Australian Government
Australian Law Reform Commission

# Managing Discovery

SUMMARY REPORT

## Discovery of Documents in Federal Courts

ALRC Report 115 Summary

March 2011

This Report reflects the law as at 24 March 2011.



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Australian Law Reform Commission Reference: Final Report Summary 115

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

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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.

Dated 10 May 2010

Robert McClelland

Attorney-General

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# Report Summary

## Contents



## Overview

This Report Summary provides an accessible overview of the policy framework and recommendations in the Final Report in the Inquiry into the discovery of documents in federal courts by the Australian Law Reform Commission (ALRC). The full report sets out in detail the issues raised by the Terms of Reference, and the research and evidence base upon which the ALRC's recommendations were formulated, including a thorough discussion of the views expressed in consultations and submissions and the conclusions reached.

The summary begins with a brief account of the background for the Inquiry, including the law reform brief and the key themes that emerged during the course of the Inquiry. This is followed by a consideration of the framework for the recommendations for reform, including a description of the development of the reform response, the

principles underpinning the recommendations put forward by the ALRC and the key themes that emerged during the Inquiry. Finally, this Report Summary includes a description of the key recommendations and their net effect.

# Background

## Costs, terabytes and efficiency

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

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

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

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

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

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

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1 *Seven Network Limited v News Limited* [2007] FCA 1062, [10].
2 R Sackville, 'Mega-Lit: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.
3 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, 12.
4 One terabyte is 1 million megabytes.
5 Contributors from the Large Law Firm Group, *Submission DR 21*, 25 January 2011.
6 Australian Government Solicitor, *Submission DR 27*, 11 February 2011.

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

## Inquiry in context

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

Concerns about the potentially high costs of discovery had been identified in a number of reviews, summarised in Chapter 1 of the Final Report, including the prior work of the ALRC in its major inquiry into the federal civil justice system in the 1990s culminating in the report, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (2000) (*Managing Justice*). The ALRC noted in *Managing Justice* that in 'almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control'.[7]

## The law reform brief

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

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

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

- alternatives to discovery;
- the role of courts in managing discovery, including the courts' case management;

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

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

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

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

## Key themes

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

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

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

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

# Framework for reform

## Development of the reform response

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

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

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

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

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

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

Forty-seven consultations were conducted.[12] Internet communication tools were also integrated into the consultation process, to provide information and obtain comment. A monthly e-newsletter highlighted an 'issue in focus' and the comments received

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

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

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

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

provided additional input. By the end of the Inquiry there were 218 subscribers to the e-newsletter and 30 submissions were received in response to the Consultation Paper.[13]

## Principles for reform

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

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

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

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

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

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

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

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

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

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

## Focus of the recommendations

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

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

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

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

The ALRC considers that the most effective way to facilitate the resolution of disputes in the Federal Court is through robust case management. Such a model preserves the discretion of the judge while, at the same time, introducing greater clarity of expectations in relation to discovery. A key focus of the recommendations is on reinforcing the flexibility that Federal Court judges have in the case management of litigation so that, for example, any discovery regime can be tailored to suit the particular issues in each case. To achieve this, the ALRC makes a number of recommendations for reform of the *Federal Court of Australia Act* and the *Federal Court Rules* (Cth), supported by a suite of practice notes.

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

## Federal Court

The ALRC's recommendations with respect to the Federal Court emphasise the gatekeeper role of the Court in regulating discovery and the development of discovery plans and the use of other 'tools' that the Court might use to manage it—discovery plans, registrars and referees, costs orders and pre-trial oral-examination. The

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

recommendations focus on clarifying what is expected of the parties and their lawyers, complemented by education and training of both practitioners and judicial officers. The ALRC also acknowledges the limited data available to provide evidence of relevant matters—for example, to assess the proportionality of costs—and therefore recommends initiatives with respect to data collection and evaluation.

## Access to discovery

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

## General discovery

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

## Limited discovery

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

## Discovery plans

The ALRC recommends, in Chapter 6, the introduction of procedures in the Federal Court, in suitable cases, for the development of discovery plans setting out the practical steps required of the parties in the process of discovery. This will enable the parties and the Court to consider, in particular, the cost and time implications of discovery processes when seeking and making orders for discovery. It will also create certainty in the discovery process by delineating the extent of the parties' practical obligations in

15 Rec 5–2.

advance. The ALRC recommends that the *Federal Court Rules* be amended to provide that, before the Federal Court makes an order for a party to give discovery, a party may apply for an order that the parties file a practical discovery plan setting out the matters on which the parties agree or disagree in relation to the scope and process of any discovery (a discovery plan order).[16] The ALRC also recommends changes to the *Federal Court Rules* to provide that, if the Court makes a discovery plan order, the parties must: discuss in good faith and endeavour to agree upon a practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.[17]

These changes to the Rules are complemented by recommendations for practice notes concerning: the factors likely to be relevant in an application for a discovery plan order;[18] and, if the Court makes a discovery plan order, what the Court will expect the parties to do.[19] The ALRC also recommends that the practice notes be complemented by a detailed set of best-practice guidelines on the formation and content of discovery plans.[20] The practice notes will provide guidance for the parties as to the circumstances in which it may be appropriate to prepare a discovery plan and, in such cases, the matters that should be addressed in the plan. In addition, best-practice guidelines will provide a valuable resource for judges in scrutinising the proportionality and necessity of the measures proposed in discovery plans.

