice.[195] Legal professional

187 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), 7.

188 See, eg, Law Institute of Victoria, *Continuing Professional Development Rules* (2008) r 5.2.

189 *Professional Conduct and Practice Rules 1995* (NSW) r 42.1.6; Law Institute of Victoria, *Continuing Professional Development Rules* (2008) r 5.2; *Queensland Law Society Administration Rule 1995* (Qld) r 47(4); ACT Law Society, *A Continuing Professional Development Scheme for Canberra's Solicitors (MCPD Guidelines)* (2009).

190 *Legal Profession Rules 2009* (WA) r 10. The Northern Territory has mandatory CPD requirements, but does not mandate the study of ethics: *Legal Profession Regulations 2007* (NT) sch 2, reg 5.

191 *Legal Profession (Barristers) Rules 2008* (ACT) r 113; Australian Capital Territory Bar Association, *Continuing Professional Development* <http://www.actbar.com.au/> at 28 October 2010.

192 *Legal Profession Regulations 2007* (NT) sch 2 pt 2 div 1 r 2(2).

193 See, eg, New South Wales Bar Association, *Urgent Ethical Guidance for Members* <http://www.nswbar.asn.au/docs/professional/pcd/urgent_ethical.php> at 25 October 2010; Queensland Law Society, *Queensland Law Society Ethics Centre* <http://www.qls.com.au/> at 1 November 2010; Bar Association of Queensland, *From the President: Ethical Enquiries—Ethical Counsellors* <http://www.qldbar.asn.au/index.php?option=com_content&task=view&id=63&Itemid=67> at 25 October 2010.

194 See, eg, Law Institute of Victoria Ethics Committee, *Ethics Committee Rulings* <http://www.liv.asn.au/Practising-in-Victoria/Ethics/Ethics-Committee-Rulings> at 1 November 2010.

195 See, eg, Queensland Law Society, *Ethics FAQs* <http://ethics.qls.com.au/faq> at 1 November 2010; Law Society of South Australia, *Professional Standards: Ethics and Professional Responsibility* <http://www.lawsocietysa.asn.au/other/profstand.asp#Ethics> at 1 November 2010; Law Institute of Victoria Ethics Committee, *Ethics Resources* <http://www.liv.asn.au/Practising-in-Victoria/Ethics/Ethics-Resources/Ethics-guidelines> at 1 November 2010.

associations also maintain a register of disciplinary actions open for public inspection.[196]

Submissions and consultations

12.132 In the Consultation Paper, the ALRC asked whether law students and lawyers were studying the legal and ethical responsibilities of lawyers with respect to discovery, and if so, whether existing training and education was sufficient.[197] The ALRC also asked how law students and lawyers should be trained in the legal and ethical responsibilities of lawyers with respect to discovery[198] and proposed that all of the key forms of legal education give appropriate attention to the legal and ethical responsibilities of lawyers in relation to discovery.[199]

12.133 The ALRC heard that the matter was dealt with at some level in compulsory undergraduate litigation practice and procedure subjects.[200] Michael Legg, a senior lecturer at the Faculty of Law, University of New South Wales, submitted that he teaches discovery to undergraduate students not by 'overtly focusing on "ethics" but rather dealing with the obligations of legal practitioners and procedures regarded as best practice':

> The emphasis is placed on the duties that legal practitioners owe both to their clients and to the Court and that the conduct of discovery may bring those duties into conflict where clients want discovery to be conducted in a way that may be of technical advantage to them, i.e. imposing costs or causing delay but that such conduct is contrary to the lawyers' duty to the court. The undergraduate subject then deals with the mechanics of how discovery works, which through the existence of the overriding purpose, brings into play the need to be cognisant of balancing justice, cost and avoiding delay. In the complex litigation subjects, and to a lesser degree in Litigation 1, emphasis is given to evaluating approaches to the conduct of discovery so that discovery may be conducted in the most efficient way possible.[201]

12.134 NSW Young Lawyers, however, submitted that law students generally leave university without

> any understanding of what an actual discovery entails, or with any knowledge of how a reviewing lawyer would go about assessing an actual document with proper method (reviewing for relevance, category, privilege and confidentiality). As a result, law students are ill-equipped to put together the individual pieces of law and practice together and perform an actual discovery.[202]

---

196 *Legal Profession Act 2004* (NSW) s 577; *Legal Profession Act 2007* (Qld) s 472; *Legal Profession Act 2007* (Tas) s 497; *Legal Profession Act 2004* (Vic) ss 4.4.26, 4.4.27; *Legal Profession Act 2008* (WA) s 452; *Legal Profession Act 2006* (ACT) s 448; *Legal Profession Act 2006* (NT) s 541.

197 Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper 2 (2010), Question 4–23.

198 Ibid, Question 4–24.

199 Ibid, Proposal 4–4.

200 NSW Young Lawyers, *Submission DR 19*, 21 January 2011; M Legg, *Submission DR 07*, 17 January 2011.

201 M Legg, *Submission DR 07*, 17 January 2011. This submission discusses tertiary level discovery education.

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

12.135 Law students are also not given clear and comprehensive education on electronic discovery, NSW Young Lawyers submitted.[203]

12.136 The Law Council and the group of large law firms submitted that the law and ethics of discovery is best taught though practical legal training and CLE.[204] The challenges with discovery, the group of law firms said, were in the practical application of the obligations on a party and its solicitor.[205] Discovery practice could be taught in the mandatory practical legal training ethics course, the Law Council submitted.[206] While not branded as 'ethics' courses, the group of large law firms submitted, there were CLE courses on discovery that addressed the ethical obligations on both the parties and their solicitors.[207] The law firms submitted that there was 'no need for changes to the national CLE guidelines or requirements for legal practical training'.[208] Speaking more generally, the Queensland Law Society expressed support for the provision of training to lawyers 'regarding the ethical obligations and practical approaches with respect to discovery'.[209]

12.137 ACLA, on the other hand, submitted that though 'there may be a case for discovery being a small part of the CPD program of training in ethics,' discovery was really a skill that

> must be learned by practical experience rather than in a lecture or seminar or out of a text book ... [ACLA] would not support it being part of a law degree or practical legal training.[210]

12.138 On the question of whether more education was likely to reduce discovery abuse and misconduct in practice, most submissions were silent. Legg, however, argued that it would make a difference:

> There may be recalcitrant individuals who will engage in discovery abuse and misconduct regardless of the level of education provided to them. However, in the vast majority of cases discovery and misconduct may be more determined by a cultural acceptance of certain misconduct within the profession as being consistent with adversarial litigation. … [E]ducation, particularly for law students and new members of the profession, can assist them to identify the situations where they may be asked to act in an improper way through having learnt that such conduct is not allowed.[211]

12.139 But like most that considered the point, Legg noted the importance of the education being practical:

> A clinical legal education program (and other forms of experiential learning such as case studies) also provide an important avenue for teaching the legal and ethical

---

203 Ibid.
204 Law Council of Australia, *Submission DR 25*, 31 January 2011; Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
205 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
206 Law Council of Australia, *Submission DR 25*, 31 January 2011.
207 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
208 Ibid.
209 Queensland Law Society, *Submission DR 28*, 11 February 2011.
210 Australian Corporate Lawyers Association, *Submission DR 24*, 31 January 2011.
211 M Legg, *Submission DR 07*, 17 January 2011.

> responsibilities of lawyers as they place students in real-life ethical dilemmas that they need to solve, albeit with the assistance of academics and/or practicing lawyers.[212]

ALRC's views

12.140 The study of a lawyer's legal and ethical duties in relation to discovery should feature in existing university curricula, practical legal training, and in programs that form part of a lawyer's continuing legal education. Continuing education is vital to ensure that lawyers are reminded of their ethical obligations and are able to consider and apply these in practice. Education also plays a key role in shaping legal culture. Admission rules across jurisdictions appear suitably broad and therefore should not need to be changed for universities and other providers of legal education to pay closer attention to ethical discovery practice.

12.141 In the ALRC's view, although the topic can usefully be considered in subjects or programs dedicated to legal ethics, the ethics of good discovery practice should also be taught in core civil litigation subjects. Students and lawyers should understand that ethical discovery is intrinsic to good legal practice. Such subjects may usefully include real-life discovery problems and ethical dilemmas.

12.142 However, the most significant decisions about discovery in civil litigation before federal courts are likely to be made by experienced lawyers. The bulk of education about the law and ethics of discovery may therefore best be directed to practising lawyers who work in litigation and understand the real conflicts and difficulties of discovery. The ALRC therefore recommends that providers of CLE and in-house training pay particular attention to ethical discovery practices in relevant programs, such as those concerning civil litigation, ethics and management.

12.143 Providers of CLE and in-house training should also consider offering a subject dedicated to discovery. In Chapter 7, the ALRC recommends that the Federal Court, in association with relevant judicial education bodies, develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings. Practitioners would also benefit from training directed at their role in facilitating a well-managed, efficient and proportionate discovery process. In particular, and in addition to the broader professional and ethical obligations noted above, practitioners would benefit from practically-focused training on the technologies and practices used to discover electronically-stored information and the preparation of discovery plans.

Recommendation 12–2 Continuing legal education and in-house training programs should include the law, practice and ethics of discovery. Such programs should address the technologies and practices used to discover electronically-stored information and how to prepare discovery plans.

212 Ibid.

Appendix 1. List of Submissions

Name	***Submission Number***	***Date***
Allens Arthur Robinson	DR 10	19 January 2011
Association of Legal Support Managers (Qld)	DR 29	11 February 2011
Australian Corporate Lawyers Association	DR 24	31 January 2011
Australian Government Solicitor	DR 27	11 February 2011
Australian Lawyers Alliance	DR 11	19 January 2011
Australian Taxation Office	DR 14	20 January 2011
K Chasse	DR 08	17 January 2011
Commercial Bar Association of Victoria	DR 04	13 January 2011
Confidential	DR 12	20 January 2011
Contributors from the Large Law Firm Group	DR 24	25 January 2011
M Deakin	DR 30	18 March 2011
Department of Immigration and Citizenship	DR 13	20 January 2011
e.law Asia Pacific Pty Ltd	DR 16	20 January 2011
C Enright and S Lewis	DR 03	12 January 2011
Family Court of Australia	DR 23	31 January 2011
D Farrar	DR 06	17 January 2011
Federation of Community Legal Centres (Vic)	DR 17	20 January 2011

M Foster	DR 09	18 January 2011
Griffith Hack Lawyers	DR 18	21 January 2011
G Hogg	DR 02	15 November 2010
Just Leadership Program, Monash University	DR 01	7 October 2010
Law Council of Australia	DR 25	31 January 2011
Law Society of NSW	DR 22	28 January 2011
Law Society of Western Australia	DR 26	11 February 2011
M Legg	DR 07	17 January 2011
NSW Young Lawyers	DR 19	21 January 2011
Public Interest Advocacy Centre	DR 15	20 January 2011
Public Interest Law Clearing House (Vic)	DR 20	25 January 2011
Queensland Law Society	DR 28	11 February 2011
Dr I Turnbull	DR 05	15 January 2011

Appendix 2. List of Agencies, Organisations and Individuals Consulted

Name	*Location*
Allens Arthur Robinson: Mr R Drinnan, Partner, Mr R Harris, Partner, Mr P Kerr, Partner, Mr M McLennan, Partner, Ms B Patterson, Director	Sydney
Justice J Allsop, President, Court of Appeal NSW	Sydney
Australian Competition and Consumer Commission: Ms S Court and Mr S King	Canberra
Justice P Bergin, Supreme Court of NSW	Sydney
Professor C Cameron and Professor C Parker, University of Melbourne	Melbourne
Dr P Cashman, Director of the Social Justice Program, University of Sydney	Sydney
Mr S Clark, Chief Operating Officer, Partner, Clayton Utz	Sydney
Commercial Bar Association of Victoria: Mr J Digby QC, Ms C Kirton	Melbourne
Department of Justice (Vic): Mr C Humphries, Ms M MacCallum	Melbourne
Justice A Emmett, Federal Court of Australia	Sydney
Mr J Emmerig, Partner, Blake Dawson	Sydney
Family Court: Justice S Strickland, A Filippello (Principal Registrar), K Murray (Senior Legal Research Adviser)	Sydney
Federal Magistrates Court: A Byrne (Principal Registrar), K Murray (Senior Legal Research Adviser), FM Fibbs, FM Bowman, FM Driver	Sydney
Justice R Finkelstein, Federal Court of Australia, Melbourne	Sydney

Mr G Fredericks, Executive Legal Counsel, Commonwealth Bank	Sydney
Freehills: Mr A Eastwood, Partner, Mr T Varvaressos, Senior Associate	Sydney
Justice M Gordon, Federal Court of Australia, Melbourne	Sydney
Ms G Hayden, Special Counsel, Australian Securities and Investments Commission	Sydney
Mr T Howe QC, Chief Counsel Litigation, Australian Government Solicitor	Canberra
Justice P Jacobson, Federal Court of Australia	Sydney
Ms R John, Partner, Gilbert and Tobin, Sydney	Sydney
Justice M Kellam, Supreme Court of Victoria, Melbourne	Sydney
Law Council of Australia, Family Law Section: G Sinclair, R O'Brien, D Farrer	Canberra
Law Council of Australia, Federal Litigation Section: J Emmerig, B Slade, S Daley, N Parmeter, S Henderson	Sydney
Law Council of Australia, National Profession Project: Mr M Hawkins, Mr S Henderson	Canberra
Mr D McGrath, E-Litigation Solutions	Sydney
Mr J McGinness, Director, National Judicial College of Australia	Canberra
Ms A Marfording, University of New South Wales	Sydney
Mr S Mark, Legal Services Commissioner (NSW)	Sydney
Mr J Mathieson, Deputy Registrar Federal Court of Australia	Sydney
Justice J Middleton, Federal Court of Australia	Sydney
Mr G Mulherin, Director, Law and Justice Foundation of New South Wales	Sydney
NSW Bar Association: A McConnachie, G McIlwaine SC, F Kunc SC, B Pape SC, J Gleason, D Healy	Sydney

Panel Discussion, Launch of Discovery Consultation Paper: the Hon Chief Justice P Keane, the Hon Justice Peter Jacobson, Mr S Clark, Ms R Gilsenan.	Sydney
Mr A Phelan, Chief Executive and Principal Registrar, High Court of Australia	Canberra
Dr M Pryles, Chartered Arbitrator	Melbourne
Discovery Melbourne Public Forum: Ms G Hayden, Mr S Clark, Ms S Laver, Mr B Murphy; Justice R Finkelstein, Mr M Wyles, SC.	Melbourne
Public Interest Advocacy Centre: Mr E Santow and Ms L Simpson	Sydney
Professor G Reinhardt, Executive Director, Australasian Institute of Judicial Administration	Melbourne
Professor the Hon A Rogers QC, Chartered Arbitrator, formerly a Judge of the Supreme Court of NSW	Sydney
Justice R Sackville, Acting Judge, Court of Appeal NSW	Sydney
Mr W Soden, Registrar and CEO, Federal Court of Australia	Canberra
Mr A Stephenson, Partner, Clayton Utz	Melbourne
Mr A Tsacalos, Partner, Norton Rose Australia	Sydney
Mr J Walker, Executive Director, IMF Australia	Sydney
Mr N Westerink, Assistant Commissioner, Australian Taxation Office	Canberra
Senior Master S Whitaker, Senior Master of the Queen's Bench Division of the High Court of England and Wales, Mr C Dale, The E-Disclosure Information Project, Mr V Neicho, Partner, Allen and Overy, London	Sydney

Appendix 3. List of Abbreviations

ABA	Australian Bar Association
ACCC v AMI	*Australian Competition and Consumer Commission v Advanced Medical Institute Pty Ltd*
ACLA	Australian Corporate Lawyers Association
ADR	alternative dispute resolution
AGS	Australian Government Solicitor
AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ALRC DP 62	*Review of the Federal Justice System* (1999)
ASIC	Australian Securities and Investment Commission
Aveling	*Aveling v UBS Capital Markets Australia Holdings Ltd*
the Board	National Legal Services Board
C7	*Seven Network Limited v News Limited*
CFA	Conditional Fee Agreement
CLE	continuing legal education
COAG	Council of Australian Governments
the Commissioner	National Legal Services Commissioner
Costs Shifting	*Costs Shifting—Who Pays for Litigation*, ALRC Report 75 (1995)
CPD	continuing professional development
DIAC	Department of Immigration and Citizenship

Draft National Barristers' Rules	*Legal Profession National Rules: Barristers' Rules 2010*
Draft National Law	draft *Legal Profession National Law*
Draft National Solicitors' Rules	*Legal Profession National Rules: Solicitors' Rules 2010*
Draft National Rules	draft *Legal Profession National Rules*
EDRM	Electronic Discovery Reference Model
ESI	electronically-stored information
Family Court	Family Court of Australia
Federal Court	Federal Court of Australia
Federal Magistrates Court	Federal Magistrates Court of Australia
FRCP	*Federal Rules of Civil Procedure 2009* (US)
FRE	*Federal Rules of Evidence 2009* (US)
the Guide	*Admiralty and Commercial Courts Guide*
High Court	High Court of Australia
IBA	International Bar Association
LAT	Less Adversarial Trial
Law Council	Law Council of Australia
Managing Justice	*Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (2000)
Model Laws	*Legal Profession Model Laws Project Model Provisions*
Model Regulations	*Legal Profession Model Laws Project Model Regulations*
Model Rules	*Model Rules of Professional Conduct and Practice*
NADRAC	National Alternative Dispute Resolution Advisory Council

NJCA	National Judicial College of Australia
NSW	New South Wales
NSW Young Lawyers	Law Society of NSW's Young Lawyers' Civil Litigation Committee
OLSC	Office of the Legal Services Commissioner
Peruvian Guano	*Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55
PDF	Portable document format
PIAC	Public Interest Advocacy Centre
PLRs	Pre-litigation requirements
Pocket Guide	*The Elements of Case Management: A Pocket Guide for Judges*
the Practice Direction	Practice Direction—Pre-action Conduct
SCAG	Standing Committee of Attorneys-General
Strategic Framework	*A Strategic Framework for Access to Justice in the Federal Civil Justice System*
Tax Commissioner	Commissioner of Taxation of the Commonwealth of Australia
TIFF	tagged image file format
UCPR	*Uniform Civil Procedure Rules 1999* (Qld)
UK	United Kingdom
US	United States
VLRC	Victorian Law Reform Commission

Appendix 4. Questionnaire

Contents

Introduction

1 On 10 May 2010, the Attorney-General requested the Australian Law Reform Commission (ALRC) to explore options to improve the process of discovery of documents in civil proceedings before the federal courts. The Terms of Reference for this Inquiry are available at the ALRC's website www.alrc.gov.au. In conducting its Inquiry, the Attorney-General requested that the ALRC give particular consideration to the issue of ensuring that cost and time required for discovery of documents is proportionate to the matters in dispute.

2 Concerns about the proportionality of discovery costs—in terms of the extent to which discovered documents are used to facilitate the just disposal of litigation—were raised by the Access to Justice Taskforce established by the Commonwealth Attorney-General's Department, in its report *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, which stated that:

> The cost of discovery continues to be very high, and often disproportionate to the role played by discovered documents in resolving disputes.[1]

3 The ALRC has released its Consultation Paper, *Discovery in the Federal Courts*, which, in particular, considers issues about the value or utility of the discovery process, relative to its costs.[2] The ALRC's Discovery Consultation Paper is available to view or download at www.alrc.gov.au and free CDROM copies can be ordered through the ALRC.

4 In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in the Consultation Paper must reach the ALRC by **Wednesday 19 January 2011**. The ALRC encourages stakeholders to use the online submission form available at <www.alrc.gov.au/inquiries/discovery>.

Purpose of this questionnaire

5 The ALRC seeks to gauge practitioners' impressions—based on practical experience—of the degrees to which discovery costs weigh against the overall expenses of litigation, the complexity of the issues in dispute, the stakes in the litigation and the value of the documents sought in the context of the litigation. The ALRC encourages responses to this questionnaire to provide particular examples or illustrations of cases which demonstrate the cost and value of discovery in litigation.

6 This questionnaire is not intended to be an empirical method of data collection. Responses it this questionnaire may serve as exploratory or qualitative research, rather than quantitative or empirical research. Therefore, the ALRC is not primarily concerned with the exact amount spent on discovery in particular proceedings. Similarly, the ALRC is not principally focused on the causes or components of discovery costs in particular cases. Rather, the ALRC seeks to contextualise discovery costs in terms of the nature of the proceedings in which documents are sought and the value of the documents in the context of the litigation. To this end, answers to the questions below should be based on practitioners' general impressions of the discovery process gained through practical experience.

7 The ALRC requests assistance to obtain this information in exploring the concerns driving this Inquiry and underlying the Terms of Reference—that discovery costs often exceed the value of the documents obtained, in terms of their use in the just and efficient disposal of the litigation—and generally to inform the broad direction of any reforms recommended in the ALRC's final report.

---

1 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Rec 8.2.

2 Australian Law Reform Commission, *Discovery in Federal Courts* (2010) ALRC CP 2, Question 3–2.

8 Unless participants request otherwise, the themes and impressions reflected in responses to this questionnaire may be referred to in discussion of the issues canvassed in the final report in this Inquiry. Participants may request that the ALRC keep responses to this questionnaire confidential. Alternatively, where a response to a question below includes a description of a particular proceeding, by way of an example or illustration, participants may choose to provide this information on a de-identified basis—with respect to the identities of the parties, practitioners and judicial officers involved. If a particular case is de-identified in a response to this questionnaire, the ALRC asks that responses give an indication of whether the parties were individuals, corporations or government agencies, and for which party you were acting.

9 In order to ensure consideration for use in the final report, responses to this questionnaire must reach the ALRC by **Wednesday 19 January 2011**. Stakeholders who are using the online form to make a submission to this Inquiry (http://www.alrc.gov.au/content/discovery-federal-courts-online-submission-form) may provide their responses to this questionnaire there, as it is included at the end of the online submission form. Alternatively, responses to this questionnaire may be emailed to discovery@alrc.gov.au.

Representative sample of cases involving discovery

10 The ALRC is interested in a wide range of cases involving discovery in the federal courts—irrespective of the size or complexity of the proceeding or what is potentially at stake for the litigants. This includes large-scale discoveries in the context of high-stakes litigation, as well as small or mid-sized discoveries in straight-forward cases or moderately complex proceedings. While concerns about the disproportionality of discovery costs may be most evident in large and complex proceedings, the ALRC does not intend to limit this questionnaire to such cases or to practitioners acting only in these matters.

11 The focus of the ALRC's Inquiry is on the discovery of documents between parties to litigation before a federal court. This covers the disclosure or discovery of documents for inspection by one party to another party in civil proceedings before the High Court, Federal Court, Family Court or Federal Magistrates Court.

12 However, practitioners' experiences of discovery or disclosure in other jurisdictions—in other courts or tribunals, in Australia or overseas—may be comparable or may provide interesting contrast. For example, discovery of documents in a proceeding before a State Supreme Court could be comparable to the cost and scale of discovery in Federal Court proceedings. Where responses to this questionnaire are based on experiences of discovery other than in a federal court, this should be noted at an appropriate point.

13 At the same time, responses to this questionnaire should not rely on experiences with other information-gathering processes in litigation: such as subpoenas, interrogatories or 'preliminary' discovery under Order 15A rule 3 of the *Federal Court Rules*. The Terms of Reference for this Inquiry are only concerned with the discovery of documents between parties to civil litigation.

Definitions

Discovery costs

14 A number of the questions below refer to the cost of discovery or 'discovery costs'. This may include, for example, solicitors' fees for work done in formulating requests for discovery or responding to discovery requests, including time spent negotiating the categories of documents sought by way of discovery, reviewing potentially discoverable documents for disclosure and drafting a list of documents to serve on the party requesting discovery. The ALRC expects that practitioners would be familiar with such costs, and may have a fair impression of the amount of such costs in a particular client's case—and therefore would expect responses to this questionnaire to take those costs into account.

15 Discovery costs might also include disbursements such as counsels' fees for appearing in court on discovery applications or other motions relating to discovery—such as seeking leave to issue a notice for discovery, or a hearing as to the validity of privilege claims made with respect to discoverable documents—as well as a litigation support service provider's fees for electronic discovery services. The ALRC does not necessarily expect responses to this questionnaire to account for such disbursements, given that this information might not be as readily available to practitioners.

16 Similarly, discovery costs might include the cost of a client's management and employees engaged in responding to a request for discovery of documents. Again, this information might not be available to practitioners—and the ALRC does not necessarily expect that responses to this questionnaire will account for such costs.

17 For the purposes of this questionnaire, discovery costs are not intended to include costs that are consequential to the discovery process. The ALRC notes that the number of documents disclosed may have a multiplier effect on other litigation expenses. For example, legal fees and court costs may be incurred for the time taken at trial dealing with discovered documents during the examination of witnesses—particularly expert witnesses—and in counsels' submissions. While the costs that may be associated with discovery are not necessarily limited to those incurred in the production of documents by the discovering party, and the review by the other side, such costs are the focus of this questionnaire.

18 Other terms and concepts incorporated into particular questions below are discussed under each question.

Questions

Jurisdiction

Question 1 In which jurisdiction(s) is your experience of discovery of documents in civil litigation largely based? Please also specify, for example, the particular courts and registries.

19 To understand the costs of discovery and the role played by discovered documents in litigation, it is important to place the discovery process within the context of the jurisdiction in which the litigation is conducted. The rules for discovery of documents may vary between jurisdictions, and so too may the approach to case management employed in different jurisdictions.

20 During initial consultations in this Inquiry, the ALRC heard that different registries of the same court can adopt different approaches when applying the same rules for discovery of documents, and may also take different approaches to case management in general. Responses to this question might help to identify the exigencies of a particular court registry as reflected in practitioners' experience of the discovery process.

21 Practitioners may have experience in conducting litigation across a number of jurisdictions, in different courts and tribunals and in different States or Territories or countries. Responses to this question might cover a number of jurisdictions. Otherwise, participants may prefer to respond based on the jurisdiction in which they are currently practicing, or the jurisdiction in which a significant amount of your experience with discovery has been gained.

22 As noted above, the ALRC's Inquiry is primarily concerned with the discovery of documents in civil proceedings before a federal court: namely, the High Court, the Federal Court, the Family Court or the Federal Magistrates Court. However, cases in other jurisdictions—including State or Territory courts, Australian tribunals or foreign jurisdictions—may be used as the basis for responding to this questionnaire.

Type of proceeding

Question 2 In what kinds of litigation or types of proceedings is your experience of discovery largely based? Please also specify, for example, any particular court list, such as the Fast Track.

23 The cost and proportionality of the discovery process may be better understood in the context of the type of proceeding in which discovery is made. The nature of the

proceeding may have some bearing on the range and complexity of the issues in dispute, which in turn may affect the ambit and conduct of the discovery process.

24 Practitioners may have experience in litigating a broad range of matters. However, participants should respond to this question based on the kinds of litigation in which a significant amount of your experience with discovery has been gained. Otherwise, participants may prefer to respond based on the types of proceeding in which they are currently acting.

25 During initial consultations in this Inquiry, the ALRC heard that concerns about the costs of discovery are most likely to arise in the following kinds of proceedings. Where appropriate, please describe your experience with relevant types of litigation in these terms:

- corporations law;[3]
- trade practice law;[4]
- intellectual property law;[5]
- class actions;[6]
- engineering or construction law;
- product liability;
- insurance litigation;
- taxation law; or
- financial cases in family law matters.

---

3 For example, misconduct by company officers under Chapter 2D of the *Corporations Act 2001* (Cth), corporate management under Chapter 2F of that Act, and insolvency under Chapter 5 of that Act.

4 For example, restrictive trade practice under Part IV of the *Trade Practices Act 1974* (Cth) and consumer protection under Part V of that Act.

5 For example: C*opyright Act 1968* (Cth), P*atents Act 1990* (Cth), T*rade Marks Act 1995* (Cth) or D*esigns Act 2003* (Cth).

6 For example, under Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Discovery costs relative to total litigation expense

Question 3 In your experience, what proportion of the total litigation expense for your clients do discovery costs generally represent? Where possible, please provide examples or illustrations of discovery costs relative to the total cost of litigation.

26 The ALRC wishes to explore the cost of discovery as a portion of the total expense of litigation, and to examine concerns that discovery costs represent one of the largest components of total litigation costs.

27 The total litigation costs might include, for example, solicitors' fees, barristers' fees, court fees, litigation support service provider fees, experts' fees, witness expenses and other costs and disbursements. Expenses incurred in appeals or in related proceedings heard separately should not be considered in responses to this question.

28 As discussed above, solicitors' fees can form part of both discovery costs and the total litigation cost.

Discovery costs relative to range and complexity of issues in dispute

Question 4 How do the range and/or complexity of the issues in dispute in a proceeding affect the cost of discovery of documents? Where possible, please provide examples or illustrations of the cost of discovery relative to the range or complexity of the issues in dispute.

29 During initial consultations in this Inquiry, the ALRC heard that disputes involving a broad or complex range of issues—where the pleadings rely on numerous causes of action or defences, proceedings involving numerous claimants, respondents, cross-claimants and third parties, or cases based on complex factual or legal matrices—have the consequential effect of setting broad boundaries for the discovery of documents, and open up discovery to large volumes of documents. In turn, the large volume of documents discovered in such cases may have a multiplier effect on the costs of discovery.

30 This question examines the relationship between discovery costs and the complexity or breadth of the issues in dispute in a proceeding. This may include both issues of fact and law. Understanding the impact that the complexity and breadth of issues has on discovery costs may help to inform directions for reform of the discovery process. For example, the ALRC's Consultation Paper, *Discovery in Federal Courts*,

suggests that reforms to ensure clearer articulation of the critical issues in dispute may help to reduce the burden of the discovery process.[7]

31 Where possible, please provide examples or illustrations of cases which demonstrate the relationship between discovery costs and the breadth or complexity of the issues in dispute. This might be, for example, cases of 'mega-litigation' where discovery costs were noticeably high. Other examples might include relatively straight-forward cases where the costs of discovery were greater than expected, and an explanation of the reasons for usually high discovery costs. Conversely, complex cases where discovery costs were minimised—and the strategies used to contain discovery—could usefully be described here by way of example.

32 The ALRC notes that the range of issues in dispute may narrow as the litigation progresses, or the focus on particular issues may concentrate over the course of proceedings. Similarly, the discovery process may itself facilitate the resolution or clarification of certain issues in dispute. However, in this question, the ALRC is interested in the range or complexity of the issues in dispute prior to or at the time of discovery, and its subsequent impact on the cost of the discovery process.

Discovery costs relative to stakes in the case

Question 5 How does the value of what is at stake for the parties in the proceeding affect the cost of discovery of documents? Where possible, please provide examples or illustrations of the cost of discovery relative to the value of what is at stake for the parties.

33 The ALRC seeks to explore commentaries which suggest that high discovery costs are more likely to occur in cases with high stakes, and to examine concerns that the costs of discovery can be disproportionate to the stakes in the litigation.

34 Where possible, please provide examples or illustrations of the relationship between discovery costs and the stakes of litigation. This may include examples of high value cases where the costs of discovery were also high. However, it might also include examples of small claims where the costs of discovery were disproportionately high—and an explanation of why discovery was disproportionate to the stakes in the litigation. Also of interest are examples of high stakes litigation where the costs of discovery were kept down, and the means of containing discovery costs in those cases.

35 The value of what is at stake for the parties might include an amount of money claimed by way of damages or the amount of damages awarded by way of judgment in

7 Australian Law Reform Commission, *Discovery in Federal Courts* (2010) ALRC CP 2, [3.137].

a particular case, an amount paid in settlement of a dispute, or the perceived value of non-pecuniary relief such as injunctive or declaratory relief.

36 It might also include consequential matters at stake for the parties as a result of a finding of liability, for example, the potential for further litigation in other jurisdictions based on the precedent founded in an initial proceeding before a federal court. Other consequential matters at stake for the parties in litigation might include: damage to reputations, adverse publicity, potential loss of business or loss of livelihood and potential exposure to other penalties.

37 Responses to this question should not account for any amount of liability for costs, as the expense of litigation is examined in Question 1–3 above.

Use of discovered documents in defining issues in dispute

Question 6 In your experience, where the issues in dispute in a proceeding are narrowed or clarified after discovery, what proportion of discovered documents are typically used in resolving some of the issues in dispute, and generally to what extent are the issues in dispute in a proceeding narrowed through the discovery process?

Where possible, please provide examples or illustrations of the proportion of discovered documents used to resolve some of the issues in dispute in a proceeding and the impact that discovered documents had in resolving those issues, as well as an indication of the extent to which the issues in dispute were narrowed through the discovery process.

38 During initial consultations in this Inquiry, the ALRC heard that discovery can be a useful process in encouraging the settlement of a dispute but also, where settlement is not achieved, parties often abandon certain issues in dispute after discovery is given. For example, in tax matters, the Taxation Commissioner may be content, on the basis of discovered documents, that a particular transaction will not attract the general anti-avoidance provisions of the tax law—whereas a lack of understanding about that transaction prior to discovery may have driven disputes over the issue. In such cases, the time taken at trial to determine the dispute would be reduced, in part as a result of discovery.

39 The ALRC seeks to gauge practitioners' impressions of the utility of discovered documents in narrowing the issues in dispute. This includes practitioners' views on the typical yield of discovery—in terms of the relevant information produced—and views on the probative value of discovered documents for the purposes of encouraging admissions of facts or resolving some of the issues in dispute.

40 Examples provided in response to this question might describe cases where a large number of subordinate or collateral facts in issue were agreed on the basis of a large proportion of discovered documents, as well as cases where a small number of the main issues in dispute were resolved on the basis of a small proportion of discovered documents.

Use of discovered documents in settlement of disputes

Question 7 In your experience, where cases settle after discovery, what proportion of discovered documents are usually relied upon during settlement negotiations or other alternative dispute resolution processes, and generally to what extent are those documents influential in the settlement of disputes?

Where possible, please provide examples or illustrations of the proportion of discovered documents relied upon in an alternative dispute resolution process and the impact that discovered documents had on the settlement of the dispute, as well as an indication of the proportion of discovered documents that were not used in the settlement of the dispute.

41 As discussed below, there are concerns about the minimal use of discovered documents during the final court hearing of disputes. However, the ALRC was told during initial consultations that most cases will not proceed to trial—instead, disputes are generally settled prior to judgment, but not until after discovery.

42 The ALRC seeks to gauge practitioners' impressions of the utility of discovered documents in the settlement of disputes. This includes practitioners' views on the typical yield of discovery—in terms of the relevant information produced—and views on the probative value of discovered documents for the purposes of settlement negotiations or other alternative dispute resolution processes.

43 Examples provided in response to this question might include cases where a large proportion of discovered documents were relied upon to assess the quantum of damages and to negotiate a settlement amount. Other examples might highlight cases that settled on a commercial basis with little regard for discovered documents or other evidence. For example, the potential for adverse publicity for a party may be a greater influence on settlement negotiations than discovered documents, in some cases.

Use of discovered documents in judicial determination of proceedings

Question 8 In your experience, where cases proceed to judgment after discovery, what proportion of discovered documents are typically brought before the court for the determination of a dispute, and generally to what extent are those documents determinative in the court's judgment?

Where possible, please provide examples or illustrations of the proportion of discovered documents admitted into evidence in a proceeding and the impact that discovered documents had on the court's judgment, as well as an indication of the proportion of discovered documents that were not relied upon at trial in the proceeding.

44 Some judges have expressed concerns about the minimal use of discovered documents at trial, when voluminous documents are discovered and trolley loads of documents are brought to court, but only a small number of documents are relied upon by parties during the trial and fewer still are actually relevant to the court's determination of the dispute. For example, Justice Finkelstein has pointed out that in *Seven Network Limited v News Limited*[8] only 15% of the millions of pages of documents that were searched and reviewed were put before the court and only about 15% of those documents ultimately went into evidence.[9] In other words, the overall yield of discovery (in terms of the admitted evidence produced) was well below 5% of the documents discovered.

45 However, the percentage of discovered documents that are not subsequently relied upon at trial may create a misleading perception that discovery is only successful when a substantial proportion of discovered documents are tendered in evidence. In the context of certain proceedings, it is possible that a single document obtained through discovery may turn out to be crucial to the determination of the dispute.

46 The ALRC seeks to gauge practitioners' impressions of the utility of discovered documents in the judicial determination of proceedings. This includes practitioners' views on the typical yield of discovery—in terms of the admitted evidence typically produced—and views overall on the probative value of discovered documents admitted into evidence.

47 Examples provided in response to this question might include cases where large volumes of discovered documents were included in a tender bundle or court book, but only a few of those documents were relied upon by the parties at trial or considered by

8 *Seven Network Limited v News Limited* [2007] 1062.

9 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [7].

the court in its judgment of the dispute. However, such examples might also highlight cases where the court's decision in the proceeding hinged on those few discovered documents that were admitted into evidence. Other examples might illustrate trials that carefully examined a few specific discovered documents thought to be crucial to a party's case but were found by the court to be largely irrelevant to the real issues.

Other comments

Please provide any other comments you wish to make in relation to the proportionality of discovery costs—in terms of the cost of discovery in the context of the proceeding, and the utility of discovered documents in the disposal of the litigation.