The Rules Committee

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9 September 2019
Access to Justice 06/19

Circular 41 of 2019
Simplifying Discovery Obligations

Tēnā koutou,

Please find attached, for your consideration, a memorandum on potential means of simplifying discovery obligations (C 41 of 2019).

This memorandum was previously circulated to the members of the Access to Justice Working Group on 5 September 2019.

Nāku iti noa, nā;

Sebastian Hartley
Clerk to the Committee

Memorandum

To: Access to Justice Working Group Members
CC: Rules Committee Chair
From: Clerk to the Rules Committee
Date: 4 September 2019
Re: Simplifying Discovery Obligations

The Rules Committee

Contents

Introduction

1. At the Committee's last meeting, I was tasked with reporting to the Access to Justice Working Group on overseas initiatives to simplify discovery obligations. This to allow the Working Group to discuss these proposals before the Committee's next meeting on 23 September 2019.

2. To that end, below I provide a summary of the pilot scheme currently underway in England following the efforts of a working group chaired by Gloster LJ, the positions in three Australian jurisdictions (the Federal Court, Victoria, and New South Wales) and across the Canadian jurisdictions (of which Ontario offers the most interesting prospects for reform, viewed from a New Zealand perspective). I also provide a summary of the recommendations made by New Zealand Law Commission in its February 2002 *General Discovery* Report, and an account of the difficulties the Rules

Committee encountered in implementing those proposals in the face of strenuous opposition from the profession.

Current English Initiatives

The Current English Position

3. Practically speaking, the current concern in England and Wales regarding the "excessive costs, scale, and complexity of disclosure"[1] reflects the limited successes achieved after two previous rounds of reform. The first of these was the introduction of the Standard Disclosure Rule (r 31.6) following the Woolf Reforms in 1999, and the failure of that test to adequately anticipate technological change and the "unmanageable" increase in the volume of documents requiring disclosure.[2] As a result, the existing rules continue to be "conceptually based on paper disclosure" and, as a result, are "not fit for purpose in dealing with electronic data."[3]

4. The second of these is the limited impact on litigation culture that resulted from the reforms introduced in 2013 following Sir Rupert Jackson's December 2009 *Litigation Costs: Final Report*.[4] As a result, disclosure orders are not sufficiently focused on the issues, there is inadequate engagement between the parties at an early stage to adequately identify (and minimise) the scope of discovery, and searches are often much wider than is necessary.[5]

5. The concept of "discovery", as it is now understood, was introduced with the introduction of the England and Wales Civil Procedure Rules (CPRs) following the Woolf Reforms in 1999. The purpose of the reforms, which marked a very significant departure from earlier law, was to "reduce the costs of disclosure by restricting its scope" and providing that disclosure was to be available only by court order rather than automatically, while "allowing for specific disclosure by court order".[6]

6. The primary consequence of these reforms (now found in r 31.5(1)) was that an order for disclosure to be made was for "standard" disclosure only. The scope of "standard disclosure" is defined in r 31.6:

> 31.6 Standard Disclosure – What Documents are to be Disclosed

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1 Gloster LJ and others "Proposed Disclosure Pilot: Briefing Note" (2 November 2017) at [2].

2 At [3(i)].

3 At [3(iii)].

4 At [3(ii)].

5 At [3(iv)-(vi)].

6 Sir Geoffrey Vos (ed) The White Book (online looseleaf, 2019 ed, Thomson Reuters) at [31.5.1], citing Lord Woolf *Access to Justice: Interim Report* (HMSO, London, June 1995) at ch 21 and Lord Woolf *Access to Justice: Final Report* (HMSO, London, June 1996) at 124 and following.

Standard disclosure requires a party to disclose only –

(a) the documents on which [they] rely; and

(b) the documents which –

(i) adversely affect [their] own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which [they] is required to disclose by a relevant practice direction.

7. Disclosure is normally ordered at the first case management hearing, after the defence is filed and the case is allocated to one of the several "tracks" provided for under the CPRs.[7] Where claims are allocated to the small and fast tracks, the disclosure requirements under pt 31 do not apply, and the Court will give directions as to disclosure.[8] Where a claim is being fast-tracked, the disclosure ordered (if any), may be less than that required under "standard" disclosure.[9] Track allocation decisions are normally made on the basis of the statements of case and the directions questionnaires required to be completed by the parties to allocate the claim to a track.[10] Claims are allocated to tracks in accordance with the following principles:[11]

a. The small claims track provides a proportionate procedure for straightforward claims with a financial value not exceeding 10,000 GPB without the need for substantial pre-hearing preparation and the formalities of traditional trials, with rules (under pt 27) aimed at allowing lay-litigants to effectively participate in the small claims track without requiring representation. This track is generally most suitable for "consumer disputes, accident claims, dispute about the ownership of goods, and tenancy disputes", but is unsuitable for allegations of dishonesty. Generally, no more than one hearing day (5 hours of hearing time) is allowed for the hearing of such claims.

b. The fast track is suitable for cases in which limits on disclosure are appropriate, whether the use of stop-clock orders regulating trial conduct are appropriate, the extent to which expert evidence is necessary, and whether more than one hearing day is necessary to properly hear the case. Where all these indicia point in favour of the justice of the case being commensurate with the use of the fast-track procedure, a claim will, by default, be allocated to the fast-track.

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7 Civil Procedure Rules (England and Wales), r 31.5(2).

8 Rules 27.2(1)(b) and 31.1(2).

9 Pt 28 Practice Direction at [3.6(1)(c)(4).

10 Vos (ed), above n 6, at [26PD.4.2].

11 At [26PD8.1], [26PD9.1].

c. The multi-track is intended to deal with a wide range of cases of differing values and complexities, not falling within the above categories, or other specified exceptions, and is intended to give the Court flexibility to manage a case in the manner most appropriate to the needs of justice in the individual case.[12] Of note is the fact that claims estimated to have a value of 100,000 GBP will, absent good reason or statutory requirement to the contrary,[13] or where they concerns specified subject matter areas (which relate to allegations of fraud, misuse of public powers, and defamation),[14] almost always be transferred from the High Court to the County Court (the District Court equivalent).

8. Disclosure, where pt 31 applies, will take place prior to the filing of witness statements, concerns about witnesses (or counsel) tailoring their statements to the documents discovered notwithstanding.[15]

9. The editors of the *White Book* note that following the Woolf Reforms that introduced the "standard disclosure" approach, and despite other subsequent reforms, "[i]t remained the case that standard disclosure could impose considerable cost burdens on parties, in particular in the heavy cases."[16] These concerns were most apparent in relation to larger cases being managed on the multi-track (and thus subject to the full scope of pt 31 of the CPRs).[17] A significant aspect of the fact that, in many contemporary commercial cases, electronic disclosure is "inevitable";[18] particularly as most relevant information will be held in electronic format. Sir Rupert Jackson noted the concerns about the proliferation of potentially discoverable information raised by the profession, and the practical and litigation-culture related difficulties in implementing solutions to these problems, in these terms:[19]

> "What these cases appear to show is that commercial practice and the memory and storage capacity of day-to-day IT equipment is such that the amount of information potentially available in respect of any transaction is now so enormous as to be practically unmanageable.

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12 Vos (ed), above n 6, at [PD29].

13 Civil Procedure Rules (England and Wales) at [29PD.22.2].

14 At [29PD.22.6].

15 Vos (ed), above n 6, at [31.5.2], citing *Watford Petroleum Ltd v Interoil Trading SA* [2003] EWCA Civ 1417 at [40]-[42].

16 Vos (ed), above n 6, at [31.5.1], citing Sir Rupert Jackson *Review of Civil Litigation Costs: Final Report* (HMSO, London, December 2009) at 275-277 and 368-374.

17 Jackson, above n 7, at [37.1.1].

18 At [37.2.1].

19 At [37.2.6]-[37.2.7].

If the litigation process is to remain cost-effective, there must be improved ways of dealing with the exponential growth in the availability of information."

[…]

"The disclosure of emails and other electronic documents throws up a number of problems.

A particular concern which has been expressed was the tendency of the disclosing party to provide material indiscriminately and without regard to its relevance to the issues in dispute, with consequent wastage of costs.

We suggest that such problems can be avoided or reduced by appropriate case management, at a case management conference at which the extent and purpose of the proposed e-disclosure is actively considered (that is before, not after, such disclosure has commenced).

That will, of necessity, involve an understanding on the part of both counsel and judges of the workings of document management systems and the practicalities of performing electronic searches for documents. It will also require early and clear articulation of the specific issues that are likely to affect the disclosure process in any given case."

10. Therefore, in addressing those areas of civil litigation in which "costs are disproportionate and impede access to justice"[20], Sir Rupert Jackson recommended, and the Civil Procedure Rules Committee agreed to, the introduction of a "menu" of disclosure options.

11. These are now found in r 31.5:

> **31.5 Disclosure**
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> […]
>
> (7) At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make in relation to disclosure—
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> (a) an order dispensing with disclosure;
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> (b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;

[20] At i.

(c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;

(d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;

(e) an order that a party give standard disclosure;

(f) any other order in relation to disclosure that the court considers appropriate.

12. In his *Final Report*, Sir Rupert Jackson noted the ten possible options for reforming disclosure obligations in relation to larger multi-track disputes that he had circulated to the profession for comment. These where, namely, to:[21]

(i) Maintain the current position with standard disclosure remaining the default disclosure order.

(ii) Abolish standard disclosure and limit disclosure to documents relied upon, with the ability to seek specific disclosure.

(iii) Introduce "issues based" disclosure akin to the approach being trialled by the Commercial Court.

(iv) Revert to the old system of discovery with the "trail of enquiry" test.

(v) No default position with the parties and court being required to consider the most appropriate process for disclosure at the first case management conference ("CMC"). This option has generally been referred to as the "menu" option.

(vi) More rigorous case management by the court, including greater use of sanctions against parties who provide disclosure in a haphazard manner, or late, or ordering the parties to agree a constructive process and scope.

(vii) Use of experienced lawyers as disclosure assessors in "heavy" cases to identify which categories of documents merit disclosure.

(viii) Restrict the number of specific disclosure applications and/or raise the standard to be met.

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21 Jackson, above n 7, at [37.1.2].

(ix) Reverse the burden of proof in specific disclosure applications, with the costs of the disclosure exercise being met by the requesting party unless documents of real value emerge.

(x) Allocate a single judge at the outset of substantial cases to enable him or her to become more familiar with the facts and procedural history.

13. In considering which option to adopt, and in coming to favour the "menu" approach, Sir Rupert Jackson noted the existence of two major schools of thought on the importance and appropriate of the standard disclosure regime:

a. the first regarded disclosure, whether standard or that formerly in place under the RSC, as "fundamental" to the English and Welsh civil justice system and requiring of preservation except where a very good reason to the contrary existed.[22] Proponents of this view expressed the perspective that:

> the rule at the heart of the process (and principle) of disclosure – that opposing litigations must reveal documents to their opponents which are adverse to their own case – has a reach which far exceeds the disclosure process itself. It is fundamental to the way in which litigation in our common law jurisdiction is conducted. There can be legitimate debate as to how that principle is best captured (for example whether by the standard disclosure test provided for by the CPR or by the Peruvian Guano test of relevance under the old RSC), but the importance of having a generally applicable test should not be under-estimated … It is true that one size does not fit all, but the fitting should involve tailoring the same cloth, not many different types of cloth. The fact that the standard disclosure test is the normal starting point and known to all practitioners leads to it having a generally beneficial effect on the conduct of litigation.

b. the second, conversely, proceeded from an acceptance that the costs of disclosure had become sufficiently prohibitive to warrant a radical change to the rules to avoid the costs of disclosure denying some litigants access to justice. Relevantly also, Sir Rupert reports the views of a United States federal judge, who said that "civil courts are pricing themselves out of the market because of the costs of discovery, especially e-discovery. Such costs are driving parties to mediation and to other procedures outside the court system, which lack transparency."[23] Proponents of this view were reported as having said:[24]

> A comparison with other countries only illuminates the fact that our system is failing and the suggestion that there should be a reduction in the amount of disclosure is welcomed. Their systems should be used as a basis to explore

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22 At [37.3.3].

23 At ch 32, fn 39.

24 At [37.3.5].

> how the reduction can be formulated, with alterations that take into account our adversarial system.
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> […]
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> We do not believe when factoring in commercial realities that an appropriate balance can be obtained in all circumstances. Indeed the realisation must be if the situation is distilled in to the simple question 'justice or costs?' costs, commercially, must prevail."

14. As to how the disclosure rules could be reformed to best address these problems, Sir Rupert again reported sharp differences of opinion:

    a. The Circuit Judges were of the view that disclosure was a problem only in respect of large commercial cases and complex clinical negligence and employer's liability litigation, but that the current system was functioning appropriately in "run of the mill county court litigation".[25]

    b. The Commercial Litigation Association strongly refuted that suggestion, noting that they would "challenge" any analysis indicating that "the current disclosure rules work well in all significant areas of litigation apart from large multi-track cases", and would instead suggest that "practitioners who deal with non-City litigation other than personal injuries have a great deal of concern over the costs of litigation and in particular over the expenditure incurred in disclosure and the preparation of witness statements."[26]

    c. The Northern Circuit Commercial Bar Association described standard disclosure "one of the less beneficial aspects of the Woolf Reforms" and thought that, across the board, "the correct answer to the disclosure question is ultimately that it is a matter to be looked at on a case by case basis with the aim of limiting disclosure to that reasonably necessary to achieve justice in the particular circumstances of the case."[27]

15. Similarly, there was a strong division of views on the appropriateness of disclosure assessors.[28] Some submitters felt that this would add another layer of costs for no practical benefits. Others thought that any 'sub-contracting' out of that judicial function was inappropriate. Others, however, such as the London Common Law and Commercial Bar Association, were highly supportive of the proposal, and Herbert Smith, having surveyed its clients, identified 59% of respondents as supporting the use of assessors in "heavy" cases. Based on this mixed feedback, Sir

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25 At [37.3.7].

26 At [37.3.8].

27 At [37.3.10].

28 At [37.3.6].

Rupert recommended only that such a scheme be piloted, and only then in cases in which all the parties consented, making no further recommendations until further evidence was available.[29]

16. "The one area of litigation in which a clear majority view emerged" during consultation was in regard to large commercial cases. In that area the menu approach was considered most appropriate by commercial practitioners and judges.[30] It was noted that it was important that a full range of options, including even *Peruvian Guano* disclosure, should be available in order that the justice of each case could be met. For example, Sir Rupert considered that high level of discovery appropriate in fraud cases.[31]

17. Sir Rupert thought it appropriate for the menu to be available in all cases, not merely large commercial cases, in which the costs and burdens of standard disclosure were likely to be disproportionate. This was subject to the rider, ultimately adopted, that personal injury and clinical negligence claims (which, of course, are not a significant source of litigation in New Zealand) should be excluded, as standard discovery was operating well in respect of those cases. Elsewhere however:[32]

> standard disclosure ought not to be the starting point. Instead, without any steer towards a particular outcome, the court should apply itself to a suite of possible orders and select the order which is most appropriate to the instant case. This new provision will also encourage more rigorous case management in relation to disclosure. Option 6 in the disclosure chapter of the Preliminary Report is "more rigorous case management" and this option has attracted a fair amount of support in the Phase 2 submissions.

18. Another option considered by Sir Rupert was the use of reversed costs burdens to discourage the use of specific disclosure applications as a tactical tool. He cited the comment of David Steel J that:[33]

> Lack of cooperation is a blight on our procedures as any reading of a file of solicitors' correspondence will reveal. But it should not be assumed that the problem is confined to only one side (or even one side's lawyers) or that the court is in a position to undertake effective sanctions against parties for want of cooperation or even to intervene at a useful stage. In any event, the only sanction is by way of costs but, in my experience, the process merely adds to them. Nonetheless it may well be that it is

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29 At [37.3.16].

30 At [37.3.10].

31 At [37.3.13].

32 At [37.3.15].

33 At [37.3.17].

desirable to require parties to pay up front for the expenses incurred by their opponents in providing discovery which is of more marginal value.

19. Again, this process attracted strong opposing views, with the Law Society noting that it might "cause significant disadvantages to the party seeking disclosure or generate further hearings to determine the value of the documents sought",[34] with hostile submitters taking the view that the courts already had sufficient flexibility to impose adverse costs consequences in appropriate cases. Sir Rupert agreed that sufficient flexibility was already present, and that Judges should be unafraid to use it where necessary to discourage sharp practice.[35]

20. Additionally, Sir Rupert recommended (in accordance with the general scheme now in placed in the United Kingdom), that option ten be adopted, and that all complex cases be allocated to "specific judges, so far as practicalities and the existing circuit system allow. This approach should help to promote good case management in relation to disclosure issues."[36]

21. As a result of these reforms, the editors of the *White Book* note, the English and Welsh courts have been more willing to limit disclosure than in the past, noting that:[37]

> [i]n particular the court may now be more willing to exercise discretion to refuse or limit disclosure on the basis that the disclosure sought would be unduly expensive, inconvenient or troublesome in comparison to the potential forensic benefits to be gained.

22. The *White Book* suggests that orders limiting the amount of disclosure, compared to the standard disclosure presumption, will most likely issue where the parties have already (through past dealings or informal discovery) obtained most of the relevant documents from each other, the costs of standard disclosure would be disproportionate, or the amount of documentation would be so immense "given the complexity of the dispute and the underlying contract or contracts" that the costs of disclosure would be disproportionate to the sums or issues in dispute.[38]

23. However, as a matter of practice, standard disclosure orders are still made by default. Given the proliferation of electronic disclosure, and the commensurate increase in the volume of disclosure, noted above, this has resulted, in many cases, "in the production of vast quantities of data, only a small proportion of which is in

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34 At [37.3.18].

35 At [37.3.19].

36 At [37.3.20].

37 Vos (ed), above n 6, at [31.5.4].

38 At [31.5.4].

fact referred to at trial."[39] That was the view arrived at by the Gloster LJ working group after its first meeting, the working group saying in its announcement of the Disclosure Pilot scheme:[40]

> that it could not seriously be disputed that standard disclosure often produces large amounts of wholly irrelevant documents, leading to a considerable waste of time and costs. It also expressed the concern that inadequate judicial resources had led, on occasion, to judges not being able to deal effectively with disclosure issues at a case management conference, so that, in the absence of agreement between the parties, standard disclosure often became the default option.
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> It was acknowledged that while orders for standard disclosure may be appropriate (and strongly desirable) for factually complex cases, there are many other cases which can be fairly and efficiently determined on the basis of more focused and limited disclosure.

24. Herbert Smith Freehills suggests that, the "universe of documents" still needing to be searched and reviewed, it is at-least arguable that also requiring a review of to determine what documents fall within the narrower test is more time consuming, requires more thought, and perhaps more senior reviewers. Relatedly, practitioners were afraid that adopting an overly restricted (focused) approach to disclosure would run the risk of judicial criticism.[41]

25. This echoes the concerns expressed by Sir Rupert Jackson in 2009, when he observed that, even where standard disclosure only was ordered, solicitors continued to apply the old (*Peruvian Guano*) test, simply disclosing "everything that might be relevant";[42] saving themselves costs in undertaking disclosure, but grossly increasing the other side's costs in reviewing those documents (and, ultimately, their own costs).

26. Putting it more plainly, Clare Arthurs and Nicole Finlayson have said:[43]

> Let's call a spade a spade: disclosure in the UK litigation process has got increasingly out of hand …
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> Traditionally, the English 'cards on the table' approach to disclosure, whereby all parties disclosed documents both helpful and harmful to their case, drew international

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39 Ed Crosse, David Bridge, and Kirsty Oliver "New Draft Rule on Disclosure Unveiled" (Simmons & Simmons elexica, online ed, 2 November 2017).

40 Gloster LJ and others "Proposed Disclosure Pilot: Press Announcement" (31 July 2018) at [4] and [5].

41 Herbert Smith Freehills "Litigation Notes: Disclosure" (30 April 2019).

42 Jackson, above n 7, at [37.3.2].

43 Clare Arthurs and Nicole Finlayson "Disclosure Pilot Scheme: A Comprehensive Reshuffle" (Lexology, online ed, September 2018).

litigants to our justice system. Today however, the benefits of this wide approach are ever more eclipsed by the associated costs …

The disclosure menu enabled (in theory) the court and parties to tailor disclosure to the needs of the particular case, with options ranging from standard disclosure to dispensing with disclosure entirely, and several others in between. However, the judiciary and the profession largely did not engage with or adopt the changes, and standard disclosure (which can lead to many irrelevant documents being disclosed) still remains the default option and by far the most likely choice.

The Current Pilot Scheme

27. Speaking for the Working Group at a meeting of the Commercial Court Users Group Meeting on 4 December 2018,[44] Ed Crosse stated that the pilot rules "seek to balance the need for wide disclosure in appropriate cases with the desire to reduce the production of irrelevant and peripheral documentation."[45] Mr Crosse explained that the aim of the rules was not to do away with disclosure, but to create duties "not to dump large volumes of material on other parties" and "to co-operate with other parties in the lead up to a case management conference" and "to use appropriate technology in the disclosure process."[46]

28. The pilot scheme rules, which are now located in Practice Direction 51U of the CPRs, will apply to existing and new proceedings in the Business and Property Courts of England and Wales and the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, and Newcastle for two years from 1 January 2019 (and to any proceedings to which it applied at the end of the two years until those are concluded.)[47] It does not apply in the County Court, and does not apply to competition, admiralty, intellectual property, and public procurement claims, and does not apply within the Shorter and Flexible Trials Scheme or within a fixed or capped costs regime.[48]

29. The principles applicable to the pilot scheme rules are as follows:[49]

    a. Disclosure is accepted to be important to achieving the fair resolution of civil proceedings, being concerned with identifying and making available documents that are relevant to the issues in the proceedings.

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44 Teare J, Chair of the Commercial Users Group *Minutes of the Meeting of 4 December 2018* (Rolls Building, London).

45 At 2.

46 At 3.

47 Civil Procedure Rules (England and Wales), Practice Direction 51U, r 1.2.

48 Practice Direction 51U, r 1.4.

49 Practice Direction 51U, rr 2.1-2.9.

b. Parties, and their representatives, are expected to co-operate with each other, and to assist the court, to determine the appropriate and proportionate scope of disclosure in the most efficient way possible.

c. The Court will be concerned to ensure that disclosure is no wider than is reasonable and proportionate in resolving the issues in the proceeding.

30. The new rules can be summarised as a two-stage process:[50]

a. Initial Disclosure: Like the process found in arbitration, the parties are required to disclose the documents on which they rely. The parties may ot-out of this requirement if it is unnecessary.

b. Extended Disclosure: The parties must identify issues for disclosure – those issues, out of those disclosed by the pleadings, in relation to which extended disclosure is sought – to provide the basis for further discussions as to the scope of disclosure, the appropriate technology to be adopted, and so forth. A menu of five options is available to the Court in deciding whether to grant disclosure, ranging from a disclosure similar to that required in initial disclosure through to "full" disclosure. The extent of discovery ordered will be determined "having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly"[51] and, in particular:

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party;

(7) the need to ensure the case is dealt with expeditiously, fairly, and at a proportionate cost; and

(8) the purpose of the pilot rules begin to limit the searches required and the volume of document to be disclosed, such that the parties' use of

50 Teare J, above n 42, at 3.

51 Practice Direction 51U, r 6.4.

disclosure models and applications should not increase costs through undue complexity.[52]

31. The parties', and their representatives', duties in relation to disclosure commence as soon as proceedings are anticipated; triggering duties to preserve documents in their control.[53] This expands to suspending document deletion and destruction processes, to send notifications to all relevant former and current employees, agents, and third parties, to preserve documents.[54] Legal representatives have commensurate duties to inform their clients of their obligations and obtain confirmation that appropriate steps have been taken.[55] A written confirmation must be supplied together with the particulars of claim or defence that steps have been taken to preserve relevant documents.[56]

32. As initial disclosure, at the same time as their statement of case is served on the other parties, each party must provide (in, absent agreement or orders to the contrary, electronic format)[57] each other party an Initial Disclosure List of Documents that lists and is accompanied by copies of:[58]

    a. the key documents on which it has expressly or otherwise relied in support of the claims or defences advanced in its statement of case, including the documents referred to in that statement of case; and

    b. the key documents that are necessary to enable the other parties to understand the claim or defence they must meet.

33. Initial disclosure is not required where the parties have agreed to dispense with it or the court has ordered that it is not required.[59] The reasons for any agreement to that end must be recorded by each party in writing and made available to the court on request at a case management conference.[60] The court may set aside an agreement if it considers that Initial Disclosure is likely to provide significant benefits and the costs associated with initial disclosure are not likely to be disproportionate to those benefits.[61]

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52 Practice Direction 51U, r 6.6.

53 Practice Direction 51U, r 3.1(1) and 4.

54 Practice Direction 51U, r 4.2.

55 Practice Direction 51U, r 4.3

56 Practice Direction 51U, r 4.4.

57 Practice Direction 51U, r 5.5.

58 Practice Direction 51U, r 5.

59 Practice Direction 51U, rr 5.3(1)-(2).

60 Practice Direction 51U, r 5.8.

61 Practice Direction 51U, r 5.8.

34. Where the parties are unable to agree whether to dispense to Initial Disclosure, a party opposed to the performing of Initial Disclosure may apply, with notice, for directions limiting or abrogating the obligation to provide Initial Disclosure. This must be on the basis that compliance with that application will incur disproportionate costs and must be supported by evidence to that effect.[62] Such applications will, outside of exceptional cases, be dealt with without a hearing or at a short telephone hearing.

35. Initial disclosure is also not required where any party concludes and states in writing, on a good faith basis, that giving Initial Disclosure would involve giving any other party (after removing duplicates, documents already provided to the other party, or known to be possessed by the other party, which documents parties are obliged not to provide as part of Initial Disclosure unless required),[63] more than 1000 pages or 200 documents (or such higher but reasonable figure as agreed on by the parties).[64] Documents in media not structured in page format are excluded from this limit, but must be confined strictly to what it necessary to achieve the twin criteria listed above.[65]

36. Parties are not obliged to undertake any search for documents beyond any search it has already undertaken or caused to be undertaken for the purposes of the proceedings, including those undertaken in advance of the proceedings, in providing initial disclosure.[66] These searches are to be briefly described in the Initial Disclosure List of Documents.[67] Nor does Initial Disclosure require the translation of any document.[68]

37. The Court may, on application, require a party to disclose documents to another party where that is considered necessary to enable the applicant to understand the claim or defence they must meet or to formulate a defence or a reply.[69] Otherwise, complaints about Initial Disclosure will be dealt with (ordinarily) at first case management conferences, and a "significant failure" to comply with Initial Disclosure obligations can result in an adverse costs order.[70] Additionally, failures to comply with Initial Disclosure duties are relevant to the granting of extended disclosure.

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62 Practice Direction 51U, r 5.10.

63 Practice Direction 51U, r 5.4(3).

64 Practice Direction 51U, r 5.3(3).

65 Practice Direction 51U, r 5.3.

66 Practice Direction 51U, r 5.4(1).

67 Practice Direction 51U, r 5.4(2).

68 Practice Direction 51U, r 5.7.

69 Practice Direction 51U, r 5.11.

70 Practice Direction 51U, r 5.13.

38. Whether Extended Disclosure is to be granted will be determined, ordinarily, at the first case management conference.[71] There is no presumption that a party is entitled to Extended Disclosure, and particularly not models D and E (see below), and no model will apply with the approval of the court.[72]

39. No application notice is required of a party seeking Extended Disclosure, but within 28 days of the final statement of case each party must state, in writing, whether they are likely to request Extended Disclosure of one or more of Models B, C, D, or E (see below).[73] Where any of the parties has indicated this will be the case, the claimant must, within 42 days of the final statement of case, prepare and serve on the other parties a draft List of Issues for Disclosure or equivalent.[74] (Where the claimant is a litigant-in-person, and a defendant is not, the court may request that the defendant's representatives lead the preparation of the List).[75]

40. The List of Issues for Disclosure is completed on s 1A of the "Disclosure Review Document" (DRD). The Disclosure Review document is the document by which the parties identify, discuss, and seek to agree the scope of any Extended Disclosure on model C, D, and E, and provides the form in which information relevant to those issues is to be provided to the Court.[76] The format of the DRD can be modified as required in complex cases to ensure it remains an efficient, convenient, and helpful document.[77] The obligation to complete, seek to agree, and update the DRD is an ongoing one. Any party who fails to co-operate and constructively engage in the process is at risk of having any application for Extended Disclosure denied or case management conferences adjourned with an adverse order for costs.[78]

41. Issues for Disclosure are those key issues in dispute, and those issues only, that the parties consider will need to be determined by the court with some reference to contemporaneous documents for the proceedings to be resolved fairly.[79] It does not extend to every issue in dispute. The claimant must ensure that the list provides a fair and balanced summary of the key areas of dispute identified by the parties in their respect statements of claim and defence.[80] If any defendant considers the wording of the draft List unacceptable, it must provide the claimant its proposed or alternative wording within 14 days of receiving service of the draft

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71 Practice Direction 51U, r 6.3.

72 Practice Direction 51U, r 8.2.

73 Practice Direction 51U, r 7.1.

74 Practice Direction 51U, r 7.2.

75 Practice Direction 51U, r 7.9.

76 Practice Direction 51U, rr 10.1-10.2.

77 Practice Direction 51U, r 10.2.

78 Practice Direction 51U, r 10.3.

79 Practice Direction 51U, r 7.3.

80 Practice Direction 51U, r 7.4.

List.[81] In advance of the first case management conference, the parties must discuss and seek to agree the list, and to consider whether any issues can be removed.[82] The parties must further indicate which model each party seeks to apply to each issue.[83]

42. Where the parties reagreed that there are preliminary issues that require determination first, or that proceedings should be staged, the parties may apply for an order that the trail be conducted in stages, and minimise the disclosure required until that application has been heard.[84]

43. Any party proposing Model C Extended Disclosure must complete s 1B of the Disclosure Review Document and provide it to the other parties no later than 28 days after the defendant has responded to the claimant's draft List of issues for Disclosure. Parties provided with a s 1B statement must, as soon as is practicable and within 14 days at the latest, reply indicating either their agreement with that proposal or giving concise reasons for their opposition.

44. Having agreed the List of Issues for Disclosure and exchanged their proposals on the Model(s) for Extended Disclosure applicable to each, the parties should prepare and exchange drafts of s 2 of the DRD, including costs estimates of the proposals and (where possible) estimates of the likely amount of documents involved, no later than 14 days before the case management conference.[85] Any disputes that cannot be resolved will be decided at the first case management conference.[86] The claimant must file a finalised single DRD not later than 5 days before the case management conference, and each party must, as soon as practicably after that (and in any case in advance of the conference) file a signed Certificate of Compliance (with their obligations under the Rules).[87]

45. The court will determine which of the following five models of extended disclosure is appropriate in relation to each issue for disclosure at the first case management conference, having regard to the principles listed at paragraph [28(b)] above and those at [44] below. These are:[88]

    a. Model A – Confined to Known Adverse Documents: The court may order that the only disclosure required in relation to some or all Issues for Disclosure is of

81 Practice Direction 51U, r 7.5.

82 Practice Direction 51U, r 7.6.

83 Practice Direction 51U, r 7.6.

84 Practice Direction 51U, r 7.8.

85 Practice Direction 51U, r 10.6.

86 Practice Direction 51U, r 10.7.

87 Practice Direction 51U, r 10.9.

88 Practice Direction 51U, r 8.

known adverse documents in accordance with the (continuing) duty of the parties to disclose any documents that a party or their representative is actually aware (without undertaking any further search than it has already undertaken or caused to have undertaken) that are or were in its control that contradicts or materially damages, or contains information that contradicts or materially damages, the disclosing party's contention or events of events or supports the contention or version of events of an opposing party.[89]

b. Model B – Limited Disclosure: The court may order the parties to disclose, to the extent they have not already done so in Initial Disclosure, but without limit as to quantity, the key documents on which it has expressly or otherwise relied in support of the claims or defences advanced in its statement of case, including the documents referred to in that statement of case; they key documents that are necessary to enable the other parties to understand the claim or defence they must meet; and known adverse documents. Under Model B, a party is under no obligation to undertake a search for documents beyond any search already conducted for the purposes of obtaining advise on its claim or defence or preparing its statement of case. Where any such search is conducted, however, the continuing duty to disclose adverse documents applies.

c. Model C – Request-Led Search Based Disclosure: The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure. Where the parties cannot agree that disclosure should be given, or the disclosure to be given, the requesting party must raise that request at the case management conference. The court will determine if the request is reasonable and proportionate and may either, based on that conclusion, grant the request, grant the request in part, or refuse the request. The ongoing duty to disclose known adverse documents still applies.

d. Model D – Narrow Search-Based Disclosure, With or Without Narrative Documents: Under Model D, a party discloses documents that are likely to support or adversely affect its claim or defence or that of another party in relation to one or more Issue for Disclosure. Each party must undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D is ordered, with the court to determine appropriate limits based on the information contained in the DRD. The order should specify whether Narrative Documents, being those documents that are relevant only to the background or context of material facts or events, and not directly to the Issues for Disclosure, that are not themselves adverse documents, are to be disclosed. Where the disclosure of Narrative Documents is not specified, they must not be disclosed. The ongoing duty to disclose known adverse documents still applies.

[89] Practice Direction 51U, rr 2.6, 2.8, 3.1(2).

e. **Model E – Wide Search-Based Disclosure:** Model E will be ordered only in an exceptional case. Under Model E, a party must disclose documents that are likely to support or adversely affect its claim or defence or that of another party in relation to one or more Issue for Disclosure or that may lead to a train of inquiry which may then result in the identification of other documents for disclosure, being documents that likely support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure. Each party must undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D is ordered, with the court to determine appropriate limits based on the information contained in the DRD. This will likely be broader than that ordered for Model D disclose. Narrative documents must, in the absence of an order to the contrary, be disclosed. The ongoing duty to disclose known adverse documents still applies.

46. In all cases, it is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable, and proportionate. Where Disclosure Model D or E is proposed, the proposing party should be prepared to explain why Disclosure Model C is inappropriate.[90] The question of whether something is reasonable and proportionate is to be determined by the court in all the circumstances of the case, including the factors noted at [28(b)] above and the overriding objective.[91] Generally, the Court will avoid ordering different models of disclosure in relation to different Issues for Disclosure to avoid increasing the costs and burdens of disclosure, but this is subject to the general principles and overriding objective.

47. The parties may seek guidance from the court by way of a discussion with the court in advance of or after a case management conference concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure where:[92]

    a. the parties have made real efforts to resolve disputes between them; and

    b. the absence of guidance from the court before a case management conference will likely materially affect the court's ability to effectively hold a conference, or the absence of guidance after a conference will materially affect the parties' ability to carry out case management directions effectively.

48. Guidance hearings should be attended by a legal representative of each party with direct responsibility for the conduct of the disclosure, the application for guidance will be heard for no more than 30 minutes and will receive no more than 30

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90 Practice Direction 51U, r 6.5.

91 Practice Direction 51U, r 9.5.

92 Practice Direction 51U, r 11.1.

minutes' pre-reading.[93] The guidance given will be recorded in a short note but the Court may, if necessary, also make orders as necessary.[94]

49. Where no order in relation to Model B, C, D, or E disclosure is made in respect of a party on any Issue for Disclosure, that party must, within 60 days of the first case management conference, provide a completed Disclosure Certificate certifying that all known adverse documents have been disclosed.

50. The parties must, where searches are required, seek to agree, and the court may give directions, on the following matters with a view to reducing the burden and costs of disclosure:[95]

    a. that the scope of the searches required be limited to particular date ranges and custodians of documents, particular classes of documents or file types, specific repositories or geographical locations, documents responsive to particular automated or key word searches;

    b. how narrative documents are to be excluded, if that is necessary, is a reasonable and proportionate way; and

    c. the use of software and analytical tools, coding strategies, prioritisation, and workflows.

51. The court may require the use of specified software or analytical tools, require that methods to be used to remove duplicate and near-duplicate documents, require the use of data sampling, specify the format in which documents are to be disclosed; identifying the methods the court regards as sufficient for identifying privileged and other non-disclosable documents, require the use of a staged approach to disclosure, and make orders excluding certain classes of document from disclosure.[96]

52. The court may at any stage vary an order for Extended Disclosure.[97] Also, at any time a party may request a copy of a document that has not already been provided by way of disclosure but that is mentioned in a statement of case, a witness statement, a witness summary, an affidavit, or an expert's reports.[98] Copies of documents mentioned, that is, referred to, cited in whole or part, or directly

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93 Practice Direction 51U, rr 11.2-11.3

94 Practice Direction 51U, r 11.4.

95 Practice Direction 51U, r 9.6.

96 Practice Direction 51U, r 9.7.

97 Practice Direction 51U, r 18.

98 Practice Direction 51U, r 21.1.

alluded to, in a statement of claim must be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.[99]

53. A party complies with an order for Extended Disclosure by:[100]

a. serving a Disclosure Certificate signed by the party including a statement of truth signed by the party or an appropriate person at the party that all known adverse documents have been disclosed (together, in the latter case, with a statement as to why that person is an appropriate person to sign the document);

b. serving an Extended Disclosure List of Documents;

c. producing the documents that are disclosed over which no claim is made to withhold production in relation to; and

d. if unable to produce a particular document as it no longer exists, or it is no longer in the party's possession, describing each such document with reasonable precision and explaining with reasonable precision the circumstances in which, and the date when, the document ceased to exist or left it possession, or any other reason for non-production.

54. In regards production of documents, a party will, absent order or agreement to the contrary, produce:[101]

a. disclosable electronic documents to the other parties by providing electronic copies in the documents' native format, in a manner which preserves metadata and that allows receiving parties to access, search, review, and display the documents in the same manner as the party providing them, and with OCR versions provided where possible on an "as is" basis;

b. disclosable hard copy documents by providing scanned versions or photocopied hard copies; and

c. more than one copy of a document only where additional copies contain or bear modifications, obliterations, or other markings or features that of themselves cause the additional copies to fall within a party's Initial or Extended Disclosure obligations.

55. Without leave of the court, or agreement to that effect, a party may not rely on a document in its control that it has not disclosed at the time required for Extended Disclosure or, otherwise, within 60 days after the first case management

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99 Practice Direction 51U, rr 21.2-21.3.

100 Practice Direction 51U, r 12.

101 Practice Direction 51U, r 13.1.

conference (subject to the continuing duty in respect of adverse known documents).[102] Additionally, the court retains its full powers of case management and the full range of sanctions available to it, and where a party has failed to comply with its obligations, the court may adjourn any hearing, make an adverse costs order, or order that any further disclosure be made conditional on any matter the court specifies. The court may also deal with any failures as a contempt of court.[103]

56. Applications may be made for disclosure before proceedings have started where there is a right under an enactment to do so, which is to be granted where granting that application is desirable to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.[104] Orders may also be sought against non-parties where the documents sought are likely to support the case of the applicant, adversely affect the case of other parties, and disclosure is necessary to dispose fairly of the proceedings or to save costs.[105]

Reactions to, and Commentary on, the Pilot Scheme

57. There is an apparently wide-spread consensus amongst those involved in the drafting of the pilot scheme, and those who will be involved in administering it, that this radical rules reform will need to be accompanied by an equally great change to litigation culture to avoid the same lacklustre outcomes as were seen following the Woolf and Jackson reforms. Ed Crosse has stated:[106]

> The new pilot scheme is much needed and will be a success provided clients, the legal profession and judges truly embrace the new rules. Change is never easy and, at least initially, it will require an investment of time and focus by all for the new rules to bed down. No matter how they are drafted, rules can only achieve so much. The success or otherwise of this scheme in my view turns on whether we seize this opportunity to take a new, modern, efficient, and robust approach to disclosure.

58. Rosemary Martin, Group General Counsel of the Vodafone Group (UK), and Chair of the GC100, has similarly said that:[107]

> If, collectively, we can get behaviours to change too (the difficult bit) then this initiative will be enormously valuable for the future.

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102 Practice Direction 51U, r 12.5.

103 Practice Direction 51U, rr 20 and 23.

104 Practice Direction 51U, r 31.16.

105 Practice Direction 51U, r 31.17.

106 Ed Crosse, David Bridge, and Kirsty Oliver "Disclosure Pilot Scheme Approved" (Simmons & Simmons elexica, online ed, 31 July 2018).

107 Ed Crosse, David Bridge, and Kirsty Oliver "New Draft Rule on Disclosure Unveiled" (Simmons & Simmons elexica, online ed, 2 November 2017).

59. Commenting on the pilot scheme, Etherton MR said:[108]

> The result is, I believe, the promulgation of an entirely new and innovative set of rules for disclosure, which, if embraced by all, should promote a significant change in culture and approach to what is a key element of civil proceedings in England and Wales.

60. Sir Geoffrey Vos, Chancellor (Chief Judge) of the High Court of England and Wales, said:[109]

> I am delighted that the disclosure pilot is now being brought into effect. It is a much-needed and far-sighted reform. There will now be a menu of options available to litigants so that disclosure can be targeted appropriately to the kind of case that as being litigated.

61. Members of the profession appear generally enthusiastic about the changes, on my incomplete survey of firms' and publishers' online commentary. Clare Arthurs and Nicole Finlayson have said:[110]

> The emphasis is clearly on early 'common sense' disclosure with minimal additional cost, allowing each party to make a more accurate early evaluation of their position, and which should even, in some cases, obviate the need for further disclosure completely. Because the parties ought to be able to be better able to assess their strengths and weaknesses, it is hoped that this may also increase early settlements before the proceedings get further underway.
>
> […]
>
> These new rules have enormous potential and, with the combined efforts of all those involved in the pilot, should, it is hoped, herald a new, more efficient and effective age in disclosure … For that to happen however requires the profession and the judiciary to embrace the pilot, in a way that they did not engage with Jackson's disclosure reforms.

62. Adopting a more balanced assessment, Slaughter and May have commented that:[111]

> [The rules indicate] a clear steer away from the current 'default' option of standard disclosure towards the request-led approach to disclosure often used in international arbitrations (although importantly known adverse documents will still need to be disclosed even if they fall outside the parties' requests).

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108 Gloster LJ and others "Proposed Disclosure Pilot: Press Announcement" (31 July 2018).

109 Gloster LJ and others "Proposed Disclosure Pilot: Press Announcement" (31 July 2018).

110 Clare Arthurs and Nicole Finlayson "Disclosure Pilot Scheme: A Comprehensive Reshuffle" (Lexology, online ed, September 2018).

111 Richard Jeens and Samantha Holland *New Year's Resolutions: New Disclosure Pilot Scheme* (Slaughter and May, London, December 2018).

Adopting an arbitration-style approach to disclosure may have costs benefits as it can result in a smaller pool of documents to be searched and reviewed, and possibly, disclosed. However, disclosure requests in complex disputes can be difficult to agree and the back and forth between parties on these issues can be time consuming and expensive.

[…]

Agreeing a list of issues for disclosure could prove to be a sticking point in certain cases due to the large number of complex issues at the centre of many big commercial disputes. It may also result in a front-loading of cost, although a more targeted approach to disclosure could lead to costs savings at later stages in proceedings.

[…]

Whilst the broad principle is not a new one – parties giving standard disclosure under the existing rules are required to disclose adverse documents – the formulation of the duty in the new rules has prompted questions over it scope and the extent of knowledge required in the context of companies and other organisations.

[…]

The pilot has for the most part received a positive reception from the courts, court users, and lawyers. … changing the wording of the rules can only take us so far towards achieving the reform's ambitious aims. As the working group behind the pilot acknowledges, meaningful reform of the disclosure process requires a "wholesale cultural change" by parties, their legal representatives, and the judiciary. Whether the pilot achieves the aims of reducing the scale, cost, and complexity of disclosure (and without sacrificing the English's court's stand-out ability to get to the heart of any dispute) remains to be seen …

63. More critically, Chris Dale, of the EDisclosure Information Project, suggests that:[112]

it seems rather heavy-handed to give us a whole new rule, with all that entails, when the disclosue working group itself makes clear that many of the existing problems arise becaue nobody, lawyers and judges alike, is reading and applying the existing rules.

[…]

The problem [with the Jackson reforms] really came down to human behaviour. Judges were critically of solicitors, and in particular of their unwillingness to have the discussions required by the rules. It was necessary, they thought, to make those discussions a mandatory process …

112 Chris Dale "Bringing clarity to the implications of the proposed new disclosure rule" (eDisclosure Information Project, online ed, 13 February 2018).

Solicitors in turn blamed the judges for not making orders conducive to effective disclosure. … It was accepted that