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

## Judicial education and training

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

16 Rec 6–1.
17 Rec 6–4.
18 Rec 6–3.
19 Rec 6–5.
20 Recs 6–6 to 6–8.
21 Rec 6–9.
22 Recs 7–1, 7–2.

that regular training—properly resourced, of high quality and professionally appropriate—is an essential aspect of long-term cultural change. Accordingly, the ALRC also recommends that all judges are actively encouraged and supported to participate in this training.[23]

## Registrars and referees

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

The ALRC recommends that registrars in each registry of the Federal Court should be trained and equipped to undertake the tasks delegated to them, including preparing and critically interrogating discovery plans and making discovery orders, especially in large or complex proceedings where discovery may prove burdensome by way of cost or delay to the parties.[24]

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

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

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

## Costs

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

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23 Rec 7–3.
24 Rec 8–1.
25 Rec 8–2.
26 Rec 8–3.

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

Secondly, the ALRC recommends that the *Federal Court of Australia Act* be amended to provide that, without limiting the discretion of the Court or a judge in relation to costs, the Court or judge may make an order that: some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery; a party requesting discovery give security for the payment of the cost of discovery; or, specifies the maximum cost that may be recovered for giving discovery or taking inspection.[27] The ALRC considers that such orders may be useful tools for robust case management, serving to focus the scope of discovery and maintain proportionality to the issues in dispute. An order for advance payment, for example, may be a useful order to make when a party requests the discovery of data stored on backup tapes that have been kept for disaster recovery, rather than archival purposes.

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

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

## Pre-trial oral examinations

Another tool in the toolkit that may be useful in limited cases, is pre-trial oral examinations for discovery. Pre-trial oral examinations may assist the discovery process by facilitating the discovery of evidence and the identity of documents, and by

27 Rec 9–2.
28 Rec 9–3.
29 Rec 9–4.

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

## Professional and ethical discovery

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

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

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

30 Rec 10–1.
31 Rec 10–2.
32 Rec 12–1.
33 Rec 12–2.

### Data collection

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

## Family Court and Federal Magistrates Court

The Family Court works on the basis of 'disclosure'—that parties must give full and frank disclosure in a timely manner to the Court and to the other party of all information relevant to the case. The jurisdiction conferred on the Federal Magistrates Court overlaps with that of the Family Court, but discovery in relation to proceedings in the Federal Magistrates Court is not allowed unless the Court or a Federal Magistrate declares that it is appropriate, in the interests of the administration of justice, to allow it. To resolve the tension between the differing scope of access to disclosure in the Family Court and the Federal Magistrates Court in respect of similar types of family law matters, the ALRC recommends reform to promote parties' right to disclosure of documents in the Federal Magistrates Court's family law jurisdiction. Such reform will ensure that access to disclosable documents in family law cases before the Federal Magistrates Court is consistent with the Family Court, so that disclosure of documents is not contingent upon any action of the Federal Magistrates Court.[35]

## Net effect of recommendations

The net effect of the recommendations will be that:

- judicial officers are encouraged and supported in their role as robust case managers;
- parties and practitioners will have a clearer understanding of what is expected of them in relation to discovery obligations;

34 Rec 3–1.
35 Rec 5–3.

- the scope of discovery will be defined more clearly and in the context of an understanding of how information is stored and can be accessed; and
- the clarity of expectations and certainty in obligations will help to maintain proportionality in discovery costs.

# List of Recommendations

## 3. Data Collection

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

This should include data on the proportionality of costs associated with the discovery of documents—in terms of the costs of discovery relative to the total litigation costs, the value of what is at stake for the parties in the litigation and the utility of discovered documents in the context of the litigation.

## 5. Access to Discovery and General Discovery

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

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

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

## 6. Limited Discovery and Discovery Plans

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 7. Judicial Case Management and Training

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

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

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

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

## 8. Registrars and Referees

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

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

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

## 9. Costs Orders and Reasonable Fees

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

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

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

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

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

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

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

(a) the parties' financial resources;

(b) the likely cost of retrieving relevant documents;

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

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

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

## 10. Pre-trial Oral Examinations

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

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

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

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

(c) resolve any disputes about discovery.

## 12. Professional and Ethical Discovery

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

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