Australian Government

Australian Law Reform Commission

Discovery in Federal Courts

CONSULTATION PAPER

ALRC CP 2

November 2010

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Australian Law Reform Commission Reference: ALRC Consultation Paper 2

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 25, 135 King Street, Sydney, NSW, 2000, Australia.

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Making a submission

Making a Submission to the Inquiry

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Inquiry is Wednesday 19 January 2011.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Consultation Paper. You may respond to as many or as few questions and proposals as you wish.

Online submission tool

The ALRC strongly encourages online submissions directly through the ALRC's website <www.alrc.gov.au/inquiries/discovery>, where an online submission form will allow you to respond to individual questions and/or proposals. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6333.

Alternatively, written submissions may be mailed, faxed or emailed to:

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Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the Commissions to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are made available to any person or organisation upon request after completion of an inquiry. For the purposes of this policy, an inquiry is considered to have been completed when the final Report has been tabled in Parliament. Non-confidential submissions may also be published on the ALRC website.

The Commissions also accept submissions made in confidence. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the Commissions will treat the submission as non-confidential.

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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.

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)

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List of Questions and Proposals

2. Legal Framework for Discovery in Federal Courts

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

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

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

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

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

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

(a) documents on which the party intends to rely; and

(b) documents that have significant probative value adverse to a party's case?

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

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

3. Discovery Practice and Procedure in Federal Courts

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

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

(a) too much information;

(b) too little information; or

(c) about the right amount of information

to facilitate the just and efficient disposal of the litigation?

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

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

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

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

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

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

(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.

Proposal 3–2 Prior to the pre-discovery conference proposed in Proposal 3–1, the party seeking discovery should be required to file and serve a written statement

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

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

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

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

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

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

(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.

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

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

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

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

Question 3–10 Should the Federal Court have explicit statutory powers to make orders limiting the costs able to be charged by a law practice to a client for discovery, to the actual costs to the law practice of carrying out such work (with a reasonable allowance for overheads, but excluding a mark up or profit component)?

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

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

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

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

4. Ensuring Professional Integrity: Ethical Obligations and Discovery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) a failure to comply with discovery obligations; or

(b) conduct intended to delay, frustrate or avoid discovery of documents?

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

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

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

Proposal 4–3 The Law Council of Australia, the Australian Bar Association and the legal professional bodies in each state and territory should develop commentary as part of, or a supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the electronic discovery of documents.

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

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

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

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

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

(b) practical legal training required for admission to practice as a solicitor or barrister; and

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

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

5. Alternatives to Discovery

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

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

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

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

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

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

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

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

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

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

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

1. Introduction to the Inquiry

Contents

Background

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.*[1] The underlying premise for this Inquiry is that the costs of discovery, which can be very high, may inhibit access to justice and generate, in addition, an undue public cost.

Access to Justice Taskforce

1.3 The Strategic Framework developed by the Access to Justice Taskforce included the following 'Access to Justice Principles': accessibility; appropriateness; equity;

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.

efficiency; and effectiveness.[2] 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.[3]

1.4 Case management was identified as critical in addressing proportionality of costs: 'Case management of litigation will help to ensure that costs incurred are directed to resolving the dispute, and limit costs from collateral actions'.[4]

Managing Justice

1.5 In the report, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (2000), the ALRC had pointed similarly to the importance of control through case management:

> 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.[5]

1.6 While noting that discovery is '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,[6] the ALRC considered that discovery has 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.[7]

1.7 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'.[8]

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2 Ibid, 62–63.
3 Ibid, 64.
4 Ibid, 64.
5 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.67].
6 Ibid, [6.67].
7 Ibid, [6.68].
8 Ibid, [6.68], citing Arthur Robinson & Hedderwicks, *Submission 189*.

Other inquiries and reports

1.8 Other inquiries that have been of assistance to the ALRC include: the review of the rules and principles governing the costs of civil litigation in England and Wales conducted by Lord Justice Jackson in 2008–2009;[9] 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;[10] the review of the civil justice system in Victoria by the Victorian Law Reform Commission (VLRC) in 2006–2008;[11] the report of the British Columbia Civil Justice Reform Working Group in 2006;[12] 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;[13] and the review and consolidation of civil procedure in England and Wales conducted by Lord Woolf in 1994–1996.[14] The key principles for reform considered in these inquiries are summarised below.

Review of Civil Litigation Costs

1.9 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.

1.10 Commencing on 1 January 2009, Lord Jackson's preliminary report was published on 8 May 2009,[15] identifying relevant issues for consideration during an extensive consultation period to follow. Among the topics covered, with some illustrative examples,[16] were:

- the basic facts—how much civil litigation there is, and what lawyers earn;[17]
- research and consultation into costs—academic studies, views of court users and stakeholders, and statistical data;[18]
- the funding of civil litigation—legal aid, before or after the event insurance, third party funding, conditional fee agreements ('no win, no fee'), and contingency fees;[19]

9 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009).
10 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).
11 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008).
12 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).
13 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004).
14 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).
15 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009).
16 As summarised in Judicial Communications Office (UK) 'Lord Justice Jackson publishes preliminary findings of his civil litigation cost review' (Press Release, 8 May 2009) <www.judiciary.gov.uk>.
17 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009), pt 2.
18 Ibid, pt 3.
19 Ibid, pt 4.

- fixed costs—assessing the present regime;[20]
- personal injuries litigation;[21]
- other specific types of litigation—such as consumer claims, housing claims, environmental claims, defamation proceedings and collective actions;[22]
- controlling the costs of litigation—e-disclosure, case management, cost capping and cost management;[23]
- regimes where there is no cost shifting—small claims and employment tribunals;[24]
- the assessment of costs by the court;[25] and
- a review of costs systems in other countries—including Australia.[26]

1.11 The final report was published on 21 December 2009 and set out a coherent package of interlocking reforms, designed to reduce litigation costs and to promote access to justice. The report's key findings and recommendations[27] include:

- proportionality—the costs system should be based on legal expenses that reflect the nature and complexity of the case;[28]
- success fees and after the event insurance premiums to be irrecoverable in 'no win, no fee' cases (conditional fee agreements), as these are the greatest contributors to disproportionate costs;[29]
- to offset the effects of this for claimants, general damages awards for personal injuries and other civil wrongs should be increased by 10%;[30]
- referral fees—fees paid by lawyers to organisations that 'sell' damages claims but offer no real value to the process—should be scrapped;[31]
- 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;[32]
- fixed costs to be set for 'fast track' cases (those with a claim up to £25,000) to provide certainty of legal costs;[33]

20 Ibid, pt 5.
21 Ibid, pt 6.
22 Ibid, pt 7.
23 Ibid, pt 8.
24 Ibid, pt 9.
25 Ibid, pt 10.
26 Ibid, pt 11.
27 As summarised in Judicial Communications Office (UK) 'Jackson Review calls for a package of reforms to rein in the costs of civil justice' (Press Release, 14 January 2010) <www.judiciary.gov.uk>.
28 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), chs 3, 35.
29 Ibid, chs 9, 10.
30 Ibid, ch 10.
31 Ibid, ch 20.
32 Ibid, chs 9, 19.
33 Ibid, ch 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;[34]
- 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;[35] and
- promotion of 'before the event' legal insurance, encouraging people to take out legal expenses insurance, for example as part of household insurance.[36]

The Resolve to Resolve (NADRAC)

1.12 On 13 June 2008, the Australian Government Attorney-General wrote to NADRAC requesting that it enquire 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. The letter of reference asked NADRAC to provide advice on strategies for litigants, the legal profession, tribunals and courts, as well as initiatives the Government might take, including legislative action.[37] In particular, NADRAC was asked to consider:

- whether mandatory requirements to use ADR should be introduced;
- 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.[38]

1.13 In response to its Issues Paper, released on 26 March 2009, NADRAC received over 60 submissions from federal and state government departments and agencies, ADR providers, courts, tribunals and individuals. The report, *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction,* was delivered in September 2009. It identifies strategies to remove barriers to justice and provide incentives for greater use of ADR in the federal civil justice system.

Civil Justice Review (Victorian Law Reform Commission)

1.14 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.

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34 Ibid, ch 6.
35 Ibid, ch 12.
36 Ibid, ch 8.
37 National Alternative Dispute Resolution Advisory Council, *ADR in the Civil Justice System: Issues Paper* (2009), [1.3].
38 Ibid, [1.4].

1.15 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 commission 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'.

1.16 The final report, *Civil Justice Review*, VLRC Report 14 (2008), was launched on 28 May 2008. The report suggests areas for future law reform and identifies changes which will reduce the cost, complexity and length of civil trials.

Effective and Affordable Civil Justice (British Columbia Justice Review Task Force, Civil Justice Reform Working Group)

1.17 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'.[39]

1.18 The report provides three key recommendations.[40] The first recommendation involves the establishment of a 'central hub' to provide information, advice, guidance and other services required to assist people in solving their own legal problems. The second recommendation is that parties personally attend a case planning conference before they actively engage 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.

1.19 The third recommendation has eight components and proposes 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;

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), Executive Summary.

40 Ibid, viii.

- 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.[41]

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

1.20 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.[42]

1.21 After publication of an Interim Report and Consultative Paper in November 2001, a final report, *Civil Justice Reform*, was released on 3 March 2004.[43] It set out 150 recommendations in respect of the reforms to be introduced to civil proceedings of the High Court and the District Court of Hong Kong. These reforms came into effect on 2 April 2009, the underlying objectives of which are:

(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.[44]

Access to Justice (Lord Woolf's Report)

1.22 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 *Access to Justice Report* in which he identified 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;

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41 Ibid, vi.

42 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), [1].

43 Ibid.

44 Hong Kong Special Administrative Region Government, *Civil Justice Reform* (2009) <www.civiljustice.gov.hk/eng/home.html> at 5 November 2010.

(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.[45]

1.23 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;
- 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).[46]

Themes

1.24 As a brief introduction to the key themes articulated throughout this Consultation Paper and informing the Inquiry, this section summarises the underlying rationale and development of the doctrine of discovery and provides a distillation of the tensions that are evident throughout.

Rationale

1.25 As noted by Professor Camille Cameron and Jonathan Liberman, discovery has 'a long history in common law systems', and its centrality to the fact-finding and decision-making processes 'have 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.[47]

1.26 The doctrine of discovery derives from early Chancery practice.[48] 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,

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

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

47 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.

48 Although its origins can be traced to civil law: Ibid, 276.

> 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.[49]

1.27 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.[50]

1.28 Common law processes were much more limited, and the methods for getting the evidence of facts in issue before the courts were 'most rudimentary'.[51] 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.[52]

> In chancery ... discovery was of the very essence of the bill. Every bill for relief in equity was, in reality, a bill for discovery.[53]

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

> The truth-seeking purposes of discovery in the Court of Chancery continue to be a cornerstone of the modern discovery process. In addition to this truth-seeking function, early commentaries and cases show that parties were entitled to discovery in order to avoid the expense and delay that would result if they had to look for the documents themselves. 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'.[54]

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

50 Ibid, 1–2.

51 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* (1768), vol iii, 382–383.

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

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

54 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.

1.30 The underlying rationale of fairness, 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.[55]

1.31 In the contemporary context the rationale of discovery as reflected in its history, noted above, is captured in s 37M of the *Federal Court of Australia Act 1976* (Cth), which articulates the 'overarching purpose' of civil practice and procedure 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.

Tensions

1.32 There are several areas of tension that present challenges in this Inquiry. These arise between policy objectives, parties involved in civil litigation before federal courts, as well as with respect to the professional obligations owed by lawyers. For example, there is an inherent tension between 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. This tension is reflected particularly in Chapter 3, which discusses the practice and procedure of discovery in federal courts.

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

1.33 There is also a tension between the key obligations owed by a lawyer, specifically between a lawyer's duty to a client—to represent and protect the best interests of a client—and the overarching duty to the court in the interests of the administration of justice. In a broader sense a tension also arises between the drive to reduce the public costs of justice through a reduction in the time that litigation occupies the courts and the right of a litigant to pursue their rights to achieve justice under the law.

1.34 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. This creates a tension in practice between appropriate and legitimate destruction of documents in accordance with a document management system or policy, and the deliberate destruction of documents aimed at removing documents from the jurisdiction of the court.

1.35 The task in this Inquiry is to develop proposals and ultimately recommendations for reform that balances these tensions fairly and practically. The key tensions noted in this section are developed further throughout the chapters in this Consultation Paper and will inform the consultation process to follow.

Scope of the Inquiry

Terms of Reference

1.36 The Terms of Reference are reproduced at the beginning of this Consultation Paper. 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.

1.37 In identifying law reform options to improve the practical operation and effectiveness of discovery of documents, the ALRC is directed 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.

Matters outside the Inquiry

1.38 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 their opponents 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.

1.39 In some jurisdictions, discovery may extend to documents in the possession of third parties. For example, under Order 15A rule 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.

1.40 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, Order 15A rule 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.

1.41 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;[56] rules which facilitate the obtaining and tendering of expert evidence;[57] procedures which assist a party to obtain admissions from an opposing party prior to trial;[58] and the use of the subpoena process to compel the attendance of persons to give evidence at the trial or to produce documents either pre-trial or at the trial.[59]

1.42 The Terms of Reference limit the ALRC's Inquiry to the discovery of documents in litigation before the 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

56 *Federal Court Rules* (Cth) O 17 r 1.
57 Ibid O 10 r 1(xv).
58 Ibid O 18 r 2.
59 Ibid O 27A r 2.

procedures—such as interrogatories, preliminary discovery, discovery from non-parties or other means of obtaining information relevant to a proceeding—are not the central focus of this Inquiry.

1.43 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. For example, the ALRC has been asked to give particular consideration to alternatives to the discovery of documents. Where discovery, other than the exchange of documents between parties, is considered in this Consultation Paper, it is noted at relevant points.

Terminology

1.44 In this Consultation Paper, the terms 'discovery' and 'disclosure' are used on occasion to distinguish between different procedural requirements for the exchange of documents between parties to civil litigation, as explained below.

Disclosure

1.45 The term 'disclosure' is used to describe an obligation, falling on a party to proceedings, to provide documents to another party, which 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.[60] 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.[61]

Discovery

1.46 The term 'discovery' is used to describe the obligation imposed upon a party when another party to the proceeding requires that party to give discovery of documents, usually by filing and serving on that party a notice requiring discovery. In particular, 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 to 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*.

Lawyer

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

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

61 *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.

Legal ethical obligations

1.48 The term 'legal ethical obligations' is used in this Consultation Paper to reflect that ethical and legal rules relating to discovery practice are not mutually exclusive. It is used as an expression to refer to the more general professional and ethical duties placed on lawyers, over and above those specifically developed to govern legal practice, acknowledging the distinction often made between rules that are professionally binding on a lawyer—ethical rules—and rules that are legally binding—legal rules.

Organisation of this Consultation Paper

1.49 This Consultation Paper concisely addresses the questions set out in the Terms of Reference. It is divided into five chapters. This chapter provides an introduction to the Inquiry, including the background to the Inquiry, other relevant inquiries and a description of the reform process.

1.50 Chapter 2, Legal Framework for Discovery in the Federal Courts, considers the obligation on a party to discover documents to another party and the range of documents discoverable in civil proceedings in the federal courts. The chapter raises issues about the need for court control over the availability of discovery and limitations on the ambit of discovery in the federal courts. Legislative provisions, court rules, practice notes and significant cases dealing with the discovery of documents are also discussed.

1.51 Chapter 3, Discovery Practices and Procedures in the Federal Courts, examines civil practice and procedure for the discovery of documents in proceedings before the federal courts. Issues about the cost of a discovery process and its proportionality, in terms of the value of the documents sought in the context of the litigation, are explored. In particular, the use of technology in the process of discovering electronically-stored information is considered and the need for strong case management of the discovery stage in litigation are considered.

1.52 Chapter 4, Ensuring Professional Integrity: Practitioner Obligations and Discovery, consists of two parts. The first part begins with a discussion of the key sources of legal ethical obligations in Australia. It then examines the nature and extent of alleged discovery abuse and professional misconduct, including identifying the key legal ethical obligations such conduct breaches, using illustrative examples. A range of proposals are discussed aimed at pre-emptively avoiding such abuse and misconduct. The enforceability of ethical obligations through court and disciplinary procedures is also discussed. The first part of the chapter also examines the role and nature of legal obligations in a changing legal environment, in particular electronic discovery and the applicability of obligations outside traditional courtroom processes. The second part of the chapter examines existing educational requirements in relation to the legal ethical obligations owed by lawyers. It proposes a new approach to the education of lawyers in this area and highlights the need for cultural change.

1.53 Chapter 5, Alternatives to Discovery, considers pre-action protocols, pre-trial oral examinations and other processes that encourage early settlement, and the

narrowing of the issues in dispute prior to the commencement of litigation. The chapter draws on recent works by other law reform bodies, as well as practices and procedures in overseas jurisdictions.

Process of reform

Consultation processes

Advisory Committee

1.54 It is standard operating procedure for the ALRC to establish an expert Advisory Committee to assist with the development of its inquiries.[62] In this Inquiry, the Advisory Committee includes judges, senior officers of Australian Government agencies, academics and senior lawyers.

1.55 The Advisory Committee met for the first time on 19 August 2010, and will meet at least once more during the course of the Inquiry to provide advice and assistance to the ALRC. The Advisory Committee has particular value in helping the ALRC to identify the key issues, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee will also assist with the development of reform proposals as the Inquiry progresses. However, the ultimate responsibility for the Report and recommendations remains with the Commissioners of the ALRC.

Community consultation and participation

1.56 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.[63] One of the most important features of ALRC inquiries is the commitment to widespread community consultation—a hallmark of best practice law reform.[64]

1.57 The nature and extent of this engagement is normally determined by the subject matter of the reference. Areas that are seen to be narrow and technical tend to be of interest mainly to experts. Some ALRC inquiries—such as those relating to the protection of human genetic information, privacy and family violence—involve a significant level of interest and involvement from the general public and the media.

1.58 To date, consultations for this Inquiry have been held with a number of government agencies, academics, judges and members of the legal profession. 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. Any individual or organisation with an interest in meeting with the Inquiry in relation to matters raised in this Consultation Paper is encouraged to contact the ALRC. A list of consultations is included as Appendix 1.

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62 A list of Advisory Committee members can be found in the List of Participants at the front of this Consultation Paper.

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

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

1.59 There are several ways in which those with an interest in this Inquiry may follow its progress and participate. Individuals and organisations may express an interest in the Inquiry by contacting the ALRC by phone or email, or they can subscribe to the Inquiry e-newsletter via the website <www.alrc.gov.au>. Free download of consultation documents is available via the website, and those who wish to receive a free CD-ROM of the consultation documents may request them via an online web form, or by phone.

1.60 In this Inquiry the ALRC is producing a regular e-newsletter to keep stakeholders informed about progress on a regular basis, with a calendar of stakeholder consultations or other key events in the upcoming month, as well as a summary of consultations and other work in the past month, and links to relevant media releases, publications and other materials, such as the Access to Justice Taskforce's report. Each e-newsletter also links to the Inquiry blog, noted below. Any individual or organisation with an interest in the inquiry is encouraged to subscribe (via the ALRC website) to receive the e-newsletter, which is then delivered directly to their inbox.

1.61 For the duration of this Inquiry the ALRC is hosting a blog at http://talk.alrc.gov.au/. The blog offers interested stakeholders insight into particular issues the ALRC is considering as it conducts its review, and enables public discussion of those issues. The invitation to comment on blog posts is open to all. Individuals and organisations may also make written submissions to the Inquiry.

1.62 Finally, the ALRC maintains an active program of direct consultation with stakeholders and other interested parties, as well as including regular briefings to key staff in the Australian Government Attorney-General's Department.

Written submissions

1.63 With the release of this Consultation Paper, the ALRC invites individuals and organisations to make submissions in response to the specific questions and proposals, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.64 There is no specified format for submissions and they may be marked confidential if preferred. The ALRC prefers electronic communications and submissions, and strongly encourages stakeholders to make use of the online submission form available on the ALRC website. However, the ALRC will gratefully accept anything from handwritten notes to detailed commentary and scholarly analyses on relevant laws and practices. Even simple dot-points are welcome. Submissions will be published on the ALRC website, unless they are marked confidential.[65]

1.65 The ALRC appreciates that tight deadlines for making submissions places considerable pressure upon those who wish to participate in ALRC inquiries. Given the deadline for delivering the final report to the Attorney-General at the end of March 2011, and the need to consider fully the submissions received in response to this Consultation Paper, all submissions must be submitted on time—by **Wednesday 19 January 2011**.

65 Submissions provided only in hard copy might not be published on the website.

1.66 It is the invaluable work of participants that enriches the whole consultative process of the Commission's inquiries. The quality of the outcomes is assisted greatly by the understanding of contributors in needing to meet the deadline imposed by the reporting process itself. This Inquiry is no exception.

> In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in this 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>.
>
> Submissions not marked confidential will be published on the ALRC website.

Stop Press—National Legal Profession Taskforce Interim Report

1.67 When this Consultation Paper was in press, as part of the National Legal Profession Reform Project the National Legal Profession Reform Taskforce, established by the Australian Government Attorney-General, at the request of the Council of Australian Governments, released its Interim Report on key issues and funding.[66] In May 2010, the National Legal Profession Taskforce released its draft National Law and National Rules for a three-month consultation period.[67] The National Law and National Rules are considered in Chapter 4 of this Consultation Paper. The proposals in the Interim Report were not available for consideration at the time of writing and will be considered in the Final Report in this Inquiry.

66 National Legal Profession Reform Taskforce, *Interim Report on Key Issues and Funding* (2010).
67 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010).

2. Legal Framework for Discovery in Federal Courts

Contents

Introduction

2.1 This chapter considers the obligation on a party to discover documents to another party and the range of documents discoverable in civil proceedings in federal courts. This chapter raises issues about the need for court control over the availability of discovery and limitations on the ambit of discovery in federal courts. Legislative provisions, court rules, practice notes and significant cases dealing with the discovery of documents are discussed here. Chapter 3 discusses the way parties carry out a discovery process and the need for strong case management of the discovery stage in litigation.

Legal framework

2.2 This part of the chapter outlines the current law imposing the obligation to discover documents and the range of documents a party may be required to disclose in the federal civil court system.

High Court of Australia

Obligation to discover documents

2.3 There are no specific provisions in the *High Court Rules 2004* (Cth) about the obligation to make discovery of 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]

Scope of discoverable documents

2.4 In the absence of specific provisions or directions to the contrary, the 'train of inquiry' test as propounded in *Compagnie Financiere 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]

Federal Court of Australia

Obligation to discover documents

2.5 The availability of discovery in the Federal Court is restricted by provisions in the *Federal Court Rules* (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.[5] The court must determine an application for leave for discovery in the way that best promotes the overarching purpose of civil practice and procedure, being the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible.[6]

2.6 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.[7] 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.[8]

2.7 The court may, subject to any question of privilege which may arise, order a party to produce a document which appears from its list of documents to be in the party's possession, custody or power.[9]

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1 *High Court Rules 2004 (Cth)* r 6.01.
2 *Compagnie Financiere 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 Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.
5 *Federal Court Rules* (Cth) O 15 r 1.
6 *Federal Court of Australia Act 1976* (Cth) s 37M.
7 *Federal Court Rules* (Cth) O 15 r 2(1).
8 Ibid O 15 r 2(2).
9 Ibid O 15 r 11(1).

2.8 However, the 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.[10] The word 'necessary' in this context has been interpreted as meaning 'reasonably necessary in the interests of a fair trial and of the fair disposition of the case'.[11]

2.9 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.[12]

2.10 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.[13]

Scope of discoverable documents

2.11 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 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.[14]

2.12 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.

2.13 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.

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10 *Federal Court Rules* (Cth) O 15 r 15.

11 *University of Western Australia v Gray (No 8)* [2007] FCA 89, [18]; *Gray v Associated Book Publishers (Aust) Pty Ltd* [2002] FCA 1045, [9].

12 *Practice Note CM 5: Discovery* (Federal Court of Australia), [2].

13 *Federal Court Rules (Cth)* O 15 r 7A.

14 Ibid O 15 r 2(3).

2.14 Orders for discovery of documents as contemplated in O 15 r 2 are referred to as orders for 'general discovery'.[15] 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.[16] However, the court has held that, not only should discovery be contained by the general categories in O 15 r 2,[17] 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.[18]

2.15 The practice and procedure for formulating limited categories of documents for the purposes of discovery is considered in Chapter 3.

2.16 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.[19]

2.17 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.[20] 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.[21]

2.18 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.[22]

2.19 While the rules require a party giving discovery to identify in their list of discoverable documents any document which they claim is privileged,[23] the party can rely on a privilege claim to refuse production of the document for inspection.[24]

Family Court of Australia

2.20 In the Family Court, as discussed below, the duty of disclosure is absolute. This may be a reflection of the court's jurisdiction. As noted in *Briese and Briese*, 'the need

15 Ibid O 15 r 5; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 2)* [2006] FCA 1001, [153].
16 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), [12.1.21].
17 *The 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.
18 *Racing New South Wales v Betfair Pty Ltd* [2009] FCAFC 119, [19].
19 *Federal Court Rules* (Cth) 15 r 2(6).
20 Ibid O 15 r 6.
21 Ibid O 15 r 2(4).
22 Ibid O 15 r 6A.
23 Ibid O 15 r 6.
24 Ibid O 15 r 11.

for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance'.[25]

Obligation to disclose documents

2.21 The *Family Law Rules* 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. The duty of disclosure is imposed from the start of pre-action procedures for a case and runs until the case is finalised.[26]

2.22 This means that a party must continue to make disclosures as circumstances change and as documents are created or come into the party's possession or control.[27] The rules require parties to comply with their duty of disclosure in a timely manner.[28]

Scope of disclosure obligations

2.23 The general duty of disclosure under the *Family Law Rules* requires each party to a case to give full and frank disclosure of all information relevant to the case.[29] The duty of disclosure 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.[30]

2.24 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.[31] In financial cases there are specific rules about full and frank disclosure of the party's total direct and indirect financial circumstances.[32]

Federal Magistrates Court of Australia

2.25 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.

Obligation to discover documents

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

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25 *Briese and Briese* (1986) FLC ¶91.713.
26 *Family Law Rules 2004* (Cth) r 13.01.
27 Family Court of Australia, *Duty of Disclosure* <www.familylawcourts.gov.au/> at 27 October 2010.
28 *Family Law Rules 2004* (Cth) r 13.01.
29 Ibid r 13.01.
30 Ibid r 13.07.
31 Ibid r 4.15, 4.26, pt 12.2 and chs 15 and 16 respectively.
32 Ibid r 13.04.

2.27 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.

Scope of discoverable documents

2.28 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.[33]

2.29 The *Federal Magistrates Court Rules 2001* (Cth) provide that a party may be required to discover documents which are or have been in that party's possession, custody or control.[34] However, a party may refuse to produce for inspection privileged documents disclosed in their affidavit of discoverable documents.[35]

Obligation to disclose documents

2.30 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 their financial circumstances, together with their application or response.[36]

2.31 The rules also impose an obligation on the respondent, in proceedings for maintenance, to bring certain categories of documents to court on the first court date.[37] In other financial matters, the applicant and respondent must file and serve on each other certain categories of documents within 14 days after the first court date.[38]

Scope of disclosure obligations

2.32 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.[39]

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33 *Federal Magistrates Court Rules 2001* (Cth) r 14.02.
34 Ibid r 14.04.
35 Ibid r 14.05.
36 Ibid rr 24.02–24.03.
37 Ibid r 24.05.
38 Ibid r 24.04.
39 Ibid r 24.03.

2.33 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.[40]

2.34 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.[41]

Issues with the laws of discovery

2.35 This part of the chapter discusses the issues that may arise in federal courts with respect to a party's obligation to give discovery and the scope of discoverable documents. Concerns with these aspects of discovery laws have been singled out by academic commentaries, law reform bodies and stakeholders consulted in the early stages of this Inquiry. This part also outlines options for reform to address these issues and the ALRC's preliminary views as to directions for reform of the legal framework for discovery in federal courts. The ALRC welcomes stakeholder suggestions for reforms to the laws concerning when discovery is available and what documents are discoverable in federal courts. In particular, the ALRC seeks feedback on the following questions and proposals.

High Court of Australia

2.36 The range of documents discoverable in the High Court, under the *Peruvian Guano* test of relevance, is quite broad. 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.[42]

2.37 The train of inquiry test has been narrowed in many Australian and overseas jurisdictions, including England and Wales where it was first developed.[43] In the High Court, however, the ALRC was told during initial consultations that the need for discovery arises so rarely that the application of the *Peruvian Guano* case is unlikely to cause any real problems.

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40 Ibid r 24.05.

41 Ibid r 24.04.

42 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), ch 21, [17].

43 *Civil Procedure Rules* (UK) pt 31, 'Disclosure and Inspection of Documents', commenced in January 1999 and provides for standard disclosure which is substantially identical to the documents required to be disclosed under *Federal Court Rules* (Cth) O 15 r 2.

2.38 The nature of the work undertaken in the High Court in its original jurisdiction is largely confined to constitutional work. Often that work proceeds by way of stated case under s 18 of the *Judiciary Act 1903* (Cth) or by demurrer (a plea which, for the purposes of obtaining a ruling on some question of law, admits the truth of the opponent's pleading but asserts that it does not lead to the conclusion for which the opponent contends).[44] In these types of cases, the need for discovery of documents is rarely likely to arise.

2.39 If a proceeding commenced in the original jurisdiction of the High Court did raise any significant factual issue, the ALRC has heard that it is likely the matter would be remitted to another court under s 44 of the *Judiciary Act.*

2.40 The ALRC is not aware of any recent cases in the High Court where the discovery of documents has been problematic but is interested in hearing stakeholder's views about issues or problems in relation to discovery in the High Court, particularly with regards to the *Peruvian Guano* test.

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

Federal Court of Australia

2.41 The Terms of Reference for this Inquiry indicate that a significant prompt for a review of discovery laws is 'the high and often disproportionate costs of discovery'.[45] In initial consultations, the ALRC heard concerns about the overuse of discovery in proceedings before the Federal Court and the excessively voluminous documents being discovered in Federal Court proceedings, both of which may increase the costs of discovery.

2.42 In this section of the chapter, the ALRC discusses its preliminary views on the possibility of a new threshold test that would further restrict the availability of discovery in the Federal Court. Here, the ALRC also puts forward its preliminary views on the need for greater limitations on the test for discoverable documents in proceedings before the Federal Court.

Unnecessary discovery of documents

2.43 In Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System, ALRC Report 89* (2000), the ALRC recognised the need for court supervision and control over the use of discovery in the Federal Court.[46] Subsequently, in 2002, the *Federal Court Rules* were amended to require a party to obtain leave of the court to file and serve a notice for discovery of documents.[47]

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44 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), 625.

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

46 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.73], [7.190].

47 *Federal Court Amendment Rules (No 3) 2002* (Cth).

2.44 However, doubts as to whether the leave requirement is working as an effective control over discovery have emerged. In a conference paper prepared for a joint Federal Court/Law Council of Australia (Law Council) workshop on the court's case management system in March 2008, Finkelstein J 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 requiring a party to justify a request for leave to obtain discovery by showing need or cause.[48]

2.45 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 'more strongly' control discovery.[49] His Honour noted '[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'.[50]

2.46 The same concerns were raised with the ALRC during initial consultations in 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 with any real prospects of discovering significantly relevant documents. At the same time, the judge hearing an application for discovery may be uncertain about his or her authority to refuse to make orders for discovery of documents. Whether leave to issue a notice for discovery is given is left to judicial discretion, although the court cannot make an order for the disclosure or production of documents unless it is 'necessary'.[51] The breadth given to the meaning of 'necessity' presents a wide scope for the parties to petition the court for discovery orders.

2.47 The ALRC has heard that a different attitude towards discovery is adopted in the court's Fast Track. 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 attempting to respond to commercial disputes in a more timely and cost effective manner.[52] At a conference on International Commercial Litigation and Dispute Resolution in 2009, Justice Gordon described the Fast Track attitude towards leave for discovery:

> 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*

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

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

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

51 *Federal Court Rules* (Cth) O 15 r 15.

52 See Ch 3 for discussion of the court procedures applying to matters in the Fast Track List.

> *1995* (Cth), a letter or admission from the other side, or an affidavit from a witness with the relevant knowledge).[53]

Options for reform

2.48 One way to ensure that judges in the Federal Court scrutinise more thoroughly whether leave for discovery is justified in the circumstances of a proceeding, would be to prescribe a specific threshold test for the granting of leave. There is precedent for this approach in s 45 of the *Federal Magistrates Act*, which provides that discovery is not allowed unless the court declares that 'it is appropriate, in the interests of the administration of justice'.

2.49 Another option was raised by Finkelstein J at the court's 2008 case management workshop. His Honour discussed the possibility of imposing restrictions on the availability of discovery and suggested that a cost-benefit analysis should be the bedrock principle and condition precedent to the granting of any leave for discovery.[54] Justice Finkelstein based this proposal on the *Federal Rules of Civil Procedure 2009* (US) r 26(b)(2)(C), which balances the burden or expense of the discovery against its likely benefit. Justice Finkelstein found it

> 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.[55]

2.50 Currently, the court must determine an application for leave for discovery 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.[56] In initial consultations, the ALRC sought stakeholder views about imposing specific restrictions on the availability of discovery in the Federal Court. The ALRC discussed with stakeholders the possibility of including a provision similar to s 45 of the *Federal Magistrates Act* in the *Federal Court of Australia Act 1976* (Cth), so that leave for discovery would not be allowed in the Federal Court unless the court made a declaration that it was appropriate in the interests of the administration of justice to allow the discovery.

2.51 There is a risk that such reform would give rise to disputes between the parties as to whether the relevant threshold had been reached, which may lead to litigation over whether the requirements of the legislation were satisfied in the circumstances of that case. Therefore, there may be concerns that the costs associated with discovery would increase as a result of this satellite litigation.

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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, 27-28 November 2009).

54 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [20].

55 Ibid, [10].

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

2.52 Reforms that impose greater restrictions on the availability of discovery may also put at risk the benefits of the discovery of documents in litigation. Discovery is an important part of the litigation process as it provides access to information required to resolve or determine the issues in dispute. In some cases, litigants might not be in a position to settle their disputes or present their cases at trial without discovery. The ALRC made this point in *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.[57]

2.53 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'.[58] The VLRC concluded that discovery in Victorian courts should continue to be available to the parties as of right.[59] This was despite submissions from some stakeholders that the discovery process should be viewed as a privilege and maintained for appropriate cases by leave of the court.[60] The Victorian Parliament has followed the VLRC's recommendation on this point, in that recent reforms to discovery laws in the *Civil Procedure Act 2010* (Vic) made no changes to limit the availability of discovery.

ALRC's views

2.54 Discovery of documents in proceedings before the Federal Court is important to ensure that cases are decided on their merits and on the basis of all relevant information. In principle, 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.

2.55 The ALRC's preliminary view is that the introduction of a new statutory threshold test to limit the availability of discovery in the Federal Court is unwarranted. The existing requirement under s 37M of the *Federal Court of Australia Act*, which in effect requires the court to determine an application for leave for discovery in the way that best promotes the overarching purpose of civil practice and procedure, is an appropriate limit on a party's ability to obtain discovery. The leave requirement, and the requirements of s 37M of the Act, represents a gatekeeper role for the court to regulate the use of discovery and disallow the unnecessary discovery of documents.

2.56 In the ALRC's view, introducing new rules to prohibit the court from granting leave for discovery—unless the party seeking leave meets a particular threshold test—is likely to lead to satellite litigation in relation to the requirements for leave. In this way, the ALRC expects that the costs incurred to resolve such discovery disputes would add to overall litigation expenses.

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57 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.73].

58 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.

59 Ibid, 426.

60 Ibid, 458.

2.57 The ALRC considers that the inclusive definition of the overarching purpose in s 37M of the *Federal Court of Australia Act* provides suitable guidance to judges considering applications for leave for discovery in the Federal Court. 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',[61] should be taken into account when the court decides whether to grant leave for discovery. The Explanatory Memorandum to the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* 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.[62]

2.58 Notwithstanding the ALRC's preliminary view in this regard, the ALRC is interested in receiving stakeholder views on whether existing restrictions on the availability of discovery are operating effectively to eliminate or reduce the burden of documents being discovered unnecessarily in proceedings before the Federal Court.

2.59 A separate issue is how discovery is being used in practice. The terms upon which leave for discovery is granted by the court will determine the range of discoverable documents. The procedures employed to make orders for discovery are considered in Chapter 3.

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

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

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

Overbroad discovery of documents

2.60 In 2000, when the ALRC delivered its report, *Managing Justice*, the Federal Court had recently amended O 15 to reflect the test of 'direct relevance' for the discovery of documents.[63] That test had been recommended in Lord Woolf's final

61 *Federal Court of Australia Act 1976* (Cth) s 37M(2)(e).

62 Explanatory Memorandum, *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), [18].

63 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.174]. The amendment to O 15 commenced on 3 December 1999.

report on the civil justice system in England and Wales[64] and had been incorporated into the *Civil Procedure Rules* (UK) a few months earlier.[65] The ALRC's report commented that:

> 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.[66]

2.61 Since the publication of the *Managing Justice* report, and with the rise of what Sackville J describes as 'mega-litigation' in the Federal Court, the experiences of some judges may have prompted them to query whether the test of 'direct relevance' has achieved its objectives. In *Seven Network Limited v News Limited* (the C7 case), Sackville J said 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.[67]

2.62 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.[68] Justice Sackville recently reflected on this, saying 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.[69]

2.63 However, the percentage of discovered documents that are not subsequently relied upon at trial may create a misleading perception that discovery rules are only successful when a substantial proportion of documents discovered are tendered in evidence. In the context of certain proceedings, it is possible that a single document may turn out to be crucial to the determination of the issues in dispute.

2.64 From 1 January 2011, the Federal Court's formulation of the 'direct relevance' test for discovery will apply in the Victorian Supreme Court on commencement of 2010 amendments to the *Supreme Court (General Civil Procedure) Rules 2005* (Vic),[70] replacing the *Peruvian Guano* test of relevance. In recommending this amendment, the VLRC acknowledged that 'there is little evidence to support the contention that a

64 Lord Woolf, *Access to Justice: Final Report* (1996), ch 12, [38].

65 *Civil Procedure Rules* (UK) r 31.6 commenced in April 1999.

66 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.179].

67 *Seven Network Limited v News Limited* [2007] FCA 1062, [4].

68 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [7].

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

70 *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).

narrower test will necessarily confine the scope of discovery, thereby saving costs and time'.[71] 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.[72]

2.65 In a 2008 workshop on the Federal Court's case management system, Finkelstein J made two observations about the 'direct relevance' test for discovery:

> One obvious point highlighted by the foregoing is that the scope of discovery being allowed under the current system is overbroad. If the system is to remain, the trial judge must actively manage the process, rejecting or restricting discovery requests in order to improve the yield of admissible evidence. A second, though perhaps less obvious, point is that while the cost to the party *taking* discovery might be staggering, the costs and burdens involved in making the discovery is that much more staggering. Order 15 rule 2 explicitly recognises that a discovery order effectively places a duty to search for the materials described in the order. The duty can be burdensome. If the current rule is retained the court must in all cases consider the cost and burdens associated with the performance of that duty.[73]

2.66 The general scope of discovery permitted by the test of 'direct relevance' under O 15 r 2 of the *Federal Court Rules* may be limited by orders pursuant to r 3.[74] In the normal course of proceedings, the Court should not make orders for 'general discovery' under r 2,[75] instead discovery—if necessary at all—should be limited to particular documents or issues, by orders under r 3.[76] However, the ALRC has been told that most discovery orders in Federal Court proceedings are for general discovery in accordance with O 15 r 2—with close to 70% of discovery orders being made by consent of the parties. This suggests that in most cases neither the court nor the parties are making serious attempts at limiting the ambit of general discovery.

2.67 In initial consultations, the ALRC heard widespread concerns about the burden of discovering vast categories of documents and large volumes of materials in proceedings before the Federal Court, as illustrated in the C7 case. This problem was generally raised by reference to the increasing quantity of electronic documents and information generated in contemporary trade and commerce and the growing capacity of electronic document storage and management systems with advancing computer technologies.

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71 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.

72 Ibid, 466.

73 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [8].

74 *Federal Court Rules* (Cth) O 15 r 3(1).

75 *Practice Note CM 5: Discovery* (Federal Court of Australia); *Kyocera Mita Australia Pty Ltd v Mitronics Corp Pty Ltd* [2005] FCA 242; *Pasini v Vanstone* [1999] FCA 1271.

76 *Racing New South Wales v Betfair Pty Ltd* [2009] FCAFC 119.

2.68 The same problem was noted in the United Kingdom in Lord Jackson's *Review of Civil Litigation Costs*, where the example was given of retrieving information from back-up tapes under orders for discovery as a 'vast expense and sometimes with no discernable benefit at the end'.[77] While this was his final report to the government, it is unclear at this stage which—if any—of Lord Jackson's recommendations will be implemented in the United Kingdom.

Options for reform

2.69 One way to eliminate masses of irrelevant documents from discovery would be to impose greater restrictions on the range of documents discoverable in the Federal Court. This approach was adopted in the rules applicable to Fast Track proceedings, which 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

(b) documents that have significant probative value adverse to a party's case.[78]

2.70 *Practice Note CM 8* defines a 'good-faith proportionate search' as a search undertaken by a party in which the party makes a good-faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive, having regard to the nature and complexity of issues raised by the case, including the type of relief sought and the quantum of the claim.[79]

2.71 The ambit of discovery has also been narrowed in the court's Tax List where the documents required to be disclosed must have a 'material' adverse affect on the party's own case or another party's case, or 'materially' support another party's case.[80] 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.[81]

2.72 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'.[82] The ALRC has heard that this concept is not necessarily an easy one for legal practitioners to interpret, since there is sparse judicial guidance in judgments, which leaves uncertain the issue of how it should be applied. The same comment might be made about the test of 'significant probative value' in relation to the Fast Track List.

2.73 Another model may be found in the *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'.[83] The requirement in international arbitration for discoverable documents to be 'material to the outcome of the case' imposes the same

77 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 41, [4.2].
78 *Practice Note CM 8 Fast Track (Federal Court of Australia)*, [7].
79 Ibid, [7.2].
80 *Practice Note Tax 1 Tax List* (Federal Court of Australia), [6.1].
81 Ibid, [6.1].
82 Ibid, [6.2].
83 *Rules on the Taking of Evidence in International Arbitration 2010*, art 3.

limitation as that in the court's Tax List and employs a similar concept to that of 'significant probative value' in Fast Track discoveries.

2.74 While limiting the range of discoverable documents might alleviate some of the complication, expense and inefficiency of the current process, it may also come with its own set of costs. Parties—particularly those unfamiliar with rules for more limited discovery—may litigate over compliance with narrower discovery obligations. For example, a party in search of the 'smoking gun' may assume it was not disclosed because their opponent did not search in 'good faith' and so apply to court for additional discovery. There may also be concerns that narrower discovery obligations provide parties with an excuse not to disclose relevant material. For example, a party might assume their opponent unfairly withheld documents on the unsound basis that they lacked the requisite 'probative value'.

2.75 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 *ad idem* about the significance of a particular point. At times, parties might agree that their case turns on a particular issue only to be told by the court in judgment that the 'real issue' is entirely different—and that one party's case failed for lack of evidence going to a point neither party anticipated.

2.76 These kinds of arguments and satellite litigation ensued when the current rule was introduced. In *Managing Justice*, the ALRC reported with respect to current 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'.[84]

2.77 However, the 2008 decision in *The University of Sydney v ResMed Ltd* suggests that legal practitioners are not necessarily interpreting or applying O 15 r 2 on a restrictive basis. In this case, where the Court directed that each party serve on the other a list of categories of documents of which it would seek discovery, the parties' requested categories of documents which were, in the Court's view, broader than the four classes of documents referred to in O 15 r 2(3).[85]

2.78 There is a risk that confining discovery to documents of 'significant probative value' would result in the parties incurring higher legal fees. A more stringent assessment of the extent of a document's relevance may require the involvement of more senior lawyers and, if so, costs would increase.

2.79 Such concerns are borne out by findings in Lord Jackson's *Review of Civil Litigation Costs*, which found that parties in the United Kingdom who strictly comply with the test of 'direct relevance' would disclose fewer documents, but incur higher costs, as it requires lawyers to evaluate the relevance of discoverable documents.[86] Lord Jackson pointed out that 'because of the continuing obligation [of discovery], the

84 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.179].

85 *The University of Sydney v ResMed Ltd* [2008] FCA 1020, [40].

86 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 41, [3.1].

exercise may have to be repeated if the pleadings are amended'[87] and additional costs would be incurred. However Lord Jackson reported that, in practice, solicitors simply continue to disclose everything that might be 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.[88]

2.80 There may also be concerns that narrowing the rules that define the ambit of discovery would have no practical impact unless the court, the parties and their lawyers give effect to the limits on discoverable documents. During initial consultations, the ALRC heard that nationally the Fast Track List and Tax List have had mixed results in narrowing the scope of discovery. The ALRC was told that parties to proceedings in these lists will continue to discover larger volumes of documents than permitted by the rules when the court lacks the capacity or willingness to enforce the limits.

2.81 Such discovery—broader than the rules would suggest—might also be a consequence of the nature of the proceeding. For example, some tax matters may require broad discovery where a question arises as to the nature and extent of a taxpayer's business or income-producing activity over a period of years. In such cases, the ALRC has been told, the parties might need to look at the totality of relevant documents—rather than assess a particular document in isolation—to determine whether each document materially supports or is materially adverse to one side's case.

ALRC's views

2.82 At this stage in the Inquiry, the ALRC's preliminary view is that reforms to limit the categories of documents discoverable in proceedings before the Federal Court are not necessary. The ALRC's view is that confining the ambit of discovery in the Federal Court (to those documents discoverable in Fast Track proceedings, for example) would be likely to increase the costs of discovery. There is a risk that such reform would create disputes between the parties about compliance with discovery obligations and parties would incur the cost of litigation to resolve those disputes. This would not be consistent with the Terms of Reference for this Inquiry, which set the objective of identifying 'means to limit the extent to which discovery gives rise to satellite litigation'.[89]

2.83 The VLRC's *Civil Justice Review* recommended narrowing the test for discovery in Victorian courts, while acknowledging that it would not necessarily reduce the time and expense incurred in litigation. The VLRC's reasoning was that 'a narrower discovery test will encourage important cultural change and assist parties to focus their attention on the main purpose of discovery in the litigation process'.[90]

2.84 The ALRC agrees that cultural change is required for the effective reform of discovery in the Federal Court. However, a better direction for cultural reform may be through changes to discovery practice and procedure. The ALRC is initially inclined to the view that the best way to focus the scope of discovery in the Federal Court is

87 Ibid, ch 41, [3.1].
88 Ibid, ch 41, [3.2].
89 The Terms of Reference at the front of this Consultation Paper.
90 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.

through effective judicial case management, rather than the laws governing what documents are discoverable. For example, where the range of issues in dispute is broad and complex, discovery often generates large numbers of documents. Narrowing and clarifying the issues in dispute may be one way of containing the volume of discoverable material. These issues are explored further in Chapter 3.

2.85 Nevertheless, the ALRC welcomes stakeholder views on the appropriate test for whether a document is discoverable in proceedings before the Federal Court.

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

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

(a) documents on which the party intends to rely; and

(b) documents that have significant probative value adverse to a party's case?

Family Court of Australia

Non-compliance with disclosure obligations

2.86 Based on initial consultations, the ALRC understands that disclosure obligations on the parties to proceedings in the Family Court are generally working well. If there are ever any issues with disclosure in Family Court proceedings, it is typically a matter of too little disclosure rather than too much. However, the ALRC was informed that parties will usually comply with the duty of full and frank disclosure and provide the documents required under the *Family Law Rules*. Instances of relevant information and documents being withheld in proceedings before the Family Court are, on the whole, isolated.

2.87 Where there is non-compliance with disclosure obligations in the Family Court, the court may deal with this issue in its judgment. In property matters, for example, the court may draw adverse inferences from non-disclosure and distribute assets accordingly. In *Marriage of Weir* the Full Court commented that:

> It seems to us that once it has been established that there has been a deliberate non-disclosure ... then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature.[91]

91 *In the Marriage of Weir* (1992) 110 FLR 403.

2.88 The court's ability to deal with non-disclosure was more recently expressed by the Full Court in *Marriage of Kannis*:

> 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.[92]

2.89 In such extraordinary cases where serious breaches of disclosure obligations occur, the court's authority to alter proprietary interests—to ensure a just and equitable order for property distribution—is illustrated in the following case study.

CASE STUDY

LGM & CAM & Ors [2009] FamCA 251

The applicant commenced proceedings for property settlement in the Family Court on 4 March 1997. The first respondent was the former wife of the applicant. Other respondents to the proceedings were relatives of the first respondent and private companies.[93] The final hearing before O'Ryan J occurred on 6 November 2007 and for a subsequent non-consecutive period of 68 days, eventually concluding on 5 September 2008. His Honour commented that 'this was an extraordinary case which I describe as an aberration'.[94]

The history of the marriage and the parties' shareholdings and relations with various companies were complex and claims of forgery, deception and fraud contributed towards a lengthy and costly case.[95] Costs incurred by the applicant in relation to his dispute with the first respondent in the Family Court exceeded $1.5m, and the public cost, according to O'Ryan J, was 'incalculable'.[96]

In his judgment, O'Ryan J commented on a number of factors that contributed to the complexity of the case. These included the 'complete and utter failure' of the first respondent to comply with disclosure obligations, discovery requirements and to produce documents to the Court.[97]

92 *In the Marriage of Kannis* (2003) 30 Fam LR 83.

93 *LGM & CAM & Ors* [2009] FamCA 251, [1]–[3]. The second respondent was the sister of the first respondent. The third and fourth respondents were, respectively, the father (deceased) and mother of the first and second respondents. The fifth and sixth respondents were private companies in which the first respondent had significant shareholdings.

94 Ibid, [38].

95 Ibid, [27].

96 Ibid, [23]. The estimated cost borne by the applicant in relation to all proceedings against the first respondent, including proceedings outside the Family Court, amounted to $5.1m.

97 Ibid, [28].

In this case, disclosure of documents was essential so as to determine the value of assets in the matrimonial pool.[98] However, precise determination of asset value was hampered by the first respondent's failure, amplified by the similar failure of other respondent family members, to disclose the existence and/or nature of her financial circumstances.[99] The applicant contended that such non-disclosure, and additional failure to provide discovery, were deliberate.[100] The applicant further contended that some documents produced were unauthentic and untruthful.[101]

For example, on 12 November 2007, several days after the commencement date of the hearing, the second respondent produced documents on behalf of the third and fourth respondents.[102] The applicant sought an order for an affidavit explaining the late production of relevant documents.[103] O'Ryan J found that the explanations were inconsistent with the second respondent's earlier accounts,[104] and later during cross-examination of the second respondent, his Honour found that she could not give an adequate explanation.[105]

O'Ryan J held that only 31 out of the 84 documents produced on 12 November 2007 had been previously produced,[106] and none of the produced bank cheques had been previously produced in the proceedings.[107] The applicant submitted that the documents had internal inconsistencies and that monetary and calculation figures on documents were fabricated.[108] His Honour agreed with the applicant and held that invoices were fabricated,[109] copies of bank cheques had forged signatures,110 cash books had falsified entries,[111] and stated that the behaviour of the first to fourth respondents were 'contumacious'.[112] His Honour further recounted instances where he had given express orders for discovery in favour of the applicant, but the first respondent had repeatedly failed to comply.[113]

In considering the value of available assets for the purposes of making orders, his Honour had to determine whether the applicant should be granted a distribution of assets from the matrimonial pool which

98 Ibid, [88].
99 Ibid, [91].
100 Ibid, [92] and [186]–[187].
101 Ibid, [191] and [462].
102 Ibid, [464].
103 Ibid, [464].
104 Ibid, [464].
105 Ibid, [468].
106 Ibid, [473].
107 Ibid, [485].
108 Ibid, [480].
109 Ibid, [483].
110 Ibid, [486]-[487].
111 Ibid, [504].
112 Ibid, [490] and [722].
113 Ibid, [1388], [1402], [1409] and [1487].

> amounted to more than the identified value of the pool itself.[114] The first respondent's deliberate non-disclosure and failure to provide discovery obscured the true value of her assets and financial resources,[115] and it was compounded by the fact that first respondent, in anticipation of marriage break-up, had diverted monies from the matrimonial business to a private company incorporated in Taiwan with the first to fourth respondents being the shareholders.[116]
>
> The applicant therefore submitted that instead of the usual 50% of monies being used in the calculation of an order for property distribution, 100% of the diverted monies should be added back to the matrimonial pool as a notional asset in order to arrive at a just and equitable order for property distribution.[117] The Family Court has the discretionary power to alter property interests pursuant to s 79 of the Family Law Act 1975 (Cth).[118]
>
> O'Ryan J agreed that an alteration of property interests in favour of the applicant should be made, given that the first respondent failed to discharge disclosure and discovery obligations, and that this alternation was the only manner through which a just and equitable outcome could be reached.[119]
>
> Among other things, orders were made to transfer a property to the applicant,[120] to transfer the entirety of liquidated monies from the matrimonial business to the applicant,[121] and to transfer shareholdings of the first respondent to the applicant.[122]

Overbroad disclosure of documents

2.90 Currently, the ALRC is not aware of any cause for concern regarding the amount of information or volume of documents required to be disclosed in proceedings before the Family Court. This may be due to the nature of family law matters, where the parties are generally familiar with each other's case including their respective financial circumstances. Non-court based family dispute resolution procedures prior to the commencement of proceedings in the Family Court may also help to draw out the main facts in issue and focus the objectives of disclosure obligations.

2.91 Despite the breadth of disclosure obligations in the Family Court, the transparency of cases in its jurisdiction may help to contain disclosure—as explained in the Explanatory Statement for the *Family Law Rules*:

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114 Ibid, [2217].
115 Ibid, [2217].
116 Ibid, [2230]–[2231].
117 Ibid, [2231].
118 Ibid, [2268].
119 Ibid, [2274].
120 Ibid, [2364].
121 Ibid, [2366]–[2367]. There was a surplus arrangement of monies payable to the first respondent, if the surplus exceeded $2m. However, there was likely to be little, if any, surplus.
122 Ibid, [2373].

> The 'litigation tool' of complete disclosure is an expensive process and is therefore still timed to commence only after the final resolution event. The purpose of this is that, at that stage, the parties should be in a position to know what issues need to be proven and they can therefore concentrate on obtaining disclosure relevant to those issues ... The court's expectation will be that parties will not go on a 'fishing expedition' or apply for a general order but will direct their mind to the higher standard and consider what is directly relevant to the disputed issues.[123]

2.92 The ALRC welcomes feedback from stakeholders as to whether disclosure obligations are working well in the Family Court, particularly with regards to the court's ability to deal with non-disclosure.

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

Federal Magistrates Court of Australia

2.93 The Terms of Reference for this Inquiry suggest that reforms are needed to 'reduce the expense of discovery and ensure that key documents relevant to the real issues in dispute are identified as early as possible'.[124]

2.94 This section of the chapter considers the interaction between restrictions on discovery under s 45 of the *Federal Magistrates Act* and disclosure obligations under part 24 of the *Federal Magistrates Court Rules*. This section also outlines the ALRC's proposal for clarification of disclosure obligations in financial matters under the Federal Magistrates Court's family law jurisdiction.

Non-disclosure in family law matters

2.95 During initial consultations, the ALRC heard about a particular issue with the operation of s 45 the *Federal Magistrates Act* in financial matters under the Federal Magistrates Court's family law jurisdiction. In some cases, parties may take the view that the obligation to disclose documents under part 24 of the *Federal Magistrates Court Rules* does not apply unless the court or a magistrate makes a declaration to allow discovery of documents pursuant to s 45 of the Act. This means the party does not disclose their financial documents voluntarily in the absence of court orders. This practice requires the party seeking documents to apply to the court for a declaration compelling disclosure.

2.96 While views may differ between the Court's registries, the ALRC has heard that some magistrates apply s 45 of the Act narrowly and are generally inclined to the view that discovery is not in the interests of the administration of justice. When the court dismisses an application for discovery under s 45 of the Act in a family law matter where a party refuses to disclose their financial circumstances voluntarily, it may be difficult for other parties to obtain relevant information and documents—more difficult

123 Explanatory Statement, *Family Law Rules 2004* (Cth) ch 13.
124 The Terms of Reference at the front of this Consultation Paper.

than it perhaps would have been had the proceeding been commenced in the Family Court.

2.97 On the one hand, it may be argued that the information needs of a case in the Federal Magistrates Court's family law jurisdiction are the same as proceedings in the Family Court. Disclosure of a party's financial circumstances should be as accessible in the Federal Magistrates Court as it is in the Family Court. This would mean that parties to proceedings in the Federal Magistrates Court are required to disclose relevant information and documents to each other without the need for court intervention to require the disclosure.

2.98 On the other hand, s 45 of the Act may be considered an important provision that helps the Federal Magistrates Court to achieve the purposes of being a simple and accessible forum for dispute resolution through informal and streamlined procedures. Section 45 of the Act sends a clear message that the court will not allow litigants to abuse discovery for tactical reasons, and so in most cases the parties to proceedings before the Federal Magistrates Court will make appropriate arrangements for informal discovery.

ALRC's views

2.99 The ALRC's preliminary view is that s 45 of the *Federal Magistrates Act*, which bars discovery unless the court declares that it is allowed, should be amended to clarify that disclosure obligations in financial matters under part 24 of the *Federal Magistrates Court Rules* apply independently of any declaration to allow discovery. This could be achieved by inserting a note to s 45 of the Act that refers to part 24 of the Rules.

2.100 The ALRC seeks to address concerns about instances of non-compliance with disclosure obligations by parties to financial matters under the Federal Magistrates Court's family law jurisdiction. Specifically, the proposed reform seeks to eliminate non-disclosure on the basis that disclosure obligations under part 24 of the *Federal Magistrates Court Rules* are contingent upon a court declaration to allow discovery pursuant to s 45 of the *Federal Magistrates Act*.

2.101 Part 24 of the *Federal Magistrates Court Rules* imposes a general duty of disclosure (including a duty to produce documents)[125] independently of any action of the court or any other party. A general duty of this nature should not be contingent on compliance with s 45 of the Act. Otherwise, s 45 would undermine the objective of disclosure in family law matters (to help parties focus on genuine issues, reduce cost and encourage settlement)[126] by requiring a party to incur the cost of applying to court for a declaration to allow discovery and potentially restricting access to relevant information.

125 *Federal Magistrates Court Rules 2001* (Cth) rr 24.04, 24.05.
126 *Family Law Rules 2004* (Cth) ch 13.

2.102 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.[127]

2.103 Subject to any restructure of the family court system, the ALRC is interested in stakeholder views on reforms to clarify that disclosure obligations under part 24 of the *Federal Magistrates Court Rules* apply independently of any declaration to allow discovery pursuant to s 45 of the *Federal Magistrates Act*.

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

127 Explanatory Memorandum, Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth).

3. Discovery Practice and Procedure in Federal Courts

Contents

Introduction

3.1 This chapter examines civil practice and procedure for the discovery of documents in proceedings before federal courts. Issues about the cost of a discovery process and its proportionality, in terms of the value of the documents sought in the context of the litigation, are explored in this chapter. In particular, the use of technology in the process of discovering electronically-stored information is considered here.

Procedural framework

3.2 This part of the chapter outlines the existing court rules and practices for discovery of documents in 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 documents.

High Court of Australia

3.3 There are no provisions in the *High Court Rules 2004* (Cth) 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.[1]

1 *High Court Rules 2004 (Cth)* r 6.01.

Federal Court of Australia

Pre-discovery practice

3.4 *Practice Note CM 5* implies that practitioners are expected to consider carefully any application for discovery, before approaching the court for orders, 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:

- is discovery necessary at all, and if so for what purpose?
- can those purposes be achieved:
    - by a means less expensive than discovery;
    - by discovery only in relation to particular issues; or
    - by discovery (at least in the first instances) only of defined categories of documents?
- particularly in cases where there are many documents, should discovery be given in stages, for example, initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
- should discovery be given in the list of documents (as required by O 15 r 2(2) of the *Federal Court Rules* (Cth)) by general description rather than by identification of individual documents?[2]

Planning for electronic discovery

3.5 Where discovery involves significant amounts of electronically-stored information (ESI), *Practice Note CM 6* states that before the court will make orders for electronic discovery 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.[3]

3.6 Parties are also expected to reach an agreement on protocols for the management of electronic documents in litigation.[4] *Practice Note CM 6* provides a Default Document Management Protocol which 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 under the practice note.

3.7 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

2 *Practice Note CM 5: Discovery (Federal Court of Australia)*, [1].
3 *Practice Note CM 6: Electronic Technology in Litigation (Federal Court of Australia)*, [6].
4 Ibid, [7].

resolution of any areas of disagreement between the parties concerning their discovery plan or document management protocol.[5]

3.8 A checklist of the issues which 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.[6]

3.9 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.[7] 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.[8]

Application for discovery

3.10 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.[9] 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.[10]

3.11 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.[11]

Orders for discovery

3.12 *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.[12] 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).[13] However, 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

5 *Federal Court Rules* (Cth), O 10 r 1(2)(i); *Practice Note CM 6: Pre-Discovery Conference Checklist (Federal Court of Australia)*, [9].
6 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia).
7 Ibid, [9.1].
8 Ibid, [9].
9 *Federal Court Rules* (Cth), O 10 r 1, O 15 r 1.
10 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [1.2].
11 *Latec Finance Pty Ltd v Jury (1960) 77 WN (NSW) 674.*
12 *Practice Note CM 5: Discovery* (Federal Court of Australia), [1(a)–(b)].
13 *Federal Court Rules* (Cth) O 15 r 5; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 2)* [2006] FCA 1001, [153].

discovery.[14] *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 give general discovery.[15] 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.[16]

3.13 When making orders for discovery, the court must have regard to s 37M of the *Federal Court of Australia Act 1976* (Cth) which provides that the overarching purpose of civil practice and procedure is to facilitate the just resolution of disputes:

(a) according to law; and

(b) as quickly, inexpensively and efficiently as possible.[17]

Serving a list of documents

3.14 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.[18] 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.[19]

3.15 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.[20] If the party is represented by a solicitor, the solicitor must certify that the list and the statements in it are correct.[21]

Production of documents

3.16 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.[22] The party to whom a document is produced may make copies at their own expense.[23]

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14 *Federal Court Rules* (Cth), O 15 r 3.
15 *Kyocera Mita Australia Pty Ltd v Mitronics Corp Pty Ltd* [2005] FCA 242, [5].
16 *Pasini v Vanstone* [1999] FCA 1271, [30].
17 *Federal Court of Australia Act 1976* (Cth), s 37M.
18 *Federal Court Rules* (Cth), O 15 r 2(2).
19 Ibid, O 15 r 2(1).
20 Ibid, O 15 rr 6(3),(4),(6).
21 Ibid, O 15 r 6(8).
22 Ibid, O 15 r 11(1).
23 Ibid, O 15 r 12.

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.[24]

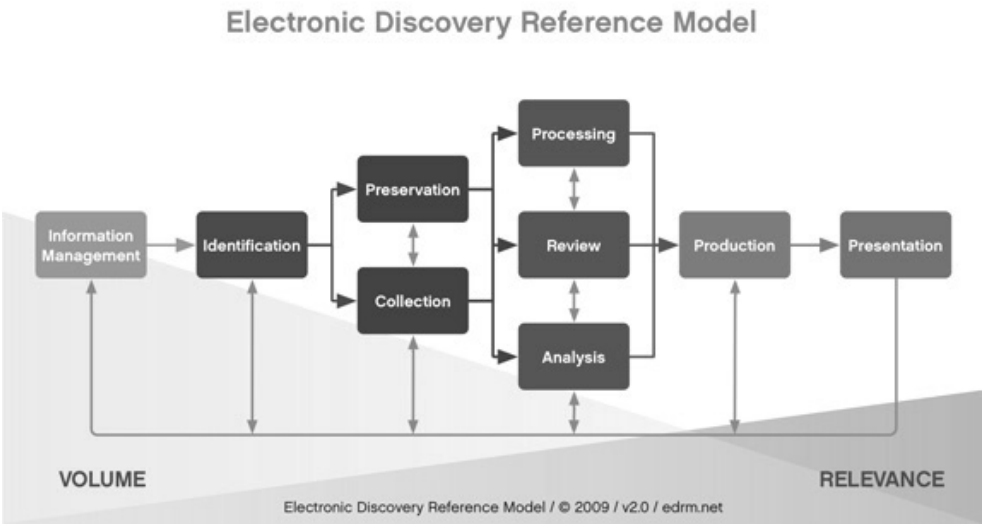
3.17 Order 15 r 13 provides that the court may, at any stage in a proceeding, order a party to produce to the court for inspection any documents in its possession, custody or control relating to any matter in question, and the court may deal with the document as it thinks fit.

3.18 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 court for inspection to decide the validity of the privilege claim or objection.[25]

Producing electronic documents

3.19 The court may order that documents be produced in electronic format, in which case the party should provide other parties with documents in a useable, searchable electronic format or in the electronic format in which the documents are ordinarily maintained.[26]

3.20 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.[27]



3.21 The following is a simplistic and brief description of the stages in the EDRM.

24 Ibid, O 15 r 11(1)(e).
25 Ibid, O 15 r 14.
26 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [5.1].
27 *EDRM: The Electronic Discovery Reference Model* (2010) <www.edrm.net> at 25 October 2010.

Information management

3.22 This is the way in which potential litigants organise their electronic information, so that documents can easily be found. The obligations on litigants to preserve relevant documents are considered in Chapter 4.

Identification

3.23 This 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 pin-point 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, back-up tapes or disaster recovery systems may be identified as potential locales of relevant information.

3.24 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.

Preservation/Collection

3.25 This is the process 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.

3.26 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.

Processing/Review/Analysis

3.27 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.

3.28 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).

3.29 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.

Production

3.30 This 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

3.31 This 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

3.32 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.[28]

Particular discovery

3.33 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.[29]

Enforcement of discovery obligations

3.34 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,[30] also possesses such inherent power as is necessary to regulate processes such as discovery and to prevent abuse of process.[31]

3.35 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.[32]

28 *Federal Court Rules* (Cth), O 15 r 7A.
29 Ibid, O 15 r 8.
30 *Federal Court of Australia Act 1976* (Cth), s 5(2).
31 *Riley McKay Pty Ltd v McKay* [1982] NSWLR 264.
32 *Federal Court of Australia Act 1976* (Cth), s 43 (3)(a), (b).

Family Court of Australia

Disclosure procedures

3.36 Chapter 13 of the *Family Law Rules 2004* (Cth) imposes an obligation on each party, from the start of pre-action procedures for a case, to provide to the court and to the other party full and frank disclosure of all relevant information in a timely manner.[33] In all cases this includes disclosure of relevant documents in the parties' possession or under their control.[34]

3.37 The parties to a financial case must make full and frank disclosure of their financial circumstances.[35] This involves filing and serving a financial statement with the application or response.[36]

3.38 A party to proceedings before the Family Court must give an undertaking to the court stating that the party has read parts 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.[37] This undertaking must be filed at least 28 days prior to the first day before a judge.[38]

3.39 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.[39] 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.[40] The court may make an order directing disclosure of documents by electronic communication.[41]

3.40 A party who breaches their disclosure obligations in the Family Court may be in contempt of court and liable to costs orders.[42] 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.[43] 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.[44]

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33 *Family Law Rules 2004* (Cth), r 13.01.
34 Ibid, r 13.07.
35 Ibid, 13.04.
36 Ibid, r 13.05.
37 Ibid, r 13.15. This does not apply to an independent children's lawyer.
38 Ibid, r 13.16.
39 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.
40 Ibid, r 13.20.
41 Ibid, r 13.24.
42 *Family Law Act 1975 (Cth)*, ss 112AP, 117.
43 Ibid, s 117 (1).
44 *Family Law Rules 2004* (Cth), r 13.15.

Federal Magistrates Court of Australia

3.41 The Federal Magistrates Court's jurisdiction overlaps with that of the Federal Court and the Family Court. Procedures for discovery prescribed in the *Federal Magistrates Court Rules 2004* (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.

Discovery procedures

3.42 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.[45] 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.[46]

3.43 The rules require the party ordered to give discovery to file an affidavit of documents.[47] 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.[48]

3.44 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.[49]

Disclosure in financial matters

3.45 Part 24 of the *Federal Magistrates Court Rules* applies to financial matters under the Federal Magistrates Court's family law jurisdiction. Rule 24.02 provides that an applicant or respondent must file and serve a financial statement with their application or response at the commencement of proceedings.[50] In this statement, the party must make full and frank disclosure of their financial circumstances.[51]

3.46 In proceedings for maintenance, the respondent must bring particular categories of documents to the court on the first court date such as tax returns, pay slips and bank statements.[52] In other financial matters, unless the court orders otherwise, the parties must serve on each other within fourteen days of the first court date specific categories of documents including tax assessments and business activity statements.[53]

45 *Federal Magistrates Court Rules 2001* (Cth), r 14.02 (1).
46 Ibid, r 14.02 (2).
47 Ibid, r 14.03.
48 Ibid, r 14.05.
49 Ibid, r 14.09.
50 Ibid, r 24.02.
51 Ibid, r 24.03.
52 Ibid, r 24.05.
53 Ibid, r 24.04.

Issues with the process of discovery

3.47 This part of the chapter looks at the issues that can arise in the discovery of documents in proceedings before federal courts, and the current practices and procedures designed to address them. It also assesses the extent to which civil practice and procedure effectively deals with discovery issues, and explores directions for reform of the discovery process in the federal courts.

High Court of Australia

3.48 During initial consultations, the ALRC heard that there have not been any obvious problems in managing the process of discovery in the High Court. Such comments were made in light of the fact that the need for discovery of documents rarely arises in the High Court.

3.49 However, the ALRC is interested in hearing from stakeholders about any issues encountered in relation to the procedures adopted by the High Court for the discovery of documents in civil proceedings.

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

Federal Court of Australia

3.50 In *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (2000), 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'.[54] The issues of scale, cost and delay that can plague a discovery process are most likely to arise in complex cases in the Federal Court's jurisdiction. This section of the chapter looks at the need for strong case management on the part of the court, the parties and their lawyers, to control the process of discovery in Federal Court proceedings.

High and disproportionate costs

3.51 The discovery of documents may be considered a critical element of fact-finding, truth seeking and decision making in civil litigation.[55] 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.[56]

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

55 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.

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

3.52 However, parties to civil proceedings may find that the benefits of discovery come at a high cost. Yet, as discussed below, it is not just the amount of money spent on discovery that causes 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.

3.53 The high price of a discovery process was noted in the Victorian Law Reform Commission's *Civil Justice Review*, which found that 'the objectives of the [discovery] process are either not being achieved or can only be achieved at great cost'.[57] A number of other commentators have also singled out the discovery process as a major litigation expense. 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'.[58]

3.54 Moreover, there are concerns that the high costs of discovery are pricing litigants out of the court system. Chief Justice James Spigelman of the New South Wales Supreme Court has noted 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'.[59] 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 the United Kingdom (UK) in 2009:

> Indeed the realisation must be if the situation is distilled in to the simple question 'justice or costs?' costs, commercially, must prevail.[60]

3.55 Despite such concerns about the high costs of discovery, there has been no systematic collection of data on discovery costs in Australia. An extensive survey of the cost of legal representation was undertaken in 1998-99 for *Managing Justice*. In particular, the survey 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.[61]

3.56 Since 1999 the range of material potentially to be discovered has increased exponentially through advancing computer technologies—with an attended and 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*

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

58 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), [75].

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

60 Phase 2 Submission, Commercial Litigation Association, cited in R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 37, [3.5].

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

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.[62]

3.57 E-discovery costs can also include expensive computer software and hardware. For example, the ALRC heard during initial consultations that the discovery of information stored on old back-up tapes can require the reconstruction of outmoded hardware at great expense in order to read the tapes only to discover completely irrelevant information.

3.58 A number of commentators have noted the distorting effect that technology has had on discovery costs. This includes Acting Justice Ronald Sackville of the New South Wales Supreme Court, formerly a judge of the Federal Court of Australia, who has remarked on the discovery process:

> It is here 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.[63]

3.59 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 the litigation. The increasing amount of information which contemporary litigants must deal with was recently highlighted in *Betfair v Racing New South Wales*.[64] In this case, one source of discoverable documents is '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'.[65] One terabyte is said to be the equivalent of 500 million printed pages.[66]

3.60 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 taken up by the Access to Justice Taskforce established by the Australian Government Attorney-General's Department, in its report *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, which stated that:

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

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

64 *Betfair v Racing New South Wales* [2010] FCA 603.

65 Ibid, [331].

66 C Ball, *Expert Explodes Page Equivalency Myth* (2007) <www.law.com/> at 8 November 2010.

> The cost of discovery continues to be very high, and often disproportionate to the role played by discovered documents in resolving disputes.[67]

3.61 Proportionality in this sense may be difficult to measure. The value of discovery is not necessarily limited to obtaining documents to tender at trial but may extend to encouraging settlement and clarifying the issues in dispute. 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.[68] However, such research has not been undertaken as far as the ALRC is aware.

3.62 The ALRC has heard that the vast majority of litigation settles before trial but not until after discovery of documents. The ALRC was also told that, where settlement is not achieved, parties often abandon certain issues in dispute after discovery is given. For example, in tax matters, the 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 the lack of knowledge of a particular transaction prior to discovery may drive disputes over such issues. In these cases, the time taken at hearing will generally be significantly reduced, in part as a result of discovery.

3.63 By comparison, a study of discovery practices in the United States (US) 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.[69]

3.64 In Australia, some weight might be given to obiter dictum in judgment concerning the futility of discovery as an evidence-gathering process. For instance, in *Baulderstone Hornibrook v Qantas Australia Limited*, Finkelstein J explained to the parties what use the majority of the documents gathered in the conduct of the proceedings, and tendered in evidence, proved to be in determining their dispute:

> BHPL tendered twenty affidavits (which took up three files) and sixteen files of exhibits. Qantas was not outdone. It tendered two lever arch folders of affidavits and eight files of exhibits, many of which were copies of BHPL's exhibits and, to make matters worse, there was no mechanism to identify which were duplicates. It turned out that much of the evidence put in by each side was irrelevant to any fact in issue and should never have been tendered ... Hundreds of pages were never referred to by counsel. The parties seemed to have assumed that it was my task to read all the material and make such use of it as best I could. At the outset of this judgment I wish to record that I have done no such thing. Although I did read most exhibits (including records of meetings, diaries and albums of photos) I could not understand all the terminology and abbreviations employed by the authors of the documents and the relevance of others simply escaped me. To a substantial extent, therefore, I have only

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67 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.

68 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <www.aija.org.au/> at 8 November 2010.

69 T Willging, J Shapard, D Striensta and D Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases* (1997).

> considered those exhibits to which I was taken by counsel, although I have no intention of reviewing the voluminous evidence in detail.[70]

3.65 Commentary from judges clearly highlights the expense wasted on discovery when viewed from the bench, in terms of the disproportionately small number of discovered documents referred to by parties at trial. This concern was voiced by former Chief Justice of the Federal Court, Michael Black, who considered that courts

> need to take a more interventionist role to avoid having trolley loads of documents being wheeled into court when hardly any of them are likely to be referred to and when every page will add to the cost of the litigation.[71]

3.66 The Access to Justice Taskforce surmised that 'the vast majority of documents obtained through discovery are not of sufficient relevance to be used in the case'.[72]

3.67 The ALRC is interested in stakeholder experiences in relation to the value or utility of the discovery process on the whole, relative to its costs in general. The ALRC encourages stakeholders to provide examples or illustrations of the degrees to which discovery costs weigh against the value of the documents sought in the context of the litigation.

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

(a) too much information;

(b) too little information; or

(c) about the right amount of information

to facilitate the just and efficient disposal of the litigation?

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

Discovery of electronic documents

3.68 Electronic technologies have proved necessary to manage the large volumes of hardcopy documents being discovered in Federal Court proceedings. Transforming hardcopy documents into electronic format made vast amounts of information more manageable. The history of e-discovery was described as follows:

> An early implementation of electronic discovery technology in Australia was to number the hardcopy documents and manage the index data (eg document number, author, date, type, title etc.) in a database. The index data could then be exchanged electronically by the parties. This was similar to records management technologies in use at that time. In 1990, the $1 billion collapse of the Estate Mortgage Trust led to complex legal proceedings with 12 parties and 750,000 documents. This spurred the

70 *Baulderstone Hornibrook v Qantas Australia Limited* [2003] FCA 174, [1].

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

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), 105.

> development of the Ringtail software suite where the index database was linked to images of the documents. Both the index data and the document images were electronically discovered by the parties in accordance with an exchange protocol.[73]

3.69 E-discovery has evolved from a hardcopy document management system to the means by which documents are discovered from source to production in electronic format. This follows contemporary corporate behaviour whereby 98% of documents now exist in electronic form only.[74]

3.70 Electronic discovery has been facilitated by changes to the law. In particular, the enactment of the *Electronic Transactions Act 1999* (Cth) affirmed the legal status of electronic records. In addition, proof of communications contained in electronic records was facilitated by amendments to s 161 of the *Evidence Act 1995* (Cth).[75]

3.71 The critical issue that arises in an e-discovery process is whether the conduct of the search for electronic documents carried out by the party giving discovery, and the extent of it, was 'reasonable'.[76] This requirement echoes the concerns discussed above about the need for proportionality in the cost of a discovery process.

3.72 Whether the search satisfies the threshold of 'reasonableness'—and is 'good enough',[77] as described by Lord Jackson—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.[78] 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.[79]

3.73 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 emails stored electronically in computer terminals, servers and backup tapes. However, Mansfield J ultimately held that those emails were not of sufficiently insubstantial relevance to warrant simply ignoring them.[80]

3.74 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

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73 D McGrath, *Australian E-Discovery Industry Grows Up* (2010) <http://idm.net.au/> at 9 November 2010.
74 S Byrne, 'E-Discovery: Where Information Management and Litigation Meet' (Paper presented at Institute for Information Management Conference, Melbourne, 27 April 2010).
75 *Evidence Amendment Act 2008* (Cth), s 68 commenced 1 January 2009. This provision was recommended in Australian Law Reform Commission, *Uniform Evidence Law,* Report 102 (2005), Rec 6–3.
76 *Federal Court Rules* (Cth) O 15 r 2(3).
77 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009), ch 40, [3.20].
78 *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1623.
79 *Molnlycke AB v Procter & Gamble (No 3)* [1990] RPC 498, [503].
80 Ibid, [9]-[10].

electronic information—had the defendant not already embarked upon the course of recovering the deleted emails from the backup tapes.[81]

3.75 A particular issue that can arise in an e-discovery process is the extent to which it is 'reasonable' for a party to search through back-up tapes or disaster recovery systems. This is a question of fact and degree and, therefore, will depend on the circumstances of each case—which creates an element of uncertainty for the party giving discovery. For example, in *BT (Australasia) Pty Ltd v New South Wales & Telstra*,[82] 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.[83]

3.76 The limits of a 'reasonable search' establish a measure of 'proportionality' in the discovery process, in terms of the resources that a party must devote to the discovery of relevant electronic documents. This may be especially important where litigants store electronic documents in a vast and complex network of electronic databases located across a number of countries. However, a proportionate discovery process will not necessarily provide full and frank disclosure of all relevant material. This was pointed out by Morgan J of the High Court of England and Wales in *Digicel (St Lucia) Ltd v Cable & Wireless*:

> The rules do not require that no stone be left unturned. This may mean that a relevant document, even a 'smoking gun' is not found. This attitude is justified by considerations of proportionality.[84]

3.77 Therefore the conduct of a discovery process, especially where extensive electronic material is involved, gives rise to a volatile tension between the parties. Expansive searches are more likely to uncover greater amounts of relevant information offering some assistance to the requesting party's case but carry a substantial costs burden for the party giving discovery. Reasonable or proportionate searches are more affordable for the discovering party but will inevitably bypass unknown quantities of potentially relevant material sought by the requesting party. In his *Review of Civil Litigation Costs* in the UK, Lord Jackson described this as the dilemma of the electronic age:

> the existence of a vast mass of electronic documents presents an acute dilemma for the civil justice system. On the one hand, full disclosure of all electronic material may be of even greater assistance to the court in arriving at the truth than old style

81 *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [2007] WASC 65 (22 March 2007).
82 *BT (Australasia) v New South Wales & Anor (No 9)* [1998] FCA 363.
83 Ibid[20].
84 *Digicel v Cable & Wireless* [2008] EWHC 2522, [46].

> discovery of documents. On the other hand, the process of retrieving, reviewing and disclosing electronic material can be prodigiously expensive.[85]

3.78 While electronic technologies may be responsible for the sheer volume of potentially discoverable material in modern litigation, technological advances may also offer some assistance in cleaning up the mess it creates for a discovery process. Advanced software systems can provide sophisticated means of reducing time and expense spent on the discovery of electronic documents. The ALRC is interested in hearing from stakeholders about the technical details of different approaches to e-discovery that help to save time and costs in the process.

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

Limiting discovery by categories or issues

3.79 The Federal Court has sought to prevent unnecessary expense in the discovery process by limiting discovery obligations in each case to particular issues in dispute or specific categories of documents. This policy was first stated in *Practice Note 14*, issued on 12 February 1999, now replaced by *Practice Note CM 5* considered above. In these practice notes, the court expresses its intention to avoid general discovery and its expectation that practitioners should limit discovery requests. The adoption of this approach was followed by amendments to the *Federal Court Rules* in 2004, to clarify that the court may limit discovery by orders under O 15 r 3 on its own initiative rather than on application by a party.[86]

3.80 The principles that should guide parties when drafting descriptions of categories—as Lindgren J has pointed out—are found in O 15 of the *Federal Court Rules*. His Honour discussed the relationship between discovery by 'categories of documents' and O 15 of the Rules in a number of cases,[87] including *The University of Sydney v ResMed Ltd*, where Lindgren J stated 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).[88]

85 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009), ch 40, [1.1].
86 *Federal Court Amendment Rules 2004 (No 1) 2004* (Cth), item 24.
87 *The 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.
88 *The University of Sydney v ResMed Ltd* [2008] FCA 1020, [40].

3.81 In January 2000, shortly after the Federal Court introduced *Practice Note 14*, the ALRC's *Managing Justice* report noted 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.[89]

3.82 In practice, limiting the scope of discovery requires the parties and their lawyers to make decisions about what it is specifically that the party wants to discover. It also requires active judicial case management to ensure that litigants are controlling their requests for discovery in the interests of keeping the process within manageable bounds.

3.83 Limited discovery might not have proved as successful as it may have been wished. 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 Law Council of Australia's 2006 *Final Report in Relation to Possible Innovations to Case Management* described this as the 'gaming' process of the categories stage in litigation; whereby the requesting party rolls the dice and hopes for a winner:

> 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).[90]

3.84 There are also concerns that the court has abdicated its responsibility for supervising the parties and managing the development of categories for discovery. The absence of judicial case management was commented upon by the Intellectual Property Committee of the Law Council, in the Law Council's report on case management innovations:

> 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.[91]

3.85 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, at a workshop on the court's case management system in 2008, summarised the current position as follows:

> 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

89 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.180].

90 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), [84].

91 Ibid, [85].

> 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.[92]

3.86 However, the ALRC has also heard that most discovery orders in Federal Court proceedings are for general discovery in accordance with O 15 r 2—with close to 70% of discovery orders being made by consent of the parties. This suggests that in most cases disputes do not arise over the categories of discoverable documents, since the parties agree to the general categories in O 15 r 2. It also tends to confirm that the court is not making serious attempts to limit the ambit of discovery to specific documents or issues in dispute, by orders under O 15 r 3.

3.87 In view of such concerns, the ALRC seeks feedback from stakeholders on the extent to which limited discovery has been successfully implemented in the Federal Court and whether this has reduced the burden of discovery.

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

Discovery plans and pre-discovery conferences

3.88 The Federal Court has sought to ensure proportionality in the search for electronically-stored information by imposing an expectation on litigants to discuss and agree upon a practical and cost-effective discovery plan.[93] In addition, the court may require the parties to attend a pre-discovery conference to address these issues.[94] The former Chief Justice, Michael Black, first issued these directions on 29 January 2009 under a revised *Practice Note 17*. 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.[95]

92 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [9].

93 *Practice Note CM 6: Electronic Technology in Litigation (Federal Court of Australia)*, [6].

94 Ibid, [7]; *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [9].

95 S Byrne, *Formal Update: Federal Court of Australia Practice Note 17* (2008) <www.elitigation.com.au/> at 9 November 2010.

3.89 Similar procedures have been established in other Australian and overseas jurisdictions,[96] aimed at achieving agreement between the parties under the supervision of the court as to the conduct of an electronic discovery process. In the US, parties are required to 'meet and confer' under r 26 (f) of the *Federal Rules of Civil Procedure 2009* (US) to develop a proposed discovery plan. A report outlining the plan must then be submitted to the court within 14 days of the conference.[97] Following receipt of the report, the court is required to hold a pre-trial conference under r 16 (b) including for the purposes of issuing a scheduling order setting down a timeframe for carrying out the discovery plan. At this point, the court may modify the extent of the proposed discovery or include other appropriate matters.[98]

3.90 In the UK, *Practice Direction 31B* issued under the *Civil Procedure Rules 1998* (UK) requires the parties to discuss the disclosure of electronic documents before the first case management conference or even before proceedings are commenced in complex cases. To assist this discussion, an Electronic Document Questionnaire is available for the parties to complete and exchange 'in order to provide information to each other in relation to the scope, extent and most suitable format for disclosure of Electronic Documents'.[99] The parties are required to submit to the court a summary of the matters on which the parties agree in relation to disclosure of electronic documents as well as any areas of disagreement.[100] The court may then give directions in relation to electronic disclosure at the first case management conference.[101]

3.91 The Federal Court's practice note was reported to be operating satisfactorily, shortly after it was revised, when Lord Jackson spoke with Federal Court judges in March 2009 during his *Review of Civil Litigation Costs*.[102] During initial consultations in the present Inquiry, the ALRC has heard that parties often attempt to make informal agreements as to the scope of an electronic discovery process. The ALRC was told that in some cases the parties may be able to agree on a discovery plan, but in many cases the parties will disagree as to the appropriate conduct of an electronic discovery process—with disputes often arising over the expected burden to the discovering party, and bearing in mind the adversarial nature of litigation. Moreover, the ALRC was informed that parties typically discuss a discovery plan only after the parties have established the relevance of their own electronically-stored information through extensive searches, as parties need to review all of their own documents to draft their

96 See: New South Wales Supreme Court, *Practice Note SC Gen 7: Use of Technology* (2008) <www.lawlink.nsw.gov.au/> 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) <www.supremecourt.vic.gov.au/> at 5 November 2010; *Practice Direction No 2 of 2002: Guidelines for the Use of Technology in any Civil Matter (NT);* Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents*; *Federal Rules of Civil Procedure 2009* (US), r 26.

97 *Federal Rules of Civil Procedure 2009* (US), r 26(f)(2).

98 Ibid, r 16(b)(3).

99 Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents*, [10].

100 Ibid, [14].

101 Ibid, [15].

102 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009), ch 40, [7.9].

pleadings and to position themselves in negotiations with other parties as to the conduct of the discovery process.

3.92 The ALRC also heard that the extent to which judges are actively involved and interested in resolving disputes between parties as to the conduct of an electronic discovery process, and determining the existence and appropriateness of a discovery plan before making orders for electronic discovery, varies between individual judicial officers as well as court registries. The ALRC was similarly informed that parties might or might not be required to address the terms of any arrangements for e-discovery at a directions hearing or case management conference, depending on the preferences of the particular judge to whose docket the case is assigned. Despite the expectation stated in *Practice Note CM 6* that parties will have discussed and agreed upon a discovery plan before the Court makes an order for electronic discovery, there were suggestions that judges are generally reticent to get into the detail of the mechanics of a discovery process. One stakeholder went so far as to adapt a quote often attributed to Otto von Bismarck, comparing the discovery process to a sausage factory, suggesting that 'judges are happy to eat the sausages but don't want to know how they are made'.

3.93 In many cases, the party giving discovery may be doing so with some degree of uncertainty as to whether its search techniques are legally sound or defensible. The ALRC has heard that litigants in this situation will often make sure their searches are more than 'reasonable' to avoid challenges from another party and possible rebuke by the court. However 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 is a lengthy and costly process, or the result of simple lack of due diligence on the part of litigants and their lawyers.

3.94 In cases where the requirements of a 'reasonable search' have not been determined in advance, the discovering party's understanding of its obligations may fall short of that held by the requesting party and the court. Both parties to *Galati v Potato Marketing Corporation of Western Australia (No 2)*[103] gave discovery in this case. However the respondent identified a number of categories of documents for which it did not search, on the basis that it would be 'very onerous, time consuming and expensive'.[104] The court was not satisfied that searching for those documents would have been so burdensome that non-disclosure should be allowed and for that reason ordered further discovery.[105]

3.95 In some cases, the party giving discovery might seek court directions to clarify the extent of its search obligations where no agreement had previously been made with the requesting party. A recent example of this scenario is *Police Federation of Australia v Nixon*.[106] In this case, Victoria Police applied for a declaration that

103 *Galati v Potato Marketing Corporation of Western Australia (No 2)* [2007] FCA 919.
104 Ibid, [11].
105 Ibid, [58]-[61].
106 *Police Federation of Australia v Nixon* [2010] FCA 315.

'[Victoria Police] is not required to conduct further searches for electronic documents stored on G Drives'.[107] The court made the order sought in this case, as Ryan J was persuaded that:

> the expense and trouble which would be incurred would far outweigh any potential assistance to the applicants' case which they might derive from further searches of the "G drives". [108]

3.96 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'.[109]

3.97 The ALRC seeks feedback from stakeholders on the extent to which the model espoused in *Practice Note CM 6* has been successful in guiding the proportionate discovery of electronic material—in terms of the parties' obligation to finalise a practical and cost-effective discovery plan and the court's use of pre-discovery conferences to address these issues—before orders for electronic discovery are made. In particular, the ALRC is interested in hearing from stakeholders whether the expectations stated in *Practice Note CM 6* for parties to exchange their best preliminary estimate of the cost associated with discovery, and to agree on a timetable for discovery, are being met in practice.

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

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

Options for procedural reform in the Federal Court

3.98 In *Managing Justice*, the ALRC found that 'badly managed discovery is widely regarded as the cause of significant cost, delay and unfairness to the parties'.[110] This part of the chapter considers a number of ways to procure better management of the discovery process. It looks at various options for reform, some developed in previous reviews of discovery and others suggested by stakeholders during initial consultations in this Inquiry. It also outlines the ALRC's preliminary views on directions for reform of the discovery process.

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107 Ibid, [2].
108 Ibid, [33].
109 *Moody v Turner* (Unreported, SD Ohio 1:07-cv-692, 21 September 2010).
110 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.178].

Stronger judicial case management

3.99 Stronger judicial control over the scope and process of discovery has been singled out by a number of commentators as a critical element of any reform in this area. For example, in its 2006 report on case management innovations in the Federal Court, the Law Council of Australia 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'.[111] These aspirations were taken up by Finkelstein J 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.[112]

3.100 Other Australian jurisdictions, most recently Victoria, have also tied discovery reform to stronger judicial case management. The VLRC stated in its *Civil Justice Review* report, that 'increased judicial management of the disclosure process ... will greatly assist in keeping the scope of disclosure focused and reduce delay and costs'.[113] Other nations, too, have 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'.[114]

3.101 However, the efficiency and effectiveness of a discovery process does not necessarily result entirely from the degree of control that individual judges are willing to exercise in their capacity as case managers. There may be a number of obstacles that need to be removed—or changes made—to enable stronger judicial control over the discovery process, including:

- clearer definition of the real issues in dispute, in relation to which discovery obligations may be limited;
- procedural obligations on the parties and the court to ensure that practice and cost-effective discovery plans are in place prior to the search for discoverable documents stored in electronic format;
- clearly delineated case management powers with respect to discovery, including the power to impose sanctions for discovery abuse or default;
- the employment of a 'special master' to case manage the discovery process;

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111 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), Proposal 5(a).

112 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [27].

113 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

114 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), [500].

- the use of costs powers to control discovery requests and voluminous production of documents, by requiring payment in advance and limiting legal fees for discovery work; and
- education and training for judges to enhance skills and capabilities in case management of the discovery process, including the technologies used to discover electronic documents.

3.102 The potential for reform in these areas is explored below.

Clearer definition of the real issues

3.103 For the court to case manage the discovery process effectively, the issues in a particular case need to be clearly defined. The responsibility for containing the discovery process, therefore, lies both on the court and the parties through their legal representatives. This was recognised at the AIJA'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.[115]

3.104 Pleadings are supposed to define the issues in each case and, in doing, so limit the ambit of discovery and the evidence which needs to be prepared for trial.[116] 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.[117] 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.

3.105 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:

> 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.[118]

3.106 Initial consultations in the present Inquiry revealed a widely held view that in most cases significant improvements could be made in the discovery process if the real issues in dispute were more clearly defined beforehand. As Stephenson put it:

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115 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <www.aija.org.au/> at 8 November 2010.

116 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), 440.

117 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.166].

118 A Stephenson, *Turning Mountains into Molehills: Improvements to Formal Dispute Resolution* (2010) unpublished, 16.

> it is important at the outset, before any preparation in relation to discovery is done, that the scope of the controversy be properly defined.[119]

3.107 The following sections of this chapter explore a number of ways in which the core issues in dispute could be more clearly defined, with a view to limiting the ambit of discovery 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 and key documents on which they intend to rely at trial.

Initial directions hearing or case management conference

3.108 The Federal Court has introduced specific procedures for matters in its Fast Track List[120] and with respect to tax matters. Both *Practice Note CM 8* and *Practice Note Tax 1* impose an obligation on the parties to proceedings in the Fast Track List and Tax List respectively to outline the issues and facts that appear to be in dispute, at an initial directions hearing called the 'scheduling conference'.[121]

3.109 A similar procedure, called the 'case planning conference', was introduced in the Supreme Court of British Columbia on 1 July 2010.[122] 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 before they actively engage the system, beyond initiating or responding to a claim'.[123] The Working Group identified key objectives of the case planning conference to include the narrowing of issues and directions for discovery.[124]

3.110 The same objectives are sought to be achieved in the US through 'Pre-Trial Conferences' under r 16 of the *Federal Rules of Civil Procedure*. The Pocket Guide for Judges in the US 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'.[125]

3.111 In her account of the Fast Track experience, Gordon J 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

119 Ibid, 16.
120 This issue was raised in Ch 2.
121 *Practice Note CM 8 Fast Track (Federal Court of Australia)*, pt 6; *Practice Note Tax 1 Tax List (Federal Court of Australia)*, pt 5.
122 *Supreme Court Civil Rules* (BC, Canada), pt 5.
123 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.
124 Ibid, 10.
125 W Shwarzer and A Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* (2nd ed, 2006), 5.

> 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.[126]

3.112 While this practice is not as explicitly required 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?[127]

3.113 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*[128] 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:

> 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'.[129]

3.114 During initial consultations, the ALRC was told that, in effect, the judge or registrar presiding at a directions hearing or scheduling conference is 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 case management pocket guide for judges 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.[130]

126 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, 27-28 November 2009), 8.

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

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

129 Lawyers Weekly, *Excess or Necessity? Lawyers Reflect on C7 Litigation* (2010) <www.lawyersweekly.com.au> at 21 July 2010.

130 W Shwarzer and A Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* (2nd ed, 2006), 5.

3.115 The approach which judges in the 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?[131]

3.116 Not all judges in the Federal Court may be entirely comfortable in pressing the parties or their lawyers to limit the issues in dispute, with a view to focusing tightly the scope of discovery. In initial consultations, the ALRC heard that varied levels of effectiveness amongst judges in this regard have prompted some litigants to 'forum shop' between registries—that, on occasion, litigants have sought to commence or transfer proceedings to a registry where they are less likely to be as restricted on the matters in relation to which discovery may be sought.

3.117 Therefore there may be concerns that clarifying the obligation on parties to outline the issues in dispute when seeking orders for discovery would not, itself, achieve any significant efficiency in the process. Unless the court effectively enforces this obligation by interrogating the parties as to the nature of their case, such reform might not result in any meaningful clarification of the issues in dispute. As discussed below, additional measures may be required to minimise the dependence on judges to extract a clear definition of the case from the parties and to put the onus to do so more squarely on the parties to limit their own requests for discovery.

Statement of issues in dispute

3.118 One way to clarify the real issues in a particular case, in relation to which discovery may be limited, would be to introduce a requirement on the party seeking discovery to submit a written statement of the issues. This could mean, for example, filing and serving a statement of issues for discussion at an initial directions hearing or case management conference as discussed above.

3.119 The statement could set out in narrative form the factual issues that appear to be in dispute between the parties, as well as any legal issues and the conclusions that the parties wish the court to draw. To identify which of these issues matters most to the party seeking discovery, the statement could be tiered in order of importance. This statement may give a better indication than the pleadings of which are the main facts in issue and which are subordinate or collateral facts in issue, as well as the essential ingredients in the cause of action or defence.

3.120 The party seeking discovery could also be required to include in this statement a description of the specific documents or categories of documents which it expects to discover from another party. This may indicate how the scope of discovery could be limited to key documents or expanded to other documents relating to less critical issues, or indeed whether documents are even necessary to resolve certain issues.

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131 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, 25 June 2008)), [2].

3.121 This statement of issues could then form the basis of discussion at an early directions hearing or case management conference. Under the supervision of the court, the party requested to give discovery would have this opportunity to confirm whether the issues so stated are actually in dispute, provide their own views on which are the critical issues in the proceeding or comment on whether the stated categories of documents are appropriately fashioned to suit the issues in the case. The presiding judge or registrar may be guided by the statement of issues, and assisted by discussion of the core issues at the hearing or conference, to direct the parties in formulating the range of documents that may be subject to discovery orders.

3.122 An obvious concern with this approach may be the legal costs incurred in drafting a statement of issues. Significant lengths of time may be required to draft a clear and considered statement of the case, particularly in complex cases concerning involved factual and legal issues. While it may eventually help to limit the scope of discovery and minimise that expense, this mechanism would carry its own cost burden and might 'front-load'[132] civil proceedings in the Federal Court.

3.123 In practice, litigants and their lawyers might take shortcuts in a statement of issues to minimise the time and cost burden. In effect, the statement may simply repeat the pleadings without any narrowing of the controversy. The utility of this statement might therefore be contingent upon the diligence of legal practitioners to give effect to its objective of defining the real issues in dispute.

3.124 A separate issue is the effect of this statement on the formal pleadings. Pleadings play a much larger role in civil litigation than just demarcating the ambit of discovery. Pleadings provide a record of all the matters involved in the action, and in that way prevent further actions between the same parties in relation to them.[133] There may be concerns that putting less important issues to one side, for the purposes of limiting discovery, would prevent a party from seeking judicial determination of the issue.

Production of testimonial and documentary evidence prior to discovery

3.125 Another way to clarify the real issues in dispute, so that discovery can focus on them, may be to require production of evidence, or at least an outline of the evidence, prior to discovery of documents. The Fast Track List and Tax List provide models for such a procedural requirement.

3.126 *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.[134]

3.127 Another model for this approach is found in Rule 7–4 of the *Supreme Court Civil Rules* (BC). 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

132 Lord Woolf, *Access to Justice: Final Report* (1996).
133 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), 440.
134 *Practice Note CM 8 Fast Track* (Federal Court of Australia), [6.4].

call at trial.[135] The introduction of this rule was recommended by the Civil Justice Reform Working Group in 2006, which considered that:

> 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.[136]

3.128 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.

3.129 The idea of producing evidence prior to discovery was considered by the Law Council in 2006, which generally opposed 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:

> there was general opposition to the proposition that discovery should be preceded by either all or some of the evidence in chief. 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.[137]

3.130 Whereas 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 Fast Track or Tax List proceedings requires only an outline of the evidence. Nevertheless, concerns about the time and expense incurred to draft an outline of testimony might arise in cases involving large numbers of witnesses or lengthy examination of those witnesses.

3.131 In addition to an outline of testimony, key documents may also be produced at a scheduling conference in Fast Track and Tax List proceedings. While there is no express requirement in *Practice Note CM 7* or *Practice Note Tax 1* for the parties to produce key documents at a scheduling conference, Gordon J has said that this practice is often adopted or required in the Fast Track as a matter of course:

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135 *Supreme Court Civil Rules* (BC, Canada), r 7–4(1), came into force on 1 July 2010.

136 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.

137 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), Proposal 5(c), [94]–[96].

> 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.[138]

3.132 This can already be achieved by the court making orders under O 15 r 13 of *Federal Court Rules*, for production of any document in a party's possession, custody or power relating to any issue in the proceeding.[139] At the same time, a party may require any other party to produce for inspection any document referred to in a pleading or affidavit filed by that party.[140] However a number of commentators have suggested that parties should be required to produce the core documents relevant to their case, without being asked to do so.

3.133 For example, at the AIJA discovery seminar, Peter Gordon of the law firm Slater and Gordon, 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'.[141] In support of such a process, Applegarth J, in his work for the Queensland Supreme Court's Better Resolution of Litigation Group, has argued that the early exchange of key documents between the parties would enhance 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.[142]

3.134 However, Finkelstein J canvassed a number of practical and theoretical problems with this approach at the Federal Court's case management workshop in 2008. 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'.[143]

3.135 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*.[144] In light of his concerns, Finkelstein J considered that 'there must

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138 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, 27-28 November 2009).

139 *Federal Court Rules (Cth)*, O 15 r 13.

140 Ibid, O 15 r 10.

141 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <www.aija.org.au/> at 8 November 2010.

142 'The Devil is in the Documents', *Hearsay* (online), 1 March 2010, <www.hearsay.org.au/>.

143 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [14].

144 Ibid, [16].

be real doubt whether mandatory discovery, even of a theoretically limited nature, would reduce the burden on the court or litigants'.[145]

ALRC's views

3.136 The need for clearer definition to the issues in dispute to narrow the scope of discovery 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.[146]

3.137 The ALRC's preliminary view in this Inquiry is that reforms 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. The following proposal describes a new court procedure aimed at narrowing the issues in dispute for the purposes of limiting discovery obligations.

3.138 This proposal is prefaced by noting that reforms to the rules on pleadings, to enhance the clarity with which the issues in a proceeding are presented to the court, may have the complementary effect of narrowing the scope of discovery. While the ALRC considers the rules on pleadings generally to be outside its current Terms of Reference, this area of civil litigation would merit further consideration.

3.139 The ALRC also notes that the procedural reforms proposed below might be best suited to complex cases involving large-scale discoveries. That is, the resources required of the parties and the court to implement these procedures could be unnecessarily burdensome for the discovery of documents in small or straightforward cases. However, the ALRC's preliminary view is that a sufficiently large proportion of discoveries in the Federal Court are of such magnitude to warrant general implementation of these procedures. The ALRC proposes that the court's existing power to waive or vary any of its procedures[147] will ensure that more suitable pre-trial management strategies are adopted in other cases. In small cases, for example, where the issues are contained and clear, the parties might seek limited discovery by consent and forego the proposed procedures.

3.140 In cases where the procedures proposed below are applied, the ALRC expects that proceeding in this fashion will come at a cost to the parties and the taxpayer in terms of the court resources required. However, the ALRC's preliminary view is that these procedures are likely to result in savings to the overall cost of litigation—both private and public—which would outweigh the expense incurred and at the same time open up access to justice in a broad sense.

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145 Ibid, [17].

146 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.70].

147 *Federal Court of Australia Act 1976* (Cth), s 37P (3)(f).

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

(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.

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

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

3.141 The ALRC notes that the proposal above would not require the parties to produce or exchange the core documents relevant to the case. The ALRC's preliminary view is that existing procedures under O 15 rr 10 and 13 are sufficient to achieve this outcome. A notice under r 10 or an order under r 13 is, in the ALRC's preliminary view, necessary to limit the production to particular documents which the court or party considers critical in the proceeding. A general obligation to produce 'key' documents in the early stages of proceedings would be too vague and ambiguous to expect strict compliance and is likely to breed satellite litigation. It would also be conducive to inefficiencies in cases where each party already possesses a copy of the core documents, such as the contract in a contractual dispute.

3.142 However, the ALRC is interested in stakeholder views on whether a procedure requiring the parties to act on their own initiative in identifying and exchanging core documents early in a proceeding could be successful established. This would be

distinct from O 15 rr 10 and 13 which require the other party to issue a notice or the court to make orders. Alternatively, the ALRC welcomes suggestions from stakeholders on ways to encourage greater use of existing procedures under O 15 rr 10 and 13.

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

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

Discovery plan and pre-discovery conference

3.143 As discussed above, a number of jurisdictions (including the Federal Court, the US and the UK) have come to rely on the creation of discovery plans as an effective way to handle electronic discovery processes.

3.144 In contrast to the 'meet-and-confer' obligations on litigants in the US and the UK, for the purposes of devising a discovery plan, the language of *Practice Note CM 6* is more permissive than mandatory. Parties to Federal Court proceedings may be 'expected' to have devised a discovery plan before the court makes an order for electronic discovery.[148] The parties might also be expected to inform the court of how these issues are to be addressed (if the judge asks) at a directions hearing or case management conference.[149] However, there is no positive legal obligation on the parties to do so, nor is there any prohibition on the court from making orders in cases without a discovery plan.

3.145 By comparison, litigants in the UK 'must' discuss the disclosure of electronic documents before the first case management conference.[150] Parties to proceedings in the US are 'jointly responsible ... for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan'.[151]

3.146 The Rules and Directions in these jurisdictions may provide suitable models for reform to Federal Court procedures, to impose positive and legally enforceable obligations on the parties to: (a) meet and confer, for the purposes of discussing a discovery plan; and (b) submit their plan to court for approval or resolution of any areas of disagreement.

148 *Practice Note CM 6: Electronic Technology in Litigation* (Federal Court of Australia), [6].

149 *Practice Note CM 6: Pre-Discovery Conference Checklist* (Federal Court of Australia), [1].

150 Civil Procedure Rule Committee (UK), *Practice Direction 31B: Disclosure of Electronic Documents* [9]. This practice direction came into force on 1 October 2010 and replaced *Practice Direction 31.2A*, which suggested 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].

151 *Federal Rules of Civil Procedure 2009 (US)* r 26(f)(2).

3.147 A corresponding obligation on the court to satisfy itself that the proposed discovery plan is reasonable or proportionate—before making orders for discovery—could also be introduced. To this end, the court might exercise its existing discretion to schedule a pre-discovery conference with the parties to inform the judge or registrar of the issues addressed in the proposed discovery plan. Pre-discovery conferences would also be available to the court to determine any areas of disagreement between the parties.

3.148 This process may be assisted by an initial case management conference, as outlined in Proposal 3–1, where the core issues in dispute are clarified and particular documents or specific categories of documents relating to those issues are identified.[152] The outcome of that procedure may form the basis of plans for limiting the scope of electronic documents to be discovered.

3.149 A proposed discovery plan, which the parties would be required to develop, might address such issues as whether and the extent to which the party giving discovery will search through back-up tapes or disaster recovery systems for particular classes of electronic documents identified in the plan. In particular, as expected by the provisions of *Practice Note CM 6*, a proposed discovery plan may also provide a preliminary estimate of the cost associated with discovery and a timetable for carrying out the proposed discovery process.

3.150 The terms of a discovery plan approved by the court may then be entered as orders for discovery of documents. This means discovery would be limited both in terms of the scope of documents and the extent of searches. Carrying out the court approved plan according to its terms would discharge a party of its discovery obligations.

3.151 The benefits of this approach may be that it promotes certainty and efficiency in the discovery process by determining in advance what searches will be good enough. The same objectives are sought to be achieved in the US, as noted in a practitioner's guide to planning a discovery process:

> 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.[153]

3.152 A general concern with this approach may be its impact on the court's ability to determine the merits of the case. A rigid and a priori determination of a party's duty to search for electronic documents may discard the flexibility of the current *Practice Note CM 6* approach. When *Practice Note 17* was revised in January 2009, Seamus Byrne warned that 'the Practice Note is not intended to serve as a process to overtake the outcome'.[154] That is, restraining the amount of electronically-stored information available to the parties and the court should not impede 'the just resolution of disputes, according to law'.[155]

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152 See Proposal 3–1.

153 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.

154 S Byrne, *ALSP Update* (2009) <www.alsponline.org/> at 9 November 2010.

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

3.153 A more commercial concern may be the cost involved in the laborious forward planning of an e-discovery process. Litigants who possess vast masses of electronically-stored information across a complex network of electronic databases might be required to spend considerable time with their lawyers and IT experts to determine what would amount to a reasonable search. The same concerns have been raised in the UK, where

> 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.[156]

3.154 The cost of drafting a discovery plan to file in court would also add to the up-front expense of litigation. This may be a particularly involved document in complex cases where sophisticated software is used to search through vast databases of electronic material. Similar concerns have been raised in relation to lengthy questionnaires in the UK:

> 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.[157]

3.155 The utility of a discovery plan might therefore depend on litigants and their lawyers allocating sufficient resources to its development. In practice, economic and time constraints on a party giving discovery may lead to insufficient consideration of what searches would be reasonable. An ill-considered or under-developed plan might simply fall back on broad searches in vague or general terms, and provide little assistance to the court in overseeing a proportionate and timely electronic discovery process.

3.156 This has been the experience in the US, at times, where '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'.[158] Judge Paul Grimm has confirmed 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'.[159] 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.[160]

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156 D Kavan and T Streeton, 'A Change in Direction on E-disclosure', *Law Society Gazette* (online), 1 October 2010, <www.lawgazette.co.uk/>.

157 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.

158 L Rosenthal, 'A Few Thoughts on Electronic Discovery After December 1, 2006' (2006) 116(176) *Yale Law Journal Pocket Part* 167.

159 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.

160 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.

ALRC's views

3.157 Commentators on e-discovery universally acknowledge project management as the key to success. For example, the Sedona Conference emphasises project management as the first principle of an e-discovery process:

> Principle 1. In cases involving ESI [electronically-stored information] of increasing scope and complexity, the attorney in charge should utilize project management and exercise leadership to ensure that a reasonable process has been followed by his or her legal team to locate responsive material.[161]

3.158 The ALRC's preliminary view is that the clear expectation laid down in *Practice Note CM 6* for parties to have agreed upon a practical and cost-effective discovery plan, and to inform the court of how these issues are to be addressed before it makes orders for electronic discovery, can be an effective means of project managing a discovery process when fulfilled in practice. However—subject to feedback from stakeholders—there seems to be reluctance on the part of the court, the parties and their lawyers to collaborate as project managers of an electronic discovery process, to keep the costs down and the process as efficient and proportionate as possible.

3.159 In the ALRC's preliminary view, the introduction of positive procedural obligations on the parties to develop a discovery plan—and corresponding obligations on the court to satisfy itself that the proposed discovery plan is proportionate or reasonable—may help to ensure greater participation by all involved in civil litigation to manage an e-discovery project.

3.160 The following proposal describes a new court procedure aimed at engaging the parties, their lawyers and the court in the management of an electronic discovery process. The objectives of this procedure include limiting the scope of discovery and instilling certainty in the discovery process, by determining the extent of a 'reasonable search' for discoverable documents stored in an electronic format, as far as possible in advance of any searches of electronic databases. In particular, greater certainty as to the scope and conduct of an e-discovery process may improve the predictability of discovery costs and enable preliminary costs estimates to become more accurate.

3.161 The ALRC does not intend for the proposed procedure to obstruct the overarching purpose of civil procedure in achieving 'the just resolution of disputes'.[162] Should the adoption of a discovery plan yield an unhelpfully limited amount of information relevant to the proceeding, the court should not be prevented from making further orders for discovery where necessary.

3.162 The ALRC expects that the procedures proposed below will require parties to incur the cost of drafting a discovery plan and attending any court hearing to finalise its terms. The ALRC also acknowledges that the proposed procedure will require the expenditure of public resources by involving the court in the management of an electronic discovery process. However, the ALRC's preliminary view is that overall

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161 The Sedona Conference, *Commentary on Achieving Quality in the E-Discovery Process* (2nd ed, 2009).
162 *Federal Court of Australia Act 1976* (Cth) s 37M.

the public and private costs of discovery of electronic documents would decrease with closer management of the process on the part of litigants, their lawyers and the court.

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

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

(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.

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

Special masters, discovery masters and referees

3.163 A number of commentators have expressed a desire for the introduction of 'special staff to manage discovery issues in large cases'.[163] An example often cited is the role of Masters in American courts under r 53 of the *Federal Rules of Civil Procedure*. This section of the chapter considers a number of proposed or implemented models for the appointment of independent persons to assist the court in case management of discovery issues.

Rule 53 of the Federal Rules of Civil Procedure

3.164 Under r 53 of the *Federal Rules of Civil Procedure*, US courts may appoint masters to perform any duties to which the parties consent, 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.[164] 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.[165] The compensation must be paid either by the parties or funded by the subject matter of the action.[166] A master may regulate the proceedings and 'take all appropriate measures to

163 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <www.aija.org .au> at 8 November 2010.
164 *Federal Rules of Civil Procedure 2009* (US), r 53(a)(1).
165 Ibid, r 53(b)(2).
166 Ibid, r 53(g)(2).

perform the assigned duties fairly and efficiently',[167] and may also impose a range of sanctions.[168]

3.165 Before the court acts on a master's recommendations, the parties have an opportunity to object.[169] The court reviews findings of fact de novo (unless the parties have agreed they will be reviewed for clear error),[170] reviews findings of law de novo[171] and reviews procedural rulings 'only for an abuse of discretion'.[172]

3.166 Rule 53 contemplates the use of masters at all three stages of a trial: pre-trial, trial and post-trial.[173] At these different stages, masters may fill any of a number of different roles: settlement master; decision-making master; or case management master.[174]

3.167 The settlement master attempts to mediate and facilitate negotiation.[175] A decision-making master may decide non-dispositive motions (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) usually in the context of discovery.[176] 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

3.168 The VLRC's 2008 *Civil Justice Review* recommended the use of special masters in three contexts:

- as one of a number of options within an alternative dispute resolution framework;[177]
- as part of the discovery process;[178] and
- in helping self-represented litigants.[179]

3.169 In the context of alternative dispute resolution, the VLRC discussed a special master's role as being similar to that of a special referee under O 50 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). Here, 'the court would retain

167 Ibid, r 53(c)(1).
168 Ibid, r 53(c)(2).
169 Ibid, r 53(f)(1), (f)(2).
170 Ibid, r 53(f)(3).
171 Ibid, r 53(f)(4).
172 Ibid, r 53(f)(5).
173 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.
174 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').
175 Ibid, 1282.
176 Ibid, 1283.
177 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 219.
178 Ibid, 469.
179 Ibid, 573.

jurisdiction ... and remain responsible for the final adjudication' but the special referee or master would make a 'provisional determination', if the parties failed to reach a settlement.[180] It is likely that O 72A of the *Federal Court Rules*, described further below, would allow for this role for referees in the Federal Court.

3.170 The VLRC also recommended provision for a special master 'to be appointed by the court to assist in the case management of discovery issues in complex cases'.[181] The VLRC's model 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.[182]

3.171 The costs of an externally appointed special master under the VLRC's model would be set at the discretion of the court and paid for by the parties or ordered by the court to be costs in the cause.[183] When appointing a special master in the Victorian context, 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.[184]

3.172 Therefore, the VLRC contemplated both the introduction of special masters and the increased use of special referees. As conceived in the VLRC report, the primary difference between a referee and a master appears to be the level of intervention in the discovery process itself. A referee may be able to report on particular discovery issues when they are referred but a special master could play an ongoing and continuing role, working with the parties rather than merely as a form of adjudicator. While referees answer specific questions and 'are required to give reasons for their determinations and the principles governing whether such reasons are adequate',[185] special masters could explain the parties' duties, investigate and help the parties to identify appropriate discovery management strategies, facilitate discussion and hear interim applications.[186] Adopting the language of r 53 commentators, it appears that a referee can be a decision-maker but the VLRC's special master would also be a case manager.

Justice Finkelstein's proposed O 72A

3.173 At a joint Federal Court/Law Council workshop on case management in 2008, Finkelstein J outlined a proposal for the introduction of discovery masters in the Federal Court. This included a draft of proposed amendments to the *Federal Court*

180 Ibid, 276.
181 Ibid, 469.
182 Ibid, 469.
183 Ibid, 470.
184 Ibid, 470.
185 Ibid, 231.
186 Ibid, 470.

Rules, introducing a new O 72A, which Finkelstein J prepared along the lines of r 53 of the *Federal Rules of Civil Procedure*.[187]

3.174 However, there were three differences. First, r 53 allows a master to impose sanctions[188] but the proposed O 72A made no such provision. Secondly, r 53 allows a party 20 days in which to file objections to a Master's report,[189] whereas Finkelstein J only allowed 7 days.[190] Thirdly, Finkelstein J limited a discovery master's rulings to the realm of managing pre-trial discovery.[191]

3.175 This last distinction about the scope of a master's powers is most relevant. Rule 53 is broader in allowing a master to be involved at any stage. The VLRC's proposal is also broader, in that special masters may play a role in alternative dispute resolution proceedings. However, within the realm of pre-trial discovery, Finkelstein J would allow masters to direct the proceedings.[192] Like r 53 findings, a discovery master's factual findings and legal conclusions would be reviewed de novo (although the parties may stipulate that factual findings should only be reviewed for clear error).[193] 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.[194]

Federal Court Rules current O 72A

3.176 The *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* (Cth) amended the *Federal Court of Australia Act* to allow courts to refer 'a proceeding ... or one or more questions arising in a proceeding ... to a referee for inquiry and report'.[195] The Second Reading Speech for this amendment affirmed that the purpose of this provision is to 'enable the court to more effectively and efficiently manage large litigation'.[196] Contemplated benefits included the 'procedural flexibility with which a referee can deal with a question' and a referee's 'technical expertise', which may allow a referee to 'more quickly get to the core of technical issues'.[197]

3.177 *Federal Court Rules* O 72A, introduced pursuant to this amendment, allows the court to make a referral '[a]t any stage of a proceeding' for inquiry and report into 'questions or issues arising in a proceeding, whether of fact or law or both, and whether raised by pleadings, agreement of parties or otherwise'.[198] The costs of a referee appear to be paid for by the parties, as the court may make directions for a party to give security for a referee's costs or otherwise deal with a referee's remuneration under the

187 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, Annexure E.
188 *Federal Rules of Civil Procedure 2009* (US), r 53(c)(2).
189 Ibid, r 53(f)(2).
190 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, Annexure E, Rule 6(2).
191 Ibid, Annexure E, Rule 1(1).
192 Ibid, Annexure E, r 6(5).
193 Ibid, Annexure E, r 6(3), (4).
194 Ibid, Annexure E, r 7(2).
195 *Federal Court of Australia Act 1976* (Cth) s 54A(1).
196 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12296 (R McClelland—Attorney-General), 12296.
197 Ibid, 12296.
198 *Federal Court Rules* (Cth), O 72A r 1.

powers of the court as to costs.[199] Unless otherwise ordered by the court, the referee must give his or her opinion in a report which the court may then choose to adopt in whole, adopt in part, vary or reject.[200]

3.178 A referee's determinations are not automatically binding on the parties as ch III of the Australian *Constitution* precludes anyone other than a judicial officer from exercising judicial power.[201] While the concept of judicial power is affected by many variables, which makes it incapable of exhaustive definition, dispensing with discovery applications in litigation may arguably fall within it.[202] In *Nicholas v The Queen*, Gaudron J stated that:

> The difficulties involved in defining 'judicial power' are well known. In general terms, however, it is that power which is brought to bear in making determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and in making adjustments of rights and interests in accordance with legal standards.[203]

Referees as discovery masters

3.179 In the three models of special masters discussed above, each may engage in case management activities, such as clarifying the issues in dispute and focusing the discovery process. Justice Finkelstein, for example, describes how a discovery master could help in 'crafting discovery orders, creating a confidentiality regime, [and] monitoring production and compliance'.[204]

3.180 The VLRC was also of the view that a special master should be able to investigate and identify appropriate strategies in relation to the management of discovery, and facilitate discussion between the parties in relation to electronic discovery.[205]

3.181 As described by a US judge, a special master can facilitate collaborative tasks such as preparing parties for meetings, negotiating discovery procedures or developing search protocols.[206]

3.182 By contrast, the primary role of a referee in the Federal Court appears to be that of an adjudicator, rather than case manager. In particular, referees are intended to adjudicate matters

> where technical expertise is required and it is neither cost effective nor an appropriate use of a judge's time to gain the necessary in-depth expertise in a particular science or

199 Ibid, O 72A r 5.
200 *Federal Court of Australia Act 1976* (Cth) s 54A (3).
201 See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report 92 (2001).
202 S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2002), 120.
203 *Nicholas v The Queen* (1998) 193 CLR 173., [70]. See also *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330., 357.
204 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [41].
205 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.
206 S Scheindlin and J Redgrave, 'Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure' (2008) 30 *Cardozo Law Review* 347, 383.

> trade, or where detailed examination of accounts or other financial records is necessary to assess damages.[207]

3.183 Parties are required to cooperate with referees, but their cooperation is aimed toward ensuring that the referee 'can form a just opinion' rather than shape a discovery process.[208] Referees are explicitly freed from evidentiary rules in their adjudicative role, but this does not appear to be intended to allow them to perform a broader range of case management functions.

3.184 It is unlikely that existing mechanisms in the Federal Court for referral of questions or issues to a referee could be used to the same extent as those that allow special masters to case manage a discovery process. If a position of a special master was required to manage discovery in Federal Court proceedings, legislative amendments may be required to introduce this element into the court's case management procedures. Models for reform along these lines include amendments to O 72A as proposed by Finkelstein J and the provisions of r 53 in the *Federal Rules of Civil Procedure*, on which this proposal is based, as discussed above.

Advantages and disadvantages of discovery masters in the Federal Court

3.185 One US District Court judge identified four primary reasons for a judge to appoint a special master:[209]

1. Time commitment—When a party asserts privilege over thousands, sometimes in the tens of thousands, of pages of material, a special master may review the documents to determine the validity of the assertion of privilege.

2. Knowledge and expertise—In *Re: Seroquel Products Liability Litigation*, the Master supervised the process of discovering electronically-stored information:

   > No particular discovery dispute was referred to the Master; instead, he was directed to review all discovery requests and employ his skills to determine 'where such information is stored and how it can most effectively be accessed and made available'.[210]

3. Resources—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, a special master may act as a 'project manager' to coordinate these professionals.

4. Neutrality—A special master may be able to conduct settlement discussions to avoid the judge losing any appearance of neutrality.[211]

3.186 Preserving the neutrality of judges was particularly compelling for the VLRC in its proposal for a special master to manage discovery issues:

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207 Explanatory Memorandum, Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2009 (Cth).

208 *Federal Court Rules (Cth)*, O 72A r 7(7).

209 S Scheindlin, 'We Need Help: The Increasing Use of Special Masters in Federal Courts' (2009) 58 *DePaul Law Review* 479, 481.

210 *Re Seroquel Products Liability Litigation* (Unreported, M.D. Fla., 5 October 2007), O 1.

211 S Scheindlin, 'We Need Help: The Increasing Use of Special Masters in Federal Courts' (2009) 58 *DePaul Law Review* 479, 486.

> the use of special masters will greatly assist the court to adopt a more interventionist approach to discovery, without compromising judicial objectivity and independence.[212]

3.187 The desire for discovery masters may also be a matter of finding the right person for the job, as Finkelstein J put it:

> the master can be selected with an eye to specialization (prior expertise in the relevant field of law) and available time (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).[213]

3.188 Another reason for the VLRC to advocate the use of special masters was to save on public resources, arguing that special masters would

> assist to free up judge time, which may otherwise be consumed by complex and protracted discovery processes.[214]

3.189 This point was also taken up by Finkelstein J in his arguments for appointing discovery masters in large or complex cases:

> it is 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.[215]

3.190 The corollary to this, however, is the increase in litigation costs for the parties who would bear the expense of a discovery master. This is likely to be a higher cost to the parties than court fees spent on judicial case management, which are essentially a public cost. A case manager with greater expertise in discovery than the docket judge may save the parties time and money through more efficient discovery processes but comes with his or her own set of costs.

3.191 A key concern against the introduction of discovery 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.[216] However, outsourcing case management to a discovery master may detract from the judge's involvement and familiarity with cases in his or her docket. This may undermine the advantages of the docket system in relation to discovery, which were outlined by Heerey J in his submission to the ALRC's *Managing Justice* report:

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212 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

213 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [40].

214 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

215 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [37].

216 Federal Court of Australia, *Individual Docket System* <www.fedcourt.gov.au/> at 20 October 2010.

> [t]he docket system will promote (and already has, in my experience) a more interventionist and practical approach to discovery, tailored to the individual case and the real issues in dispute.[217]

3.192 There may also be concerns that discovery masters would add a layer of inefficiency to the discovery process, in that their decisions would have to be reported to the court for action and subject to objections from the parties. It may be more efficient for the docket judge to deal with any objections from the parties at the time of making orders for discovery.

ALRC's views

3.193 Subject to feedback from stakeholders, the ALRC's preliminary view is that management of the discovery process should be primarily the responsibility of the judge under the court's docket system. The use of a discovery master may obstruct active judicial case management which, in the ALRC's preliminary view, is required to control the scale and cost of discovery in the Federal Court.

3.194 The ALRC is also concerned about the additional expense to the parties which would be incurred by the employment of a discovery master. As discussed in this chapter, the high cost of discovery has been singled out as a major criticism of this stage in civil litigation. The ALRC's preliminary view is that the expected costs of discovery masters, and the potential impact of this approach on case management by judicial officers in the Federal Court, render such reform less practical than the reforms proposed above.

3.195 However, the ALRC welcomes stakeholder views on the merits of special masters to manage the discovery process in Federal Court proceedings. The ALRC is interested in stakeholders' proposals for any particular mechanism to introduce discovery masters in the Federal Court.

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

Case management powers

3.196 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'.[218] 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 by the Victorian Parliament in s 55 of the *Civil Procedure Act 2010* (Vic). Section 55 provides an extensive but non-exhaustive list of directions which Victorian courts may give in relation to discovery.

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217 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.181].

218 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 470.

3.197 This degree of particularisation is not found in the Federal Court's legislation. 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.

3.198 The *Federal Court of Australia Act* was amended to give statutory form to the court's case management powers in broad terms.[219] These amendments were intended to 'provide clear legislative direction and support to judges so that they can confidently employ active case management powers'.[220] While the Act does not specify the kinds of orders the court may make in relation to discovery, it relevantly provides that the court may 'require things to be done'.[221]

3.199 Greater specification of the court's case management powers in legislation would not necessarily increase the court's authority to control the discovery process, or create new powers without which it has been ill-equipped to manage discovery. Rather, the intent would be to raise awareness of the ways in which the discovery process can be managed and encourage greater and more effective use of case management powers. As the VLRC reasoned in its *Civil Justice Review*:

> 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.[222]

3.200 The same argument can be made with respect to the court's power to sanction non-compliance with discovery orders. 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.[223] 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.[224]

3.201 However, there may be doubts as to whether clearer statutory prescription of the Federal Court's power to case-manage, including through the use of sanctions, would itself have much practical impact on 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 behavioural changes envisaged by the VLRC are unlikely to materialise.

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219 Section 37P of the *Federal Court of Australia Act* was enacted by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).

220 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), 3.

221 *Federal Court of Australia Act 1976* (Cth) s 37P(3)(a), (b).

222 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 471.

223 *Civil Procedure Act 2010* (Vic), s 56. See also *Federal Court of Australia Act 1976* (Cth) s 37P (6).

224 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 473.

ALRC's views

3.202 The ALRC considers that legislative reforms to clarify and strengthen the Federal Court's existing statutory powers to case manage the discovery process are desirable. The ALRC's preliminary view is that by setting out in primary legislation some detail of the court's case management powers with respect to discovery, it may encourage the judiciary, the parties and their lawyers proactively to confine the scope of discovery and reduce the burden of litigation.

3.203 Express statutory authority to direct the conduct of a discovery process, and to sanction discovery default and abuse, may help to build a culture within the Federal Court that promotes a focused and efficient discovery process. However, the ALRC acknowledges that such cultural change takes time to develop and may fail to eventuate unless the court, litigants and practitioners implement the rationale of such law reform in practice. Judicial officers may be encouraged and better equipped to utilise legislative case management powers through education and training, discussed further below. To this end, clearer statutory prescription of the court's powers to manage a discovery process may be

> more than motherhood statements if they are used to achieve cultural change. It gives a basis for the bench to say to people 'this is how we do litigation.[225]

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

Costs powers

3.204 This section of the chapter considers the use of costs powers to maintain proportionality in a discovery process. Specifically, the power to order payment of discovery costs in advance and the power to limit legal fees for discovery are discussed.

Payment of discovery costs in advance

3.205 One way to ensure that discovery requests are proportionate to the information needs of the case may be to require payment of costs in advance of discovery by the requesting party. This approach was recommended by the Access to Justice Taskforce.[226] The court's existing costs powers, including those prescribed in s 43 of the *Federal Court of Australia Act*, already allow judges to order payment of discovery costs in advance. A number of judges consulted by the ALRC in this Inquiry recalled cases in which they had made such orders, with the effect of limiting a party's request

225 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <www.aija.org.au/> at 8 November 2010.

226 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.

for discovery. The Taskforce suggested that there should be a presumption in favour of making such orders in all cases unless the court exercises its discretion not to do so, for example, where a meritorious litigant would be denied access to justice through a lack of capacity to pay for discovery costs.[227]

3.206 A requesting party could also be denied justice if, having been required to pay the costs of discovery in advance, it is ultimately successful in the litigation but unable to recover those costs—whether this is due to the other party's inability to satisfy a costs order in favour of the successful party, or because the order for payment of discovery costs in advance stipulates that such costs cannot be recovered.

3.207 The Taskforce suggested that over-inflated costs estimates, attempting to intimidate a party not to persist with their discovery request, may be addressed by judges assessing the reasonable costs of discovery.[228] However, in practice, judges might not be adequately informed to assess the reasonable costs of discovery. This point was made at the AIJA's discovery seminar, where the issue of costs capping was discussed. The seminar concluded that judges often do not have sufficient information to fix costs caps at an appropriate level.[229]

3.208 In any event, it appears that the parties are more likely to underestimate the costs of discovery rather than over-inflate costs estimates. The ALRC was told on separate occasions in consultations with General Counsel for a large corporation and a litigation funder that a budget is usually drawn up at the start of a proceeding, including a component for discovery, but the actual litigation costs will invariably exceed initial estimates.

3.209 It may also be argued that a presumption in favour of payment in advance for discovery costs does not reflect the commercial realities faced by most litigants. In the vast majority of cases, the parties would be denied justice by a lack of capacity to pay for discovery in advance. In these circumstances, almost all cases would involve an interlocutory application seeking orders to overturn the presumption of costs on the requesting party. In this way, the enactment of such a presumption could result in satellite litigation and an increase in costs.

Limiting the costs of discovery

3.210 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*[230] was later remarked upon by the trial judge, Heerey J:

> 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

227 Ibid, 106.
228 Ibid, 105.
229 A Cannon, 'Discovery Show and Tell Notes' (Paper presented at AIJA Discovery Seminar, Melbourne, 24 August 2007).
230 *Trade Practices Commission v Santos* (1992) 38 FCR 382.

> expression that developed amongst junior practitioners who had been ensnared in the discovery process was 'I have been Santossed'.[231]

3.211 Law firms have been criticised for using an army of employees to generate profits from the discovery process. The VLRC's *Civil Justice Review* explained that:

> 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.[232]

3.212 The VLRC recommended that Victorian courts be given the power to limit the costs charged to clients 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 being added to the actual costs.[233]

3.213 Currently, where a party to Federal Court proceedings has concerns about the amount charged by its lawyers for discovery, the client may apply for taxation of its lawyer's fees under the Legal Profession Act of the relevant jurisdiction.[234] The *Federal Court Rules* also give the court express power to disallow costs as between a lawyer and their client where the costs are incurred improperly or without reasonable cause.[235]

3.214 Introducing costs powers to limit legal fees may be criticised on the basis that there is no widespread over-charging for discovery in the Federal Court. On the other hand, if law firms are charging for discovery work without any mark up, then such costs orders would not have any effect other than to prevent potential overcharging.

3.215 The ALRC heard during initial consultations that some lawyers may charge fees for discovery work at a fixed or flat rate. This fee structure is commonly used for certain types of legal services, such as conveyancing or drafting a contract. The costs of litigation, particularly the discovery stage, may be more difficult to estimate or quote. However, if procedural reform (such as Proposals 3–2 and 3–3) is able to instil greater certainty in the discovery process, the costs of discovery may become more predictable.

ALRC's views

3.216 The ALRC acknowledges that costs orders can be useful strategies to help limit the scope of discovery and keep the costs of a discovery process proportionate to the information needs of the case.

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231 P Heerey, 'Some Lessons from Santos' (1994) 29 *Australian Lawyer* 24.

232 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), ch 6, 473.

233 Ibid, Rec 90.

234 *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.

235 *Federal Court Rules* (Cth), O 62 r 9.

3.217 In particular, the power to order payment for discovery in advance may be utilised by the Federal Court to manage the discovery of documents. The ALRC's preliminary view is that such costs powers should continue to be available to the court and exercised in its discretion in the circumstances of each case. At this stage of the Inquiry, the ALRC is not inclined to the view that up-front payment should be required of a party requesting discovery by default, unless the court orders otherwise. The ALRC expects that such a burden would be unbearable for most litigants and would typically result in parties incurring additional costs through litigation to overturn that presumption.

3.218 While the ALRC is not aware of any widespread overcharging for discovery costs, the ALRC accepts that discovery has the potential to serve as a profit centre for law firms. However, the ALRC's preliminary view is that the amount charged to clients for discovery is generally a matter for cost assessment or review under existing Legal Profession Acts. Where court orders are necessary to restrict discovery costs to those actually incurred by the firm for such work, the ALRC's preliminary view is that O 62 of the *Federal Court Rules* adequately equips the court to make those orders. Firms which inappropriately profit from the discovery process might also be dealt with under existing disciplinary frameworks, which are considered in Chapter 4.

3.219 The ALRC is, however, interested in stakeholder views on the ways in which the Federal Court might make greater use of costs powers to ensure proportionality in the discovery process.

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

Question 3–10 Should the Federal Court have explicit statutory powers to make orders limiting the costs able to be charged by a law practice to a client for discovery, to the actual costs to the law practice of carrying out such work (with a reasonable allowance for overheads, but excluding a mark up or profit component)?

Judicial education and training

3.220 As discussed above, the key to discovery reform may lie in more active judicial case management of the process. Effective case management skills are necessary for judges effectively to narrow the issues in dispute and control the scope and process of discovery. The need for judicial education and training in case management skills was recognised by the Access to Justice Taskforce in recommending that:

> 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.[236]

236 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.

3.221 A particular issue that needs managing in the discovery process is the use of computer technologies in the production of electronically-stored information. The need for effective training for judges managing an e-discovery process was specifically targeted in the UK by Lord Jackson in his *Review of Civil Litigation Costs*. In his final report, Lord Jackson recommended that:

> 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.[237]

3.222 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 NJCA includes a session on case management, examining 'the role of judges dealing with busy application lists, the identification of cases requiring management and the referral of cases for alternative dispute resolution'.[238]

3.223 Continuing education for judges includes modules on pre-trial case management, under the national curriculum for professional development for Australian judicial officers.[239] 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 of cases.[240]

3.224 While the curriculum includes a module on information and other technologies, there is currently no inclusion of e-discovery in the national curriculum.[241] Programs in this module are focused on technologies used in the court room (the design of electronic courtrooms, the use of audio/visual technologies and electronic filing, for example) and computers as a research tool for writing judgements, rather than those used in the discovery process.

3.225 Judicial education at a national level may be lacking a particular focus on the management of large-scale discoveries that involve masses of electronically-stored information. This might reflect the fact that such discovery processes are largely confined to the Federal Court, and a few state Supreme Courts, rather than the majority of jurisdictions. It may also be difficult to take a national approach to this topic, since each court has its own case management system to deal with discovery issues.

3.226 Professional development specifically for Federal Court judges may be provided through the Federal Court itself via its Judicial Education Committee or Practice Committee. The Practice Committee, together with the Law Council of Australia, 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.[242] The ALRC was told that plans for a further case management workshop are in train.

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237 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), Rec 4.1(i).
238 National Judicial Conference of Australia, *National Judicial Orientation Program* (2010), Session 13B.
239 C Roper, *Report: A Curriculum for Professional Development for Australian Judicial Officers* (2007), prepared for the National Judicial College of Australia, Program 2.1.
240 Ibid, Program 2.1.
241 Ibid, Module 7.
242 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia.

3.227 From time to time, the AIJA holds conferences and seminars for judicial officers. In the past, some of these have covered discovery issues; including the use of computer technologies. In 2008, the AIJA held the *4th AIJA Law & Technology Conference* where several sessions focused on e-discovery.[243] Previously, in 2007, the AIJA held a discovery seminar which canvassed case management and the rise of e-disclosure.[244]

3.228 The ALRC has heard that case management, including management of the discovery process, can be a topic of conversation at regular judges' meetings in the Federal Court. This kind of peer-to-peer education may be an effective way to inform Federal Court judges about the case management needs of the discovery process.

3.229 Another source of information on case management for Federal Court judges is the court's Benchbook. It includes a chapter on discovery which covers the general principles and rules for making discovery orders, as well as sample orders for discovery of documents. The ALRC understands that this chapter was last updated in 2002. In particular it does not refer to the requirements of *Practice Note CM 6*—specifically, the need to agree upon a discovery plan before the court makes orders for discovery of documents in electronic format—which was in substance issued in January 2009. Due to the Benchbook falling out of date, the ALRC has heard that it is not widely used among Federal Court judges.

3.230 However, the ALRC was told that work is progressing in the Federal Court on a replacement handbook. This may be an 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.

ALRC's views

3.231 As outlined above, there are already many opportunities for Federal Court judges to develop their case management knowledge and skills (including those required to effectively manage the discovery process) through education, training and the information resources of the court. However, the ALRC's preliminary view is that existing case management training and education for Federal Court judges should give greater focus to the issues arising in a discovery process—including the technologies used to discover electronically-stored information.

3.232 In the ALRC's preliminary view, there is a particular need for Federal Court judges to be provided frequent and continuing education in electronic discovery due to the constant advancement of information and communication technologies. This may be an especially important aspect of judicial education, if judges are to be more involved in planning the conduct of an e-discovery process as suggested in Proposal 3–2.

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243 Australian Institute of Judicial Administration, *AIJA Law & Technology Conference 2008 [Program]* <www.aija.org.au/> at 8 November 2010.

244 Australian Institute of Judicial Administration, *AIJA Discovery Seminar* (2007) <www.aija.org.au/> at 8 November 2010.

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

Discovery data collection

3.233 As mentioned earlier in this Chapter, 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. Consequently, accurate and up-to-date information as to the proportionality of discovery processes in federal courts—in terms of discovery costs relative to the utility of discovered documents in the context of the litigation—is not readily available.

3.234 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 reform in this area of civil litigation. It may also enable a basis for comparison to measure the effectiveness of the pre-discovery procedures outlined above, in Proposals 3–1 and 3–2, should they be implemented. Reliable statistics would be helpful to accurately assess whether these proposed procedures are successful in achieving the expected goals of reducing litigation expenses overall.

3.235 In particular, data on discovery costs may provide an indication as to whether the procedures proposed above, if implemented, 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.

3.236 The collection of accurate and meaningful data on the proportionality of discovery processes would likely present significant challenges. It may 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, for example, the protection of confidential information.

3.237 Quantifying the utility of discovered documents may also raise a particular challenge in the collection of this data. As discussed in this chapter, 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 the parties' 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. This may suggest that the extent to which discovered documents are actually used in the

disposal of litigation could only be measured by the impressions of the parties or their lawyers, rather than exact numerical or monetary terms.

ALRC's views

3.238 The ALRC's preliminary view is that 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, is necessary to identify and act upon concerns relating to the high and disproportionate costs of the discovery process. The collection of such data is also, in the ALRC's preliminary view, necessary to measure the success of the new court procedures proposed in this Chapter, if implemented.

3.239 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.

3.240 At this stage of the Inquiry, the ALRC considers 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 effectively gather this data. The ALRC also acknowledges that the court may require additional funding to establish and maintain data collection facilities to measure the proportionality of discovery processes.

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

Family Court of Australia

3.241 During initial consultations in this Inquiry, the ALRC heard that disclosure procedures in the Family Court are generally working well. As mentioned in Chapter 2, this may be in part due to the nature of family law proceedings, as the issues in family law matters are relatively contained and largely well-known to the parties. The ALRC has heard that pre-litigation requirements in family law proceedings also help to clarify and refine the issues in dispute between the parties. Disclosure in proceedings before the Family Court, therefore, may have a particularly narrow focus that is amenable to an efficient disclosure process.

3.242 Based on initial consultations, the ALRC understands that parties are generally compliant with disclosure obligations in Family Court proceedings. The ALRC is not aware of any particular issues arising in the process of disclosure in proceedings before the Family Court. However, the ALRC welcomes feedback from stakeholders on any difficulties encountered in a disclosure process in Family Court proceedings.

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

Federal Magistrates Court of Australia

3.243 As discussed in Chapter 2, the ALRC is aware of concerns relating to the operation of s 45 of the *Federal Magistrates Act 1999*—which prohibits discovery unless the court declares that it is appropriate in the interests of the administration of justice. This issue is considered in detail in Chapter 2.

3.244 The ALRC is not aware of any other particular issues arising in the discovery process in proceedings before the Federal Magistrates Court. The ALRC has heard that in many cases before the Federal Magistrates Court, the parties will make appropriate, informal arrangements for the disclosure of documents. This may be possible due in part to the nature of the smaller, less complex matters which the court is intended to handle in its jurisdiction.

3.245 In the Federal Magistrate Court's family law jurisdiction, as in Family Court proceedings discussed above, the issues in dispute may be sufficiently clear and contained to facilitate a focussed and efficient disclosure process.

3.246 Nevertheless, the ALRC welcomes feedback from stakeholders on any issues arising in the process of disclosure in Federal Magistrate Court proceedings—in addition to stakeholder views on s 45 issues discussed in Chapter 2.

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

4. Ensuring Professional Integrity: Ethical Obligations and Discovery

Contents

Introduction

4.1 The Terms of Reference for this Inquiry direct the ALRC to inquire into and report on, among other things, 'the law, practice and management of discovery of documents in litigation before federal courts' and the questions of the overuse and expense of discovery.[1] The Terms of Reference also direct the ALRC to have regard to 'the sufficiency, clarity and enforceability of obligations on practitioners and parties to identify relevant material as part of the discovery process as early as possible'. The

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

ethical and professional 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. Such obligations have a role to play in limiting the overuse, and reducing the cost, of discovery. Accordingly, this chapter considers the ethical and professional obligations of lawyers in the context of discovery.

4.2 The first part of this chapter outlines the key sources of legal ethical obligations in Australia and provides an illustrative overview of the nature and extent of several key forms of potential discovery abuse and misconduct, including identifying the key legal ethical obligations such conduct may contravene. It also outlines the current professional and court imposed disciplinary structures and mechanisms in place to enforce those obligations.

4.3 The second part discusses the overarching issues that arise with respect to legal ethical obligations and misconduct in the context of discovery, including: lack of awareness about, and the broad nature of, legal ethical obligations; the limited application of such obligations; and difficulties in enforcement. This part also includes a brief examination of the role and nature of legal obligations in a changing legal environment, in particular in the context of electronic discovery and the applicability of obligations outside traditional courtroom processes.

4.4 The final part of the chapter examines existing educational requirements in relation to the legal ethical obligations owed by lawyers and proposes a new approach to the education of lawyers in this area.

Legal ethical obligations

4.5 The preceding chapters discuss legal obligations imposed on parties to litigation by disclosure requirements or court orders for discovery, procedures prescribed to determine the extent of those discovery obligations, and the practices employed to discharge them.

4.6 At the same time, lawyers owe a series of concurrent legal ethical obligations to the administration of justice, including the court, their clients and other lawyers. This framework of legal ethical obligations may be characterised as a 'duty matrix',[2] and is the focus of this chapter.

4.7 The ethical and legal rules relating to discovery practice are not mutually exclusive, and the 'ethical' rules are no less important than the 'legal' rules. As Professor Gino Dal Pont has indicated:

> the phrase 'legal ethics'... is an oxymoron to the extent that 'legal' implies mandatory laws, whereas 'ethics' for many connotes discretionary rules. In this latter sense, some use the term 'ethics' to distinguish rules that are professionally binding on a lawyer (ethical rules) from rules that are legally binding (legal rules). But such a practice conveys the incorrect impression that the ethical and legal rules are mutually exclusive, and that legal rules are more important than ethical rules.[3]

2 A Lamb and J Littrich, *Lawyers in Australia* (2007), 185.
3 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 4.

4.8 To reflect this, the ALRC refers to the duties discussed in this chapter as 'legal ethical obligations'. That said, the distinction can be useful, and so this chapter considers 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 crucially, the enforcement mechanisms—are also more clearly directed to lawyers, as opposed to other parties, than the other legal rules discussed earlier.

4.9 The nature and practical effect of these obligations on the behaviour of legal practitioners has evolved over time, which in part reflects the increasingly diverse practice of law and the evolution of the Australian legal system. For example, the growth of in-house legal counsel; the public listing of law firms; the rise of multidisciplinary firms; and the increasing role played by litigation funders may be seen to have 'muddied' the legal ethical waters.

Sources of legal ethical obligations

4.10 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'.[4]

4.11 As outlined above, the focus of this Inquiry is on discovery in the context of the federal civil justice system. However, to the extent that lawyers practising in the federal system are subject to regulation at a state and territory level, this chapter necessarily considers sources of obligations under state and territory legislation and professional rules.[5]

4.12 Of particular relevance in this context is that, in early 2009 the Council of Australian Governments (COAG) embarked on a project to nationalise regulation of the legal profession in Australia, referred to as the National Legal Profession Reform Project. 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 associations'.[6] In April 2010 a consultation package was released, which included a draft *Legal Profession National Law* (Draft National Law) and accompanying draft *Legal Profession National Rules* (Draft National Rules).[7] At the time of writing a three-month public consultation period on the consultation package had closed and the Taskforce was considering submissions received.

4.13 While the obligations articulated and imposed by substantive legislation and rules provide an important framework on a professional level, the ethical practice of

4 See, eg, C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 4.

5 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.

6 National Legal Profession Reform Taskforce, *Regulatory Framework* (2009).

7 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010); National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010).

law also involves lawyers deciding 'on a personal level ... what the rules mean, how to obey them [and] what to do when there are gaps or conflicts in the rules'.[8] This issue is addressed further with respect to approaches to the education of lawyers about legal ethical obligations.

General law

4.14 General law—in particular the law of contract, torts and equity—governs 'most incidents of lawyers' relationships with their clients, the court and third parties'.[9] For example, a lawyer's duty to their client arises in the context of the lawyer–client relationship, which is essentially a contractual relationship. Also arising in the context of that relationship is the lawyer's duty of care arising in tort and of confidentiality arising in equity.[10]

4.15 Further, while statute and rules largely govern the discovery process, 'the substantive right to discovery still exists as a principle of equity ... and recourse is had to equity where the rules are silent'.[11]

4.16 However, to the extent that the key obligations relevant to the discovery context arise from statute and professional rules, the focus of this chapter is on those sources of legal ethical obligations, rather than general law duties.

Statute and delegated legislation

4.17 There are several statutory sources of legal ethical obligations in Australia, including: the legal profession and civil procedure legislation in each jurisdiction; model laws; and other specific pieces of legislation.

4.18 The legal profession legislation in each jurisdiction outlines general requirements for engaging in legal practice and obligations with respect to trust accounting and costs, as well as establishing regulatory bodies and processes for handling complaints against, and the discipline of, practitioners in the jurisdiction.[12]

4.19 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 of Australia (Law Council).[13] The Model Laws were initially released in 2004 and revised in July 2006.

4.20 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.[14]

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8 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 4.
9 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 15.
10 See discussion below in relation to civil liability laws which have consolidated tort law.
11 B Cairns, *Australian Civil Procedure* (8th ed, 2009), 336.
12 *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).
13 Standing Committee of Attorneys-General, *Legal Profession Model Laws* (2nd ed, 2006).
14 Standing Committee of Attorneys-General, *Legal Profession Model Regulations* (2nd ed, 2007).

4.21 The core provisions of the Model Laws and the Model Regulations that are of relevance to this Inquiry relate to standards for legal education, definitions of misconduct, costs disclosures and the regulation of legal practices.

4.22 In addition, as part of the National Legal Profession Reform Project, COAG, with the support of the Australian Government Attorney-General, released the Draft National Law and accompanying Draft National Rules. The Draft National Law encompasses those areas currently dealt with in legal profession legislation in each jurisdiction.[15]

4.23 There is also civil procedure legislation in some jurisdictions which regulates the conduct of participants in civil litigation and includes several provisions of relevance to the discovery process.[16] For example, the *Civil Procedure Act 2010* (Vic) implemented a series of recommendations from the Victorian Law Reform Commission's (VLRC) *Civil Justice Review* to improve the standard of conduct of participants in civil litigation and reduce costs and delay, including several measures applicable to discovery.[17] Of particular relevance to this Inquiry are the 'overarching obligations'—the content and effect of which are discussed later in this chapter—imposed by the *Civil Procedure Act* on all parties to litigation and their legal representatives.

4.24 The statutory sources of legal ethical obligations outlined above are augmented by obligations—both legal and ethical—imposed by other specific pieces of legislation. These are discussed in this chapter only to the extent that they impose legal ethical obligations, rather than practice-directed obligations. For example, these include:

- the obligation to act,[18] and assist their clients to act,[19] consistently with the overarching purpose of the *Federal Court of Australia Act 1976* (Cth).[20] There is a similar obligation under various other pieces of legislation;[21] and
- the obligation not to proceed unless there are reasonable prospects of success under legislation introduced to consolidate tort law and procedural changes in civil actions to encourage quicker and cheaper resolution of civil disputes.[22]

4.25 Finally, the *Legal Services Directions 2005* (Cth) are a set of binding rules issued under s 55ZF of the *Judiciary Act 1903* (Cth) by the Attorney-General about the

15 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010); National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010).

16 See, eg, *Civil Procedure Act 2005* (NSW); *Civil Procedure Act 2010* (Vic).

17 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008). The reforms will take effect on 1 January 2011.

18 *Federal Court of Australia Act 1976* (Cth) s 37N(1).

19 Ibid s 37N(2).

20 Ibid s 37M. The overarching purpose provisions took effect on 1 January 2010.

21 See, eg, *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). See: J Spigelman, 'Just, Quick and Cheap: A New Standard for Civil Procedure' (2000) Special Edition 6 *Bar Brief* Note also that the Civil Dispute Resolution Bill 2010 (Cth), which was being considered by the Senate Legal and Constitutional Affairs Legislation Committee due to report on 22 November 2010, includes a similar overarching purpose clause.

22 See, eg, *Civil Law (Wrongs) Act 2002* (ACT) ss 186–190.

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.[23]

Professional rules

4.26 In Australia, the legal profession is essentially regulated on a state and territory basis. Traditionally, the legal profession was divided into solicitors and barristers. In many jurisdictions, the profession is now combined—either formally, or in practice. For most purposes, however, solicitors and barristers are regulated separately by professional bodies such as law societies and bar associations. Legal profession rules are binding on Australian legal practitioners and Australian-registered foreign lawyers to whom they apply.[24]

4.27 As is the case with legal profession legislation, while there are no national professional conduct rules in force, the professional conduct rules that apply to Australian legal practitioners are now largely uniform. Most jurisdictions have now adopted some form of the Law Council's *Model Rules of Professional Conduct and Practice* (Model Rules)[25] developed in 2002.[26]

4.28 In line with a recommendation made by the ALRC in *Managing Justice—A Review of the Federal Civil Justice System* (ALRC Report 89)[27] 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).[28] At the time of writing, public consultation on these rules had closed and the Law Council and ABA were considering submissions received.

Legal ethical obligations, misconduct and discovery

4.29 In ALRC Report 89, the ALRC commented that: 'in almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly

23 *Legal Services Directions 2005* (Cth). At the time of writing, these Directions were under review.

24 See, eg, *Legal Profession Act 2004* (NSW) s 711.

25 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002).

26 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 Western Australian and Tasmanian rules have yet to follow: *Legal Profession Rules 2009* (WA); *Rules of Practice 1994* (Tas), however the ALRC understands that Western Australia is currently in the process of revising its professional conduct rules and has previously indicated it will adopt the Model Rules following the current revision by the Law Council and Australian Bar Association: *Draft Professional Conduct Rules 2010* (WA).

27 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 13.

28 Law Council of Australia, *Legal Profession National Rules: Solicitors' Rules* (2010); Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010).

and the most in need of court supervision and control'.[29] An overarching concern is that discovery may be used as a tactical tool to exhaust the resources of the other party or encourage settlement.

4.30 As indicated throughout this Consultation Paper, the primary concerns with regard to the discovery process in Australia centre on expense, scale and delay.

4.31 While the ALRC is not aware of any evidence of chronic abuse or misconduct arising in relation to discovery, allegations of misconduct and abuse in the context of discovery concern the following issues: charging unreasonable costs; making unnecessarily broad discovery requests or flooding the other party with voluminous irrelevant documents; withholding relevant documents; and delay.

4.32 These concerns are examined below against the backdrop of legal ethical obligations owed by lawyers to the administration of justice, including to the court, the client, other lawyers and third parties. Potentially, there is a range of other forms of discovery abuse that may occur, encompassing ethically objectionable practices ranging from discourtesy to harassment, however this discussion is illustrative and is not intended to provide an exhaustive overview of the ways in which discovery abuse may conflict with legal ethical obligations.

4.33 The ALRC notes that the challenge in this Inquiry is to disentangle issues arising from perceptions of abuse, from those of valid practice, to assess what should be appropriate responses to actual instances of misconduct.

'Trolley load litigation' and defensive legal practice

4.34 On admission to practice, lawyers become officers of the court. Accordingly, lawyers owe an overriding duty to the court which prevails over all other duties, including the duty to the client. The preamble to the Advocacy and Litigation Rules, contained within the Model Rules, relevantly states:

> Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence [or] the preparation and filing of documents ... should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents.[30]

4.35 The Model Rules also incorporate an expression of the general standard of conduct expected of practitioners:

> A practitioner must not engage in conduct, whether in the course of practice or otherwise, which is:
>
> ... calculated, or likely to a material degree, to:
>
> (a) be prejudicial to the administration of justice;
>
> (b) diminish public confidence in the administration of justice...[31]

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

30 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 12.

31 Ibid r 30.1.

4.36 Despite this duty to the administration of justice and, in particular, to the court, in initial consultations the ALRC heard concerns about what has been referred to as 'trolley load litigation', 'trial by avalanche', or 'defensive legal practice'.[32]

4.37 These practices essentially involve lawyers providing the opponent with vast numbers of documents.[33] Former Chief Justice Black of the Federal Court has observed 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.[34]

4.38 There are many reasons put forward to explain the phenomenon of trolley load litigation. First, it might be argued that the production of vast numbers of documents is simply a consequence of the exponential growth in documents in the wake of computer technology; secondly, the adversarial nature of the system and attempts by lawyers to do what is seen to be in the best interests of their client; thirdly, an attempt to 'wear down' the other party; and finally, where the scope of required discovery is unclear, in order to avoid disciplinary action for professional misconduct if documents are withheld.

Legal rules

4.39 Legislation and court rules increasingly contain an overarching purpose to facilitate the 'just resolution of disputes', 'according to law' 'as quickly, inexpensively and efficiently as possible'.[35] While not expressly stated, lawyers applying due diligence to reduce the volume of potentially discoverable documents to those directly relevant to the proceeding is clearly consistent with such purposes. Accordingly, practices such as trolley load litigation may constitute a breach of the duty to conduct proceedings in a way which is consistent with those overarching purposes.[36]

Legal ethical obligations

Duty to the administration of justice and the court

4.40 Practices such as trolley load litigation may be inconsistent with the legal ethical obligations owed by lawyers to the court and the administration of justice. More specifically they raise issues with respect to:

- the duty of fairness, in particular not to abuse court processes (discussed in more detail in relation to misconduct involving unreasonable expense and delay);

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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 a term used by a stakeholder in consultations.

33 The focus of this Inquiry is on trolley load litigation that arises as a result of the discovery process, as opposed to arising from, eg, the filing of unnecessary material as exhibits to affidavits.

34 As cited in Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 434.

35 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37M; *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 See, eg, *Federal Court of Australia Act 1976* (Cth) s 37N; *Civil Procedure Act 2005* (NSW) s 56.

- the duty to narrow the issues in dispute and identify relevant material and thereby reduce the volume of potentially discoverable documents;[37] and
- the obligation of lawyers to appraise the case and exercise personal judgment about the existence and relevance of documents in the proceedings.[38]

Duty to the client

4.41 The lawyer's duty to the client forms another important aspect of the 'duty matrix' and arises in the context of the lawyer–client relationship, the basis of which is the 'retainer'. As a result, the duty to the client arises under general law (in particular contract, torts and equity) as well as relevant legislation and professional rules.

4.42 For example, while the retainer is contractual in nature, the relationship is also fiduciary and, accordingly, lawyers owe a duty of care to exercise reasonable competency and skill in the conduct of the client's matter.[39]

4.43 In a general sense, the Model Rules articulate a lawyer's duty to the client. The preamble to the 'Relations with Clients' section states:

> Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests ... 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.[40]

4.44 More specifically, the Model Rules provide that a practitioner must

> seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions.[41]

37 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 5.

38 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.

39 *Rogers v Whitaker* (1992) 175 CLR 479.

40 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), 5.

41 Ibid r 12.2.

4.45 Accordingly, a lawyer's duty to the client encompasses a duty to advise, that is subject to the overriding duty to the court. The duty requires that, for example, lawyers advise their clients about the purposes of discovery, their rights and obligations with respect to the discovery process, and which documents are relevant for the purposes of discovery.

4.46 Judicial discussion of the duty has emphasised the obligation to take positive steps to ensure that clients are aware of the duty of discovery[42] and to take responsibility for ensuring that clients comply with those duties. While not specifically articulated in the professional rules, other cases have also suggested that lawyers have an obligation to work with clients to understand and interrogate document management systems in order to satisfy discovery search obligations.[43]

4.47 In the preceding chapter, the ALRC proposed greater judicial control over the discovery process, including in relation to the scope of discoverable documents. Even where the scope of discovery is more strictly controlled, however, the role of lawyers and parties to litigation in making decisions about how much to disclose, and at what stage, remains of central importance in attempts to address the expense, scale and delay currently associated with discovery.

4.48 For example, lawyers and their clients still face decisions about which documents to discover where they are aware of documents that fall within the scope of a request or order but that are not substantially relevant to the issues in dispute and where disclosure will only burden their opponent with the task of vetting useless material.

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

Withholding documents—misleading conduct

4.49 The duty to act with candour, including not to mislead the court, is articulated in legislation and professional rules, and reflects the position at common law. The duty—both proscriptive and prescriptive—is a central obligation owed by lawyers and necessarily has general application to the conduct of matters by lawyers.

4.50 However, in the context of discovery it also has application to the extent that in some instances, parties do not provide adequate discovery through failing to disclose the existence of relevant documents, or by destroying documents.

42 See, eg, *Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaires) Ltd* [1968] All ER 98, 99. See also: M Costello, 'The Legal Practitioners Disciplinary Tribunal: A Solicitor's Duty Regarding Discovery' (1996) 23(10) *Brief* 26.

43 This obligation is discussed later in this chapter in relation to document destruction and the duty to preserve documents. See also the seminal case in the US: *Qualcomm v Broadcom* (Unreported, USDC Cal., 05cv1958, 3 August 2007).

4.51 Under professional rules, lawyers must not knowingly make—either in oral or written submissions—'a misleading statement to a court', 'a false statement to the opponent in relation to the case', or 'deceive or knowingly or recklessly mislead the court'; and they have an obligation to correct any misleading statements.[44]

4.52 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.[45]

4.53 The Model Rules incorporate an expression of the general standard of conduct expected of practitioners, providing that 'a practitioner must not engage in conduct, whether in the course of practice or otherwise, which is ... dishonest'.[46]

4.54 Specific legislative articulations of the duty of candour are broad, often included within the scope of overarching obligations. For example, the *Civil Procedure Act 2010* (Vic) contains overarching obligations including to act honestly.[47]

4.55 In the context of discovery, such an obligation is likely to arise most frequently where lawyers and their clients are making decisions about which documents falls within the terms of a discovery request or order, particularly where those decisions lead to a failure to discover relevant documents.

4.56 Such decisions raise a dilemma which lawyers often need to consider, that is where their obligation to their client and the duty to the court may come into conflict.

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

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44 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; *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; *Conduct Rules* (WA) rr 20, 21; *Legal Profession (Barristers) Rules 2008* (ACT) rr 21, 22.

45 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; *Conduct Rules* (WA) r 25; *Legal Profession (Barristers) Rules 2008* (ACT) r 25. See also *Rondel v Worsley* [1969] AC 191, 227–228.

46 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 30.1.

47 *Civil Procedure Act 2010* (Vic) s 17.

Delay

4.57 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.[48] In many respects, these legislative articulations reflect 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 made the following comments:

> The time has passed when obstructionist and delaying tactics on the part of parties to proceedings in the court can be countenanced by the court ... 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.[49]

4.58 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.[50]

4.59 The Draft National Laws impose an obligation on law practices to 'act reasonably to avoid unnecessary delay' where it results in increased legal costs.[51]

4.60 Under the National Barristers' Rules, barristers are required to complete work in sufficient time in order to comply with orders, directions, rules or practice notes of the court.[52]

4.61 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',[53] to 'avoid unnecessary expense and waste of the court's time'[54] and 'complete a client's business within a reasonable time'.[55]

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48 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.

49 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169.

50 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); *Conduct Rules* (WA) r 18(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).

51 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.5.

52 Australian Bar Association, *Barristers' Conduct Rules* r 56(a).

53 *Professional Conduct and Practice Rules 2005* (Vic) r 1.2.

54 *Legal Profession Rules 2009* (WA) r 14.4.

4.62 In NSW, both the *Professional Conduct and Practice Rules* and the *Barristers' Rules* require lawyers to complete work in sufficient time in order to comply with court rules and orders.[56]

4.63 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'.[57]

4.64 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 that contravenes lawyers' legal ethical obligations.

4.65 Commentators and stakeholders have indicated that 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
- other forms of satellite litigation about matters such as the assertion of legal professional privilege over documents.[58]

4.66 Delay is an area in which there is considerable overlap in regulation between legal and ethical rules. For example, 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 the discovery process or the progress of litigation more broadly, such conduct is in breach of legal rules and lawyers may be subject to personal costs orders, an enforcement mechanism discussed later in this chapter.[59]

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55 *Rules of Practice 1994* (Tas) r 10.

56 Australian Bar Association, *Legal Profession National Rules: Barristers' Rules* (2010) r 56(a); *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.

57 *Civil Procedure Act 2010* (Vic) s 26.

58 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). While lawyers owe legal ethical obligations in relation to the responsible use of privilege this issue is not discussed in this chapter. For discussion of privilege in the specific context of federal investigations, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (2008).

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).

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

Costs

4.67 The Terms of Reference note the 'high and often disproportionate cost of discovery'. Complaints made to legal service bodies and disciplinary bodies commonly relate, at least in part, to legal costs.

4.68 In the context of discovery, the ALRC has heard that there are two primary forms of cost-related complaint that contribute to the concern that discovery may be used as a 'profit centre'. These are: using discovery as a tactical tool to increase legal costs and thus exhaust the resources of the other party; and charging excessive costs for work performed, including for work performed at a certain level.

4.69 Chief Justice 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 argues, 'the control is of course, the practitioner's sense of professional responsibility'.[60]

4.70 Under legal profession legislation in most jurisdictions, once retained in a matter, lawyers are under various obligations to provide to the client a written disclosure of costs, including an estimate which outlines the possible contingencies that may affect that estimate and which details the way in which costs are calculated.[61]

4.71 Existing legal professional legislation does not require that lawyers charge their clients reasonable fees. In many jurisdictions only where there is no costs agreement or applicable scale of costs are legal costs recoverable according to the 'fair and reasonable value of the legal services provided'.[62] However, mandatory criteria included for determining what is fair and reasonable only apply to costs assessors making a costs assessment.[63]

4.72 However, under the Draft National Laws, a law practice would be under an obligation not to charge more than fair and reasonable legal costs.[64] Legal costs would be considered fair and reasonable if they:

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60 J Spigelman, 'Opening of the Law Term' (2004) *(Speech to the Law Society of New South Wales Opening of the Law Term Dinner, Sydney, 2 February 2004)* .

61 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.

62 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.

63 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 a recommendation made in Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 27.

64 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010), s 4.3.4.

> (a) are reasonably incurred and are reasonable in amount; and
>
> (b) are proportionate in amount to the importance and complexity of the issues involved in a matter, the amount or value involved in a matter, and whether the matter involved a matter of public interest; and
>
> (c) reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned; and
>
> (d) conform to any applicable requirements of this Part, the National Rules and fixed costs legislative provisions.[65]

4.73 The Draft National Laws also impose an obligation on law practices to avoid increased legal costs. Specifically, a 'law practice must not act in a way that 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'.[66]

4.74 Generally professional rules do not explicitly require that lawyers charge their clients reasonable fees. However, jurisdictions vary in relation to the obligations owed by lawyers with respect to costs. For example, under the draft professional conduct rules in Western Australia

> a practitioner may only charge costs which are no more than is reasonable for the practitioner's services having regard to the complexity of the matter, the time and skill involved, any scale of costs that might be applicable and any agreement as to costs between the practitioner and the client.[67]

4.75 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'.[68]

4.76 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.[69]

4.77 In considering whether the fees or the terms of a cost agreement are unfair or unreasonable there is a range of factors to which regard is had. These include: the nature of the matter; the amount at stake; jurisdiction; the client; and the experience and reputation of the lawyer.[70]

4.78 The overarching obligations of the *Civil Procedure Act 2010* (Vic) also include the obligation to ensure that costs are reasonable and proportionate.[71]

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65 Ibid, s 4.3.4(2).
66 Ibid, s 4.3.5.
67 *Draft Professional Conduct Rules 2010* (WA) r 15.4. As noted earlier, Western Australia is revising its professional conduct rules, for the existing rule see: *Legal Profession Rules 2009* (WA) r 5.8.
68 *Legal Profession (Solicitors) Rule 2007* (Qld) guidelines to r 2.1.
69 *Rules of Professional Conduct and Practice* (SA) r 42.2.
70 Ibid.
71 *Civil Procedure Act 2010* (Vic) s 24.

4.79 As discussed in Chapter 3, the often high cost of discovery is sometimes attributed to the array of junior solicitors, law clerks and paralegals who may work through a request for discovery of documents. Abuse of discovery through the use of non-legally qualified 'paralegals to perform tasks which progress the matter which are billed as if they involve the exercise of legal skill' is alleged.[72]

4.80 Submissions to the VLRC *Civil Justice Review*, including submissions by the Victorian Bar, suggested that there is a culture in the Australian legal system of leaving no stone unturned, and continually searching for the 'smoking gun'.[73] However, where such approaches result in gross or excessive overcharging, such conduct may constitute professional misconduct under legal profession legislation. Legislation across jurisdictions provides that professional misconduct includes 'charging of excessive legal costs in connection with the practice of law'.[74]

4.81 Courts also have jurisdiction to supervise legal costs charged by lawyers to their clients, as well as to supervise the ethical conduct of lawyers in this respect.[75]

4.82 The vexed question is deciding what is undue or excessive with respect to costs. The focus of this Inquiry is on proposing steps which may assist in preventing such questions arising.

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

Other issues

Delegation and outsourcing

4.83 In consultations, stakeholders expressed their concern about the practice of delegating responsibility for reviewing and categorising documents relevant to the discovery process to junior lawyers and paralegals and having more senior lawyers check only a small sample of documents and potentially not providing adequate supervision.

4.84 A similar concern was also raised with respect to the increasing practice of outsourcing this type of discovery work overseas, utilising lower labour costs as a means of reducing the costs of working through discovery requests and retrieving electronic data.

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72 B Bartley, 'Fair Trade? Why We Need to Rethink Time Billing' (2010) 30(8) *Proctor* 12. See also *Council of the Queensland Law Society v Roche* [2004] Qd R 574, in which disciplinary action arose as a result of a solicitor's gross overcharging, including most notably for 24 minutes spent, and $156 charged, for discussing and wrapping a box of chocolates for a reporting doctor's secretary, although the case did not arise in a discovery-specific context.

73 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 435.

74 See, eg, *Legal Profession Act 2004* (NSW) s 498; *Legal Profession Act 2007* (Qld) s 420; *Legal Profession Act 2007* (Tas) s 422.

75 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.

4.85 In consultations, it was suggested that a further issue arising from delegation and outsourcing is the extent to which such practices lead to duplication. Specifically such duplication may arise where a senior lawyer re-does the work completed by a more junior lawyer or paralegal, in part in order to ensure they comply with their legal ethical and professional obligations.

4.86 The ALRC is interested in hearing from stakeholders about the potential impact such practices may have on ensuring that lawyers comply with their legal ethical and professional obligations.

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

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

Preservation or destruction of documents

4.87 The case of *McCabe v British American Tobacco Australia Services Ltd*,[76] which was overturned on appeal in *British American Tobacco Australia Services Ltd v Cowell*[77] 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'.[78] As Professor Peta Spender has commented,

> 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.[79]

76 *McCabe v British American Tobacco Australia Service Ltd* [2002] VSC 73.

77 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524. The Victorian Court of Appeal 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].

78 A Lamb and J Littrich, *Lawyers in Australia* (2007), 260.

79 P Spender, 'McCabe: Unresolved Questions about Truth and Justice' (2004) 12 *Torts Law Journal* 1, 10.

4.88 In light of the tensions revealed by such litigation, articulations of this duty were introduced in two jurisdictions. In NSW, the *Legal Profession Regulations* provide that lawyers must not advise clients to destroy, or be a party to the destruction of documents that are of relevance to current or anticipated litigation, contravention of which amounts to professional misconduct. The regulations state:

> **177 Advice on and handling of documents**
>
> (1) An Australian legal practitioner must not give advice to a client to the effect that a document should be destroyed, or should be moved from the place at which it is kept or from the person who has possession or control of it, if the practitioner is aware that:
>
> (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
>
> (b) following the advice will result in the document being unavailable or unusable for the purposes of those proceedings.
>
> (2) An Australian legal practitioner must not destroy a document or move it from the place at which it is kept or from the person who has possession or control of it, or aid or abet a person in the destruction of a document or in moving it from the place at which it is kept or from the person who has possession or control of it, if legal practitioner is aware that:
>
> (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
>
> (b) the destruction or moving of the document will result in the document being unavailable or unusable for the purposes of those proceedings.[80]

4.89 Following *McCabe,* the wrongful destruction of documents was inserted as an offence into the *Crimes Act 1958* (Vic).[81]

4.90 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.[82] 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.[83]

80 *Legal Profession Regulations 2005* (NSW) reg 177(1), (2).
81 *Crimes Act 1958* (Vic) pt I, div 5.
82 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.
83 *Zubulake v UBS Warburg* 229 FRD 422 (SDNY, 2004).

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

4.91 Overall, it is possible to discuss the nature of discovery abuse in a general sense, and to examine some select examples of such abuse. However, the actual nature and extent of discovery abuse in Australia remains unclear. In the course of this Inquiry stakeholders have expressed differing views as to the extent of alleged abuse by lawyers in the context of discovery. In light of this, the ALRC welcomes further submissions on this issue—and particularly about the tension between legitimate document management and inappropriate destruction.

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

Disciplinary structures and court imposed sanctions

4.92 Practitioner obligations arise largely from jurisdiction-specific legislation or professional rules. Consequently, misconduct and breaches of legal 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 jurisdiction.

4.93 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.[84]

4.94 Following the implementation of the Model Laws, misconduct is primarily characterised as 'professional misconduct' or 'unsatisfactory professional conduct', other than in South Australia where the distinction is made between 'unsatisfactory conduct' and 'unprofessional conduct'.[85]

4.95 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'.[86]

4.96 While professional misconduct is also defined under legal profession legislation, the statutory concepts are 'neither exhaustive nor intended to restrict the meaning and application of misconduct at common law'.[87] Under the legal profession legislation, professional misconduct includes:

84 Y Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th ed, 2010), 217.
85 *Legal Practitioners Act 1981* (SA) s 5(1).
86 *Allinson v General Council of Medical Education and Registration* [1984] 1 QB 750, 763.
87 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 523.

> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.[88]

4.97 Unsatisfactory professional conduct includes:

> Conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable competent Australian legal practitioner.[89]

4.98 Traditionally, other forms of constraining the conduct of lawyers, for example liability under general law to clients for breach of the duty of competence, care and skill, have complemented, and in some instances acted as an alternative, to the regulatory framework provided by the courts and professional bodies.[90] However, consideration of those more general mechanisms for enforcing a lawyer's duty to the client are a matter for individual clients and the ALRC's focus in this part of the chapter is in on systemic mechanisms for responding to alleged breaches of legal ethical obligations.

The National Legal Services Board and National Legal Ombudsman

4.99 As part of the National Legal Profession Reform Project, the Australian Government has proposed a new national framework to regulate the profession.

4.100 The proposed regulatory framework consists of a National Legal Services Board (the Board) and a National Legal Ombudsman (the Ombudsman). 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'.[91] While many of the functions of Board and Ombudsman would be delegable, the bodies would be responsible for monitoring of the functions and where necessary could assume control over special functions.[92]

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88 Standing Committee of Attorneys-General, *Legal Profession Model Laws* (2nd ed, 2006) s 4.2.2.

89 Ibid, s 4.2.1.

90 See, C Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676.

91 National Legal Profession Reform Taskforce, *Consultation Report* (2010), Executive Summary, 2.

92 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) ss 1.3.6(1), 1.3.7. See also National Legal Profession Reform Taskforce, *Consultation Report* (2010), 8 for a discussion of circumstances in which the Ombudsman would take over special functions—for example, where the relevant case may set a precedent.

4.101 The Board would be responsible for making National Rules to give effect to the National Law, except with respect to rules governing legal practice, conduct and continuing professional development.[93] These rules would be developed by the Law Council and ABA, subject to approval by the Board.[94]

4.102 The Ombudsman would be established as an independent body responsible for determining complaints about practitioners, ensuring compliance with the National Law and National Rules and serving an educative function.[95]

4.103 The Ombudsman's compliance role would encompass prosecution of practitioner misconduct[96] and powers to undertake complaint, audit and compliance investigations[97] and a role in administering the penalties regime envisaged under the National Law. Failure to comply with the National Law or National Rules would be capable of constituting unprofessional conduct or professional misconduct.[98]

4.104 In cases of unprofessional conduct or professional misconduct the Ombudsman may impose the following possible sanctions:

- caution or reprimand a practitioner;
- require an apology from the practitioner;
- order the practitioner to attend training;
- impose conditions on a practising certificate;
- order the work to be redone; or
- fine the practitioner (up to $25,000).[99]

4.105 The Ombudsman may also initiate proceedings in the designated disciplinary tribunal of the relevant jurisdiction. The designated tribunal's powers include: the power to make orders requiring the practitioner to do or refrain from doing something in connection with the practice of law; the ability to recommend that the practitioner be removed from the roll; and the power to have the practitioner's practising certificate cancelled.[100]

State and territory disciplinary structures

4.106 Legal professional disciplinary structures and processes vary across jurisdictions and the ALRC welcomes moves towards harmonisation as part of the National Legal Profession Reform Project.

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93 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 9.1.1.
94 Ibid, s 9.1.3.
95 Ibid, ss 8.3.5, 8.3.3.
96 National Legal Profession Reform Taskforce, *Consultation Report* (2010), 7.
97 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010), ch 7.
98 Ibid, s 5.4.4.
99 Ibid, s 5.4.5.
100 Ibid, s 5.4.9.

4.107 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.[101]

4.108 Generally, it is then open to the relevant body to dismiss, investigate or initiate disciplinary proceedings in relation to the complaint.[102] Complaints in some jurisdictions may be referred to mediation. In some instances the complaint is referred directly to the relevant disciplinary tribunal in that jurisdiction.

4.109 Following a finding that a practitioner's conduct constitutes unsatisfactory professional conduct or professional misconduct, a range of sanctions may be imposed, which range in severity from a caution to being struck off the roll of practitioners. Available sanctions include:

- removing the practitioner's name from the local or interstate roll;[103]
- suspending, cancelling, or imposing conditions upon the practitioner's practising certificate;[104]
- cautioning or reprimanding the practitioner;[105]
- fining the practitioner, with the maximum allowable fine ranging from $10,000–$100,000;[106]

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101 *Legal Profession Act 2004* (NSW) ss 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).

102 *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); 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).

103 *Legal Profession Act 2004* (NSW) ss 565(3), 588(2); *Legal Profession Act 2007* (Qld) ss 461(3), 484(2); *Legal Practitioners Act 1981* (SA) ss 89(2)(d), 90AF(6); *Legal Profession Act 2007* (Tas) ss 480(3), 508(2); *Legal Profession Act 2004* (Vic) s 4.4.37(2); *Legal Profession Act 2008* (WA) ss 444(2)(b), 463(2); *Legal Profession Act 2006* (ACT) ss 431(3)(b), 460(2); *Legal Profession Act 2006* (NT) ss 528(3), 552(2).

104 *Legal Profession Act 2004* (NSW) ss 540(2)(d), 562(2)(b)–(d), 562(3)(b)–(d), 562(4)(j); *Legal Profession Act 2007* (Qld) ss 456(2)(b)–(d), 456(3)(b)–(d), 456(4)(j); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(d), 82(6)(a)(iii)–(iv), 89(2)(b)–(c), 89A(c)–(d); *Legal Profession Act 2007* (Tas) ss 471(b)–(d), 472(b)–(d), 473(n); *Legal Profession Act 2004* (Vic) ss 4.4.17(b)–(d), 4.4.18(b)–(d), 4.4.19(j); *Legal Profession Act 2008* (WA) ss 439(a)–(c), 440(b)–(d), 441(m); *Legal Profession Act 2006* (ACT) ss 425(3)(b)–(d), 425(4)(b)–(d), 425(5)(i); *Legal Profession Act 2006* (NT) ss 525(3)(b)–(d), 525(4)(b)–(d), 525(5)(i).

105 *Legal Profession Act 2004* (NSW) ss 540(2)(a)–(b), 545(1)(f), 562(2)(e); *Legal Profession Act 2007* (Qld) ss 456(2)(e), 458(2)(a); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(c), 82(6)(a)(i), 89(2)(a); *Legal Profession Act 2007* (Tas) ss 454(2)(a), 456(7)(a), 471(e), 476; *Legal Profession Act 2004* (Vic) s 4.4.19(k); *Legal Profession Act 2008* (WA) ss 426(2)(a), 439(d); *Legal Profession Act 2006* (ACT) ss 413(2)(a)–(b), 425(3)(e), 429(c); *Legal Profession Act 2006* (NT) ss 499(2)(a), 525(3)(e).

106 *Legal Profession Act 2004* (NSW) ss 562(4)(a), 562(7); *Legal Profession Act 2007* (Qld) ss 456(4)(a), 458(2)(b); *Legal Practitioners Act 1981* (SA) ss 82(6)(a)(ii), 82(6)(b)–(c); *Legal Profession Act 2007* (Tas) ss 454(2)(b), 473(a); *Legal Profession Act 2004* (Vic) s 4.4.19(b); *Legal Profession Act 2008* (WA) ss 426(2)(b), 441(a); *Legal Profession Act 2006* (ACT) ss 413(2)(e), 413(3), 425(5)(a), 427; *Legal Profession Act 2006* (NT) ss 499(2)(b), 499(3), 525(5)(a).

- requiring the practitioner to comply with a compensation, costs, or other payment order;[107]
- requiring the practitioner to apologise;[108]
- requiring the practitioner to seek advice or complete a course in legal education;[109]
- requiring the practitioner to seek counselling or medical treatment;[110] and
- imposing conditions or limitations on the practitioner or the practitioner's legal practice, such as periodic inspections or working under supervision.[111]

4.110 In addition to these listed sanctions, there is also a certain degree of flexibility—in most jurisdictions at least one disciplinary body can impose any order that it considers appropriate.[112]

4.111 The Supreme Court in each jurisdiction has inherent jurisdiction over all practising lawyers and hears appeals from the relevant disciplinary tribunals.

Court-imposed sanctions

4.112 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'.[113] In addition to this inherent jurisdiction of the court, jurisdiction is also conferred under statute by way of judicial appeal from disciplinary tribunals.

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107 *Legal Profession Act 2004* (NSW) ss 540(2)(c), 545(1)(g), 562(5), 566(1), 573(1)–(3); *Legal Profession Act 2007* (Qld) ss 456(4)(b), 456(6), 458(2)(c), 458(3), 462(1); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(e), 85(1); *Legal Profession Act 2007* (Tas) ss 454(2)(d)–(e), 454(2)(g), 454(2)(m), 456(7)(d), 473(b), 473(d)–(e), 474, 481(1), 493(1); *Legal Profession Act 2004* (Vic) ss 4.3.17(1)(a)–(e); *Legal Profession Act 2008* (WA) ss 426(2)(c), 429(1), 441(c)–(e), 444(3); *Legal Profession Act 2006* (ACT) ss 413(2)(c), 429(b), 433(1), 444(1); *Legal Profession Act 2006* (NT) ss 525(6), 529(1), 536(1)–(2).

108 *Legal Profession Act 2007* (Qld) s 456(7)(b).

109 *Legal Profession Act 2004* (NSW) s 562(4)(b); *Legal Profession Act 2007* (Qld) ss 456(4)(c), 456(4)(i), 458(2)(g); *Legal Practitioners Act 1981* (SA) ss 79AB(1)(d)(ii), (6)(a)(iii)(B), 89(2)(b)(ii); *Legal Profession Act 2007* (Tas) ss 454(2)(h), 454(2)(j), 456(7)(e), 473(f), 473(l); *Legal Profession Act 2004* (Vic) s 4.4.19(c), 4.4.19(i); *Legal Profession Act 2008* (WA) ss 426(2)(d), 441(b), 441(l); *Legal Profession Act 2006* (ACT) ss 413(2)(d)(iii)–(iv), 425(5)(b), 425(5)(h); *Legal Profession Act 2006* (NT) ss 525(5)(b), 525(5)(h).

110 *Legal Profession Act 2004* (NSW) s 562(4)(h); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(d)(ii), 82(6)(a)(iii)(B), 89(2)(b)(ii); *Legal Profession Act 2007* (Tas) ss 454(2)(h), 455(7)(e), 473(k); *Legal Profession Act 2008* (WA) s 441(j).

111 *Legal Profession Act 2004* (NSW) ss 562(4)(c)–(g), 562(4)(i); *Legal Profession Act 2007* (Qld) ss 456(2)(f), 456(4)(d)–(h), 458(2)(d)–(f); *Legal Practitioners Act 1981* (SA) ss 77AB(d)(i), 77AB(e), 82(6)(a)(ib), 82(6)(a)(iii)(A), 89(2)(b)(i); *Legal Profession Act 2007* (Tas) ss 454(2)(f), 454(2)(i), 454(2)(k)–(l), 456(7)(c),473(c), 473(g)–(j), 473(m), 473(o)–(r); *Legal Profession Act 2004* (Vic) ss 4.4.17(d)–(h), 4.4.19(l)–(m); *Legal Profession Act 2008* (WA) ss 441(f)–(i), 441(k); *Legal Profession Act 2006* (ACT) ss 413(2)(d)(i)–(ii), 425(5)(c)–(g), 429(a); *Legal Profession Act 2006* (NT) ss 525(5)(c)–(g), 525(7).

112 *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).

113 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 370.

4.113 Courts possess a range of discretionary powers to discipline parties and lawyers for breach of both procedural rules and legal ethical obligations. This includes costs orders, which can be made personally against a lawyer under a range of legislation including the legal profession and civil procedure acts and various court rules.[114] Relevantly, such power may be exercised where lawyers act in a manner contrary to their legal ethical obligations, for example, by unduly delaying litigation or failing to obey court directions or orders.[115]

4.114 By way of example, under the *Civil Procedure Act 2010* (Vic), a broad range of sanctions are available to enforce the overarching obligations.[116] Contraventions can be taken into account in a court exercising any of its powers, including its discretion as to costs.[117] The court can also make compensatory orders[118] and any order it considers to be in the interests of a person prejudicially affected by the contravention.[119] Sanctions can be imposed on the court's own motion or on application by a person with sufficient interest in the proceedings.[120]

Legal ethical obligations, misconduct and discovery: issues arising

4.115 A range of factors, illustrated by the key forms of discovery abuse and misconduct outlined above, currently have an impact upon the occurrence and prevalence of such abuse and enforcement of relevant legal ethical obligations. As discussed below, these include the adversarial nature of the civil justice system, and more specifically:

- lack of knowledge about, and the broad nature and articulation of, legal ethical obligations;
- narrow application of legal ethical obligations; and
- limited enforcement of such obligations.

4.116 In many respects, the ALRC's proposals in other chapters of this Consultation Paper, encouraging a more active case management approach to discovery, will assist in countering potential discovery abuse generally.[121]

4.117 In addition, however, the ALRC considers that the proposals made below concerning: the need for greater awareness of legal ethical obligations; clearer articulation and explanation of obligations with respect to discovery; and wider

114 See, eg, *Federal Court Rules* (Cth) O 62, r 36(1); *Federal Magistrates Court Rules 2001* (Cth) r 21.07(1); *Civil Procedure Act 2005* (NSW) s 99.
115 Chapter 3 considered the use of costs powers to maintain proportionality in a discovery process, including the power to order payment of discovery costs in advance and the power to limit legal fees for discovery as well as the courts power to make costs orders.
116 *Civil Procedure Act 2010* (Vic) pt 2.4.
117 Ibid s 28.
118 Ibid s 29(1)(c).
119 Ibid s 29(1)(f).
120 Ibid s 29(2).
121 See, eg, Proposals 3–1, 3–2, 3–3.

application of the obligations and greater enforcement, will address the key legal ethical concerns expressed in relation to the discovery process.

Lack of awareness and the broad nature of legal ethical obligations

4.118 Lawyers operate within a duty matrix. However, the ALRC has heard that in some cases lawyers are not aware of their legal ethical obligations, other than in a general sense; or, more specifically, that lawyers may face difficulties in applying broad legal ethical obligations and concepts to specific circumstances arising in practice.

4.119 This difficulty appears to arise in part as a result of limited legal education about the practical application of ethics to practices such as discovery; the overly broad nature of the obligations; and lack of uniformity in the obligations across jurisdictions.

4.120 The impact of this lack of awareness is illustrated through the examples of alleged discovery abuse and misconduct outlined earlier in the chapter which demonstrate the difficulties which may arise in applying broad legal ethical in the context of discovery practice.

4.121 Professional conduct rules, as the primary site of articulated legal 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.[122]

4.122 However, legal ethical obligations contained in professional rules in Australia, which are likely to arise in the context of discovery, may be overly broad and lack clarity. In particular, there are no obligations of specific application to the discovery process, but rather they have general application to the full range of activities undertaken by lawyers in their professional capacity.

4.123 The general obligations 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.

4.124 However, in many instances the rules do not contain a positive or specific duty, and lawyers are required to apply broad concepts to specific scenarios which arise in everyday practice. This may contribute to lawyers' uncertainty about their obligations because, aside from those cases involving blatant professional misconduct, it is often difficult to establish where lawyers' behaviour amounts to discovery abuse in a broad sense or, more specifically, where misconduct is sufficient to attract sanctions or disciplinary action.

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122 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), [5.2].

4.125 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 Rules have been criticised for not imposing a positive duty. This may be particularly relevant to the practice of trolley load litigation.[123]

4.126 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.[124] However, this rule has been criticised on the basis that it does not impose a positive obligation on a lawyer to conduct a matter quickly and simply but merely *allows* a lawyer to do so, operating in a 'passive, defensive role (primarily for the benefit of the advocate) rather than in active support of the court's function'.[125]

Options for reform

4.127 There has been much debate surrounding the form that professional conduct rules should take and whether such rules should be positive or aspirational and the appropriate level of detail.

4.128 In this instance there appear to be two possible approaches to ensuring that legal ethical obligations articulated in professional rules are sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery.

4.129 The first approach is to articulate specific legal ethical obligations that apply in the context of the discovery. Such an approach would draw together existing broad legal ethical obligations and make them more relevant to the discovery process, and impose new obligations such as disclosure of the existence of all documents considered relevant to the proceedings at the earliest practicable time.[126]

4.130 The other approach is through the adoption of a principle–rule–commentary approach to professional conduct rules.[127] In ALRC Report 89 the ALRC recommended that the Law Council convene a working group to coordinate the drafting of commentary to legal practice standards, to be issued as part of, or as a supplement to, national model professional conduct rules.[128] As the ALRC has noted, such an approach to professional rules

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123 See, eg, C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 89.

124 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); *Conduct Rules* (WA) r 18(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).

125 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 89.

126 This was one of the overarching obligations recommended by the VLRC and enacted in the *Civil Procedure Act 2010* (Vic).

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

128 Ibid, Rec 14. To date, only the *Legal Profession (Solicitors) Rule 2007* (Qld) features commentary.

> 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.[129]

4.131 The inclusion of commentary as part of, or as a supplement to, professional rules would provide guidance for the practical interpretation of the obligations in the context of discovery.

ALRC's views

4.132 The ALRC has heard that in some cases lawyers are not aware of their legal ethical obligations other than in a general sense, or that they face difficulties in applying broad legal ethical obligations to specific circumstances arising in practice. The ALRC is interested in stakeholder views on this matter.

4.133 If lawyers are not fully aware of their legal ethical obligations—either generally or as they apply in the context of discovery—then the ALRC welcomes stakeholder feedback on the best way of ensuring that lawyers and litigants are properly informed about their professional and legal responsibilities in relation to the discovery of documents.

4.134 The ALRC currently considers that the best way to raise awareness of the existence and practical application of legal ethical obligations is through legal education at a university level, and on a continuing basis. The ALRC has made a number of proposals with respect to this in the final part of this chapter.[130]

4.135 In addition, the ALRC considers that the current regulation of the legal profession on a state and territory basis is likely to contribute to any uncertainty about legal ethical obligations with respect to discovery. In light of the National Legal Profession Reform Project, consideration should be given to ensuring that lawyers and litigants are properly informed about their legal ethical obligations under any new uniform regulatory regime.

4.136 Legislation and professional rules in some instances contain overly broad or unclear statements of legal ethical obligations. In order to address discovery abuse there is a need for more clearly articulated obligations. In particular, standards of conduct expected in the context of the discovery process should be outlined more explicitly. The ALRC is interested in hearing more from stakeholders about whether existing general legal ethical obligations in professional rules are sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery, and if they are not, about the best way to reform this.

General options for reform

4.137 The ALRC has considered two possible approaches to ensuring that legal ethical obligations in professional rules are sufficiently specific and clear so that lawyers are aware of their obligations concerning discovery.

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129 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [3.78].

130 See, eg, Proposal 4–4, 4–5.

4.138 The principle–rule–commentary approach appears preferable. The inclusion of commentary as part of, or as a supplement to, professional rules would provide guidance for the practical interpretation of the obligations in the context of discovery, as is the case under the *Legal Profession (Solicitors) Rule 2007* (Qld).

4.139 While acknowledging the merits of articulating specific obligations concerning discovery, the ALRC considers that almost all general legal ethical obligations have relevance to the discovery process and that a clear explanation of their application to discovery would be sufficient to ensure lawyers are aware of their obligations.

4.140 In addition, the ALRC considers that the creation of obligations which only apply in the context of discovery may detract from the force of general legal ethical obligations on lawyers' conduct outside this process. The links between such commentary and the role and form of legal education are discussed in the final part of this chapter.

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

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

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

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

Costs specific reforms

4.141 One area in which lack of awareness, clarity and specificity of legal ethical obligations is particularly evident is with respect to costs. While the ALRC is not aware of any widespread overcharging for discovery costs, discovery has the potential to serve as a 'profit centre' for law firms.

4.142 The preceding chapters have considered ways in which to limit the use and scope of discovery, and thereby the associated costs. Similarly, the means by which the ALRC proposes to address abuse of discovery procedures, including trolley load litigation and delay, both of which increase the costs of discovery, will also address costs concerns.

4.143 In attempting to reduce the costs of discovery, the VLRC in its *Civil Justice Review*, recommended that courts be given the power to limit the costs incurred in connection with discovery to those which represent the actual cost of carrying out necessary work.[131] However, as discussed in Chapter 3, in the ALRC's preliminary view, the amount charged to clients for discovery should generally a matter for cost assessment or review under existing legal profession legislation.

4.144 While arguably it is implicit in the context of the legal profession rules with respect to costs that lawyers should do so,[132] the ALRC has formed the preliminary view that all legal profession legislation or professional rules should include an obligation to charge no more than fair and reasonable legal costs.

4.145 The Draft National Law provides an instructive model and would require that a law practice only charge costs which are reasonable having regard to a number of factors. In particular, under the Draft National Law costs are fair and reasonable if they:

- are reasonably incurred and are reasonable in amount; and
- are proportionate in amount to the importance and complexity of the issues involved in a matter, the amount or value involved in a matter, and whether the matter involved a matter of public interest; and
- reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned; and
- conform to any applicable requirements of legal profession legislation, professional conduct rules and fixed costs legislative provisions.[133]

4.146 The ALRC also considers it important that overcharging is capable of constituting unsatisfactory professional conduct or professional misconduct—in line with recommendations made in ALRC Report 89 and subsequently incorporated into professional rules.[134]

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

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

131 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), Rec 90.

132 For example, this was the Law Council's argument in its submission to Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000).

133 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.4(2).

134 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), Rec 27.

Narrow application of legal ethical obligations

4.147 A central issue that affects the operation of the discovery process and the abuse of the process, highlighted by the VLRC in the *Civil Justice Review*, is the limited application of legal ethical obligations on participants in the civil justice system other than lawyers.[135]

4.148 This issue arises in the context of legal ethical obligations and discovery given the control exerted by participants other than lawyers on the discovery process, and the role played by legal culture in shaping the behaviour of individual lawyers.

Expansion of legal ethical obligations

4.149 Throughout the discovery process, control is exercised by a range of participants other than lawyers—by clients, but also by insurers, litigation funders and other third parties, for example electronic discovery service providers—over decisions affecting the discovery process itself, and influencing the operation of the civil justice system more broadly.

4.150 In a submission to the VLRC's *Civil Justice Review*, IMF Australia, a litigation funder, acknowledged that such parties 'have a greater capacity than most to systemically assist or retard' court processes.[136]

4.151 However, current legislation and professional rules impose obligations on the conduct of lawyers, or in the case of recently introduced overarching purpose clauses in some legislation, on the courts, rather than other parties.

4.152 For example, the *Federal Court of Australia Act* imposes an obligation on litigants to act consistently with the overarching purpose of civil practice and procedure. However, this is only a secondary responsibility, in the sense that the court has primary responsibility and the parties are only under an obligation to assist the court. It does not impose any obligation directly on a party to take proactive steps.

Options for reform

4.153 There are two models of relevance in discussing the potential expansion of legal ethical obligations beyond lawyers.

4.154 The first is the model recommended by the VLRC in its *Civil Justice Review* and subsequently enacted in the *Civil Procedure Act 2010* (Vic), which contains provisions directly defining overriding obligations and duties imposed on all key participants in civil proceedings before Victorian courts. The overarching obligations 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

135 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 149, 153–155.

136 IMF Australia, *Submission by IMF to Victorian Law Reform Commission Civil Justice Review* (2007) <www.imf.com.au/> at 24 October 2010.

and litigation funders.[137] The court can make a range of orders where a participant contravenes the overriding obligations.[138]

4.155 The second model is that imposed by the model litigant obligations, which are contained in the *Legal Services Directions*. Under the *Legal Services Directions*, the Commonwealth and its agencies—and by extension, lawyers working for the Australian Government—are required to behave as model litigants in the conduct of litigation. Relevantly the obligation includes, for example, endeavouring to avoid, prevent and limit the scope of legal proceedings and keeping costs to a minimum.[139]

> In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.[140]

4.156 Indeed, the obligations contained in the *Legal Services Directions* go 'beyond the requirement for lawyers to act in accordance with their ethical obligations' under the legal profession acts and professional rules.[141]

ALRC's views

4.157 The control that all participants in civil litigation exercise together over the conduct of proceedings is significant. As a result, in order to avoid discovery abuse there is a need to impose legal ethical obligations on all key participants in civil proceedings.

4.158 To the extent that the *Civil Procedure Act 2010* (Vic) imposes obligations on all key participants in civil proceedings, the ALRC favours that approach. At a federal level, in order to impose obligations on parties other than lawyers it would be necessary to amend a range of federal legislation concerning civil procedure and the courts. While proposing such a review is beyond the scope of this Inquiry,[142] the ALRC suggests that any such review by the Government should consider the extension of legal ethical obligations beyond lawyers to other legal players, such as clients, insurers, litigation funders and electronic discovery (e-discovery) service providers.

Cultural change

4.159 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

137 *Civil Procedure Act 2010* (Vic) s 10(1).
138 Ibid ss 28, 29.
139 *Legal Services Directions 2005* (Cth) Appendix B, ss 2(d), 2(e).
140 Ibid, Appendix B, Note 2.
141 Ibid, Appendix B, Note 3.
142 Note the ALRC undertook a review of the civil justice system in 2000: Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000).

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'.[143]

4.160 Similarly, in addressing the weaknesses of the current regulatory regime, Associate Professor Christine Parker and others have been vocal in recognising the difficulties associated with identifying individuals within firm structures who are responsible for misconduct, particularly where behaviour that runs contrary to legal ethical obligations may be an entrenched part of workplace culture.[144]

4.161 Further, as outlined above with respect to issues arising from delegation, the ALRC has heard some concerns arising from instances in which paralegals and junior lawyers exercise judgment with respect to discovery under minimal supervision by senior lawyers where they may not have sufficient experience to balance competing issues and interests.

4.162 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 lawyers' legal ethical obligations and those owed, for example, to a company's shareholders.

4.163 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 individual lawyers' 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.[145]

4.164 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

143 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, 15 August 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* .

144 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.

145 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.

> 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 management; the monitoring of lawyer compliance with policies and procedures; and, ethics education, training and discussion within the firm.[146]

4.165 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.[147]

4.166 Legal Services Commissions in both NSW and Queensland have developed voluntary questionnaires to encourage consideration of ethical issues by lawyers and law firms.[148] It has been suggested, in consultations, that the development of a questionnaire around legal ethical obligations arising in the context of discovery may be useful in promoting discussion and agreement about ethical discovery practice within law firms.

ALRC's views

4.167 The ALRC considers that law firms could assist in improving discovery process and minimising discovery abuse by training their own lawyers, setting strict ethical and practice standards, closely monitoring compliance with those standards, and insisting that discovery is pursued honestly, ethically, and in accordance with the letter and spirit of the rules. Law firms might, in this way, foster a culture of responsible litigation and ethical discovery practice. Such a culture should affect how litigation is conducted and focus on real decisions rather than mere 'symbolic or formalistic ethics management initiatives that do not make any difference to everyday actions and behaviours'.[149]

4.168 Further, to significantly improve the efficiency and ethical practice of discovery, a shift in culture in the wider legal community is necessary. While such a culture shift might be fostered by stricter discovery laws and a more rigorous enforcement of those laws, the ALRC welcomes stakeholder comment on the best ways to ensure legal ethical obligations are observed by both individual lawyers and by other legal participants such as large firms.

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146 Ibid, 172 (citations omitted).

147 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.

148 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* .

149 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.

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

Difficulties in enforcement and responding to misconduct

4.169 Despite reforms to the disciplinary and court-based structures for enforcement of legal ethical obligations, 'there are still few cases of disciplinary action being taken against lawyers for breach of their duty to the court or the law'.[150] Parker and Associate Professor Adrian Evans have commented that 'it is hard to believe that there really are so few cases in each of these categories where disciplinary action might be warranted'.[151]

4.170 It appears that this is due to a number of factors related to identification and reporting of misconduct and the general nature of the disciplinary model, rather than specific legal professional disciplinary structures.

4.171 In particular, the weaknesses of enforcement appear to arise from: lack of awareness about what conduct constitutes misconduct (dealt with earlier in the chapter); failure to report misconduct; and a disciplinary model which is reactive rather than proactive and focuses on individual behaviour rather than on more systemic causes of misconduct. Each of these are considered in turn below.

Failure to report misconduct

4.172 A large proportion of disciplinary matters brought to the attention of the relevant disciplinary body arise as a result of client complaints.[152] However, courts, costs assessors and other lawyers also have a role to play in reporting alleged misconduct.

4.173 There is limited recognition of the obligation owed by lawyers to report the misconduct of other lawyers under the legal profession legislation and professional rules in Australia. Indeed, there is no obligation under legal profession legislation for lawyers to report misconduct that may arise in the context of discovery.

4.174 Under professional rules in Victoria and South Australia, lawyers have an obligation to disclose conduct which is contrary to the general standards of conduct expected of lawyers—not to engage in 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 which may adversely impact on a lawyer's ability to practise according to the professional rules.[153] 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.

4.175 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

150 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 47.
151 Ibid, 47.
152 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 535.
153 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) r 31.

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 court-initiated enforcement action, other than through the imposition of costs orders, is rarely taken in response to alleged legal ethical misconduct.

4.176 Finally, under the Draft National Law and 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.[154] Similarly, however, the ALRC understands that this occurs rarely.

Options for reform

4.177 The approach taken in New Zealand (NZ), the United Kingdom (UK) and the US to ensuring lawyers report the misconduct of other lawyers provides for what has been referred to as 'lawyer whistleblowing'.[155]

4.178 In these jurisdictions, rules require lawyers to report where they consider another lawyer's conduct raises a 'substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects',[156] constitutes 'serious misconduct',[157] or where there are reasonable grounds to suspect the other lawyer is guilty of misconduct.[158]

4.179 There are difficulties associated with imposing such an obligation on lawyers, in particular with respect to the need to support and, in some cases, protect lawyers who make such reports[159] and mechanisms for safeguarding against vexatious reports. In addition, in consultations, stakeholders expressed concerns about the impact such a requirement would have on the costs of discovery.

4.180 The ALRC is not aware of any suitable models, aside from judicial education, for addressing court-initiated enforcement action.[160]

ALRC's views

4.181 Consumers of legal services as well as the courts, costs assessors and other lawyers play an important role in reporting misconduct, and as a result, in the effectiveness of means by which misconduct is brought to the attention of the relevant bodies.

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154 See, eg, National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010) s 4.3.30; *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.

155 G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 536.

156 American Bar Association, *Model Rules of Professional Conduct* (2010) r 8.3(a).

157 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.

158 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) rr 2.8, 2.9.

159 See G Dal Pont, *Lawyers' Professional Responsibility* (4th ed, 2010), 537.

160 Judicial education is discussed in Ch 3.

4.182 In a self-regulated profession, another way of ensuring that misconduct is reported to relevant disciplinary bodies is imposing mandatory reporting obligations on lawyers. In the ALRC's preliminary view, imposing mandatory obligations on lawyers to report the misconduct of other lawyers would assist in the better enforcement of legal ethical obligations.

4.183 The ALRC considers the formulation currently included in the *Professional Conduct and Practice Rules 2005* (Vic) if expanded, and the approaches in NZ, UK and US, to be useful models.

4.184 Consequently, the ALRC is interested in stakeholder feedback on whether professional rules should provide that a practitioner must promptly disclose the occurrence of possible misconduct by either themselves or another lawyer in the course of discovery and, if so, what conduct. For example, misconduct may constitute conduct that a practitioner considers to be: dishonest; or calculated (or likely to a material degree) to be prejudicial to, or diminish public confidence in, the administration of justice; or prejudice a practitioner's ability to practise.

4.185 As proposed with respect to the specificity and clarity of legal ethical obligations if such a reporting obligation were introduced, the development of commentary to accompany any such reporting obligation would be desirable.

4.186 However, given the difficulties associated with any such obligation, the ALRC is interested in stakeholder feedback on other ways to ensure alleged misconduct is reported to relevant disciplinary bodies, and whether imposition of a mandatory reporting obligation on lawyers would be an effective mechanism through which to achieve this.

4.187 With respect to the role of costs assessors in reporting misconduct, the ALRC is interested in hearing how often, in practice, costs assessors comply with requirements to refer matters to the legal disciplinary bodies where they consider that the legal costs charged are grossly excessive.

4.188 The ALRC is interested in stakeholder views on the best way to address the apparent infrequency with which judges report possible misconduct with respect to discovery in matters before them to legal professional bodies.

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

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

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

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

Reactive regulatory system

4.189 As John Britton, the Queensland Legal Services Commissioner has commented, current regulatory systems and sanctions are

> almost entirely reactive rather than proactive and preventative in character. They address past and not future behaviour, and they are all stick and no carrot. They do no more to encourage high standards of conduct than threaten disciplinary consequences for conduct that falls short of the mark.[161]

4.190 However, in some jurisdictions the Offices of Legal Services Commissioners (OLSC) have attempted to play a more proactive and educative role in the enforcement of legal ethical obligations. For example, in NSW, the OLSC's approach is 'regulating for professionalism' within the framework of 'education towards compliance'.[162] 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.[163]

ALRC's views

4.191 In addressing the reactive nature of regulatory structures, the ALRC commends the 'education towards compliance' concept and considers that bodies such as the OLSC in each jurisdiction have a vital role to play in ensuring legal ethical obligations are observed and enforced.

4.192 The ALRC considers this issue and makes several proposals related to the role of education in the final part of this chapter.

Focus on individual misconduct

4.193 The primary focus of the current disciplinary framework in Australia is on protection rather than punishment, and on the behaviour of individual lawyers rather than the systemic causes of misconduct.

4.194 Commentators such as Parker have criticised this individual focus, arguing that the current disciplinary approach

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161 J Britton, 'The Business of Ethics' (Paper presented at University of Queensland Alumni Lunchtime Lecture, Brisbane, 12 May 2010).

162 S Mark, 'Regulating for Professionalism: The New South Wales Approach' (Paper presented at American Bar Association Annual Meeting, San Francisco, 5 August 2010).

163 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.

> is one that can easily lead to making a scapegoat of an individual practitioner for character failure rather than systemic change to address public concerns about consumer service quality and the administration of justice.[164]

4.195 Britton has suggested that the system 'puts the spotlight on individual lawyers' and 'lets law firms almost entirely off the hook'.[165] This issue is considered earlier in this chapter in discussing the need for cultural change.

ALRC's views

4.196 The ALRC considers moves towards extending obligations to all parties in the civil justice system, for example as envisaged under the *Civil Procedure Act 2010* (Vic), would assist in addressing the individual focus of currently regulatory structures and in holding law firms responsible where workplace culture, management and firm structures had a role in the alleged misconduct of individual lawyers.

4.197 The other key reforms which are likely to refocus current regulatory structures and thereby enhance the effectiveness of enforcement of legal ethical obligations are discussed above in the context of the need for change to the legal culture in Australia.

4.198 Overall, it appears that weaknesses in enforcement of legal ethical obligations arise as a result of factors such as failure to identify and report misconduct, and the general nature of the disciplinary model rather than specific legal professional disciplinary structures. However, the ALRC is interested in hearing from stakeholders about whether existing legal professional disciplinary structures are sufficient to deal with discovery abuse, and if not, how they might be reformed.

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

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

(a) a failure to comply with discovery obligations; or

(b) conduct intended to delay, frustrate or avoid discovery of documents?

The changing legal context and future challenges

4.199 The changing nature of the Australian legal system and the changing context within which existing professional obligations arise increasingly impacts on discovery.

4.200 A number of emerging issues are of particular relevance, including the rise of e-discovery and the applicability of practitioner obligations outside traditional courtroom processes.

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164 C Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676, 682.

165 J Britton, 'The Business of Ethics' (Paper presented at University of Queensland Alumni Lunchtime Lecture, Brisbane, 12 May 2010).

Electronic discovery

4.201 The increasing frequency with which documents are stored electronically adds a new dimension to lawyers' legal ethical obligations with respect to discovery.

4.202 For example, e-discovery brings into focus the obligations owed by lawyers to the client and the court, which in part involve a duty to advise clients about their discovery obligations and exercise personal judgment about the existence and relevance of documents in the proceedings.

4.203 To some extent the ALRC's proposal with respect to discovery plans, which would specify the scope of discovery, including the parameters of electronic searches, provides an articulation of lawyer's obligations.[166]

4.204 However, the extent of a lawyer's obligation to ensure that a client preserves documents and is aware of a client's document retention policy and electronic document management systems is largely unclear.

4.205 As discussed earlier in the chapter, the ALRC considers there are two possible ways to ensure professional rules are sufficiently clear so that lawyers are aware of their obligations—in this instance—concerning e-discovery. These are either through the articulation of specific legal ethical obligations which apply in the context of e-discovery; or through the adoption of a principle–rule–commentary approach to professional rules, which would provide guidance about the application of general legal ethical obligations in the specific context of e-discovery.

4.206 In the context of e-discovery, lawyers could also be held responsible for implementing a legal hold when litigation is anticipated, as occurs in the US.[167]

ALRC's views

4.207 The ALRC is interested in feedback from stakeholders on the impact of e-discovery on the legal ethical obligations of lawyers.

4.208 As outlined above, in the ALRC's view, a principle–rule–commentary approach is the best approach to providing guidance for lawyers to assist them in the practical interpretation of their obligations in the context of discovery. The ALRC considers that such clarification would also be useful in the context of e-discovery. However, the ALRC welcomes submissions on this point and with respect to the potential application of obligations similar to those arising from a legal hold in an Australian context.

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

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

166 See discussion in Ch 3 and in particular Proposal 3–2.
167 The use of legal holds is discussed earlier in this chapter.

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

Proposal 4–3 The Law Council of Australia, the Australian Bar Association and the legal professional bodies in each state and territory should develop commentary as part of, or a supplement to, the professional conduct rules with a particular focus on a lawyer's legal ethical obligations with respect to the electronic discovery of documents.

Legal ethical obligations and alternative processes

4.209 Another emerging issue is the applicability of traditional legal ethical obligations outside courtroom processes, for example during pre-action protocols, pre-trial management and alternative dispute resolution processes.

4.210 Currently, professional rules define 'court' broadly to encompass: courts and tribunals; investigations or inquiries established or conducted under statute or by a Parliament; Royal Commissions; and arbitrations, mediations or any other form of dispute resolution.[168]

4.211 However, significant debate exists with respect to the imposing of legal ethical and conduct obligations on such processes, an issue recently considered by the National Alternative Dispute Resolution Advisory Council (NADRAC).[169]

4.212 NADRAC has suggested that examination of the issue involves consideration of: which participants should be subject to the obligations; the ambit and framing of obligations; when the obligations would apply; and enforcement.[170]

ALRC's views

4.213 The ALRC considers that COAG, the Law Council and legal professional bodies in each state and territory should consider the application of legal ethical obligations outside traditional courtroom processes in formulating or revising professional rules. These bodies should also consider issuing clarification about the legal ethical obligations of lawyers in these new forums.

Legal education

4.214 Education is vital to ensuring lawyers are aware of their legal ethical obligations and are able to consider and apply their obligations in practice. It also plays a key role in shaping legal culture.

4.215 Clearly then it is important that good discovery practice—grounded in consideration of legal ethical obligations—is incorporated into legal education at a university level, through the practical legal training that Australian lawyers must

168 See, eg, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), 3.
169 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009), sch 2.
170 Ibid, sch 2.

undertake before they may be admitted to practice, and in continuing legal education.[171]

Academic qualifications

4.216 In all Australian jurisdictions, admission to practise as a lawyer requires the study of 11 areas of knowledge (known as the 'Priestley Eleven').[172] These are the core subjects studied by law students in Australia.

4.217 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'.[173]

4.218 Legal ethics is also taught at universities. For example, in NSW, law students must study:

> Professional and personal conduct in respect of practitioner's duty:
>
> (a) to the law;
>
> (b) to the Courts;
>
> (c) to clients, including basic knowledge of the principles of trust accounting; and
>
> (d) to fellow practitioners.[174]

4.219 To the ALRC's knowledge, ethics classes in Australian law schools do not routinely consider ethical discovery practice. Exceptions to this appear to be the content of a course called 'Dispute Resolution and Ethics' offered at the University of Adelaide, and parts of civil procedure and litigation subjects at the Australian National University and the University of Sydney which appear to include teaching focused on practical examples. The ALRC welcomes submissions that identify other courses or subjects that consider legal ethical obligations in the context of discovery.

Practical legal training

4.220 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.

4.221 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*

171 Judicial education in discovery is discussed in ch 3.

172 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.

173 *Legal Profession Admission Rules 2005* (NSW), sch 5.

174 Ibid, sch 5.

2005 (NSW). Applicants must have achieved competence in, among other things, 'civil litigation practice' and 'ethics and professional responsibility'.[175]

4.222 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'.[176] This involves the ability to identify the issues likely to arise in a hearing and gather the necessary evidence. One of the listed means of gathering evidence is discovery.[177]

4.223 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.[178]

Continuing legal education

4.224 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.

4.225 In October 2007, the National Continuing Professional Development Taskforce issued a set of national CLE Guidelines,[179] which arose in part 'from a concern that legal practitioners were not receiving sufficient ongoing education in legal and practical ethics and professionalism'.[180]

4.226 The Guidelines recommend that practitioners be required to complete ten units[181] of CPD activity each year, including at least one unit in each of the following 'core areas':

- practical legal ethics;

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175 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.

176 *Legal Profession Admission Rules 2005* (NSW), sch 6.

177 Ibid, sch 6, Civil Practice, Explanatory Note.

178 Ibid, sch 6, Ethics and Professional Responsibility.

179 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), [3.5].

180 S Mark, *Competing Duties: Ethical Dilemmas in Practice* (presentation to Newcastle Law Society, 19 October 2009).

181 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)*.

- practice management and business skills;
- professional skills;[182] and
- substantive law (in some jurisdictions).[183]

4.227 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 'lawyer's duties to the court' and 'ethics within a technical legal context'.[184]

4.228 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.[185]

4.229 New South Wales, Queensland, Victoria and the ACT have either adopted the guidelines, or substantially based their scheme on the guidelines.[186] Western Australia also requires practitioners to complete courses on ethics and professional responsibility, and legal skills and practice.[187]

4.230 Barristers in the ACT must also complete activities in 'ethics and regulation of the profession'; and in substantive law and professional skills.[188]

4.231 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.[189]

4.232 General legal ethics courses are common.[190] However, few CPD or CLE courses specifically cover ethical obligations in the context of discovery.[191]

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182 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), [3.5].

183 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). Note, the Draft National Rules also propose that Australian legal practitioners must complete 10 CPD units of CPD activity each year including one unit relating to each of these first three core areas: practical legal ethics, practice management and business skills, and professional skills: National Legal Profession Reform Project, *Legal Profession National Rules: Consultation Draft* (2010), ch 11.

184 National Continuing Professional Development Taskforce, *A Model Continuing Professional Development Scheme for Australian Lawyers* (2007), 7.

185 See, eg, Law Institute of Victoria, *Continuing Professional Development Rules* (2008) r 5.2.

186 *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)*.

187 *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.

188 *Legal Profession (Barristers) Rules 2008* (ACT) r 113; Australian Capital Territory Bar Association, *Continuing Professional Development* <www.actbar.com.au/> at 28 October 2010.

189 *Legal Profession Regulations 2007* (NT) sch 2, pt 2, div 1, r 2(2).

190 See, eg, College of Law (NSW), *Rule 42: Ethics & Professional Responsibility; Practice Management & Business Skills; and Professional Skills [Face to Face Seminar]* (2010) <www.collaw.edu.au/> at 1 November 2010.

191 See, eg, Legalwise Seminars, *Legal Skills and Legal Ethics for All Lawyers [seminar]* (2010) <www.legalwiseseminars.com.au/> at 30 September 2010.

Guidance from legal professional associations

4.233 Guidance from legal professional associations—in particular, state and territory bar associations and law societies—also plays a role in legal education. Where such guidance exists, it may be given in the form of individualised responses to inquiries,[192] published ethics committee rulings,[193] or online collections of articles and advice on certain topics.[194]

4.234 Earlier in the chapter, the ALRC proposed that the Law Council and law societies and bar associations in each state and territory develop commentary as part of, or as a supplement to, the professional conduct rules with a particular focus on the legal ethical obligations of lawyers in relation to discovery.[195] Such commentary would also play an important role in educating lawyers about their legal ethical obligations.

4.235 Finally, legal professional associations also maintain a register of disciplinary actions open for public inspection, the availability and content of which serves an important educative function.[196]

Legal education: issues arising

4.236 There are concerns that current legal education with respect to legal ethical obligations often 'does not equip ... lawyers to know how to put ethics into action in real-life ... contexts, or even to recognise ethical issues when they arise'.[197] Such commentary highlights that it is important for legal ethical obligations to be taught using a range of teaching methods that encompass their practical application, including through case studies and skills courses.

4.237 Significant decisions about discovery in civil litigation before federal courts are likely to be made by experienced lawyers. If education is to play a significant role in improving discovery practice, particularly in the short to medium term, it is likely to be through CLE undertaken by practising lawyers who work in litigation and understand the real conflicts and difficulties that parties face in obtaining and disclosing relevant documentary evidence.

4.238 This may require that providers of CLE pay particular attention to the ethical discovery practices in relevant programs, such as those concerning civil litigation,

192 See, eg, New South Wales Bar Association, *Urgent Ethical Guidance for Members* <www.nswbar.asn.au/> at 25 October 2010; Queensland Law Society, *Queensland Law Society Ethics Centre* <www.qls.com.au/> at 1 November 2010; Bar Association of Queensland, *From the President: Ethical Enquiries—Ethical Counsellors* <www.qldbar.asn.au/> at 25 October 2010.

193 See, eg, Law Institute of Victoria Ethics Committee, *Ethics Committee Rulings* <www.liv.asn.au/> at 1 November 2010.

194 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* <www.lawsocietysa.asn.au/> at 1 November 2010; Law Institute of Victoria Ethics Committee, *Ethics Resources* <www.liv.asn.au/> at 1 November 2010.

195 Proposal 4–1.

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 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 217.

ethics and management and consider the development of subjects specifically addressing ethical discovery practices.

4.239 Another way to educate practising lawyers in ethical discovery practices may be for all legal professional associations to issue 'best practice' notes about the legal and ethical responsibilities of lawyers with respect to discovery. These practice notes would ideally be updated regularly to respond to practitioners' questions or evolving technological developments.

4.240 Ongoing legal professional education about legal ethical obligations generally, as well as those concerning discovery, may be essential to fostering professional integrity, as in order to act consistently with such obligations lawyers must have 'current knowledge and awareness of the ethical framework within which they practice'.[198]

ALRC's views

4.241 In the ALRC's preliminary view, the study of a lawyer's legal and ethical duties in relation to discovery should be incorporated, or expanded upon, in existing university curricula, through practical legal training, and in programs that form part of a lawyer's continuing legal education.

4.242 Admission rules across jurisdictions appear suitably broad and therefore should not need to be changed in order for universities and other providers of legal education to pay closer attention to ethical discovery practice.

4.243 In the ALRC's view, though the topic might 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.

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

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

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

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

198 S Mark, *Competing Duties: Ethical Dilemmas in Practice* (presentation to Newcastle Law Society, 19 October 2009).

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

(b) practical legal training required for admission to practice as a solicitor or barrister; and

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

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

5. Alternatives to Discovery

Contents

Introduction

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

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

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

What are pre-action protocols?

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

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

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

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

Advantages and disadvantages of pre-action protocols

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

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

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

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

5 Ibid, [2.6].

6 Ibid, [2.7].

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

Advantages of pre-action protocols

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

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

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

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

Disadvantages of pre-action protocols

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

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

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

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

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

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

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

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

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

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

Pre-action protocols in the United Kingdom

Specific pre-action protocols

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

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

5.14 The Woolf Report recommended that:

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

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

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

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

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

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

17 Ibid, Ch 10 Recommendations.

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

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

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

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

General pre-action protocol

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

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

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

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

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

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

Compliance and enforcement

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

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

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

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

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

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

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

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

Implementation issues

Front-loading of costs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 Ibid.

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

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

39 Ibid.

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

41 Ibid, 345.

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

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

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

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

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

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

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

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

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

Information exchange and narrowing the issues in dispute

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

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

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

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

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

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

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

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

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

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

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

49 Ibid, Art 3(a)–(b).

50 Ibid, Art 7.

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

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

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

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

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

Compliance, enforcement and satellite litigation

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

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

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

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

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

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

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

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

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

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

59 Ibid, 16.

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

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

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

The Australian context

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

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

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

Civil Dispute Resolution Bill 2010 (Cth)

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

- to change the adversarial culture often associated with disputes;

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61 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Civil Procedure Act 2010 (Vic)

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

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

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

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

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

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

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

New South Wales

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

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

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

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

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

Queensland

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

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

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

The need for a tailored approach?

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

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

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

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

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

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

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

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

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

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

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

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

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

107 Ibid, 73.

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

109 Ibid, 104.

110 Ibid, 104.

111 Ibid, Rec 8.1.

5.71 As Michael Legg and Dorne Boniface note:

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

ALRC's views

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

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

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

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

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

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

Pre-trial oral examinations

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

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

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

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

Oral depositions in the United States

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

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

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

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

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

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

Framework for oral depositions

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

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

Who may be examined

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

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

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

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

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

121 Ibid r 26(f)(1).

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

123 Ibid r 26(f)(2).

124 Ibid r 26(c)(1).

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

126 Ibid r 30(a)(1).

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

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

Procedural requirements

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

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

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

Examination and objections

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

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

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

129 Ibid r 30(b)(6).

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

131 Ibid r 30(d)(1).

132 Ibid r 28.

133 Ibid r 30(b)(5).

134 Ibid r 30(f)(1).

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

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

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

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

Sanctions

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

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

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

Advantages and disadvantages of oral depositions

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

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

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

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

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

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

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

Advantages of oral depositions

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

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

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

147 Ibid, 158.

148 Ibid, 160.

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

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

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

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

Disadvantages of oral depositions

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

Pre-trial oral examinations in the Australian context

Oral deposition-like processes in Australia

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

Federal Courts

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

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

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

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

Corporations Act 2001 (Cth)

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

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

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

Government agencies

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

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153 Ibid O 24.

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

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

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

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

158 Ibid s 597(5B).

159 Ibid s 597(4).

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

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

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

A case for oral depositions in Australia?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.113 Legg has argued that the use of depositions in Australia would aid in promoting settlement, or if no settlement occurs, a narrowing of the issues in dispute:

> The deposition is an opportunity for a party to test its view of the facts with opposing witnesses. Consequently, the opposing witness will be required to say which facts they agree with and why. In a complex case, those points of disagreement may be numerous but there will be many points of agreement which do not need to be dealt with before the court. The trial can therefore focus on the key issues and be conducted more efficiently.[184]

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

> Legal practitioners would need to move from drafting affidavits with only the witness present to the adversarial deposition... The deposition requires practitioners to have a skill-set that is often split between solicitors (witness preparation) and barristers (witness examination) which will likely need to be reconciled ... This may impact law school and professional qualification curricula.[186]

ALRC's views

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

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

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

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

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

185 Ibid, 167.

186 Ibid, 167.

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

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

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

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

Other alternatives

Interim disclosure orders

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

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

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

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

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

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

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

Civil jurisdictions

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

Current courts processes

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

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

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

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

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

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

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

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

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

Appendix 1. List of Agencies, Organisations and Individuals Consulted

Name	*Location*
Justice J Allsop, President, Court of Appeal NSW	Sydney
Justice P Bergin, Supreme Court of NSW	Sydney
Professor C Cameron and Associate Professor C Parker, University of Melbourne	Melbourne
Professor P Cashman, Director of Social Justice Program, University of Sydney	Sydney
Mr S Clark, Chief Operating Officer, Partner, Clayton Utz	Sydney
Ms S Court and Mr S King, Australian Competition and Consumer Commission	Canberra
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
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
Law Council of Australia, Federal Litigation Section	Sydney
Law Council of Australia, Family Law Section: G Sinclair, R O'Brien, D Farrer	Canberra
Mr D McGrath, E-Litigation Solutions	Sydney
Mr J McGuinness, Director, National Judicial College of Australia	Canberra
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
Mr A Phelan, Chief Executive and Principal Registrar, High Court of Australia	Canberra
Dr M Pryles, Chartered Arbitrator	Melbourne
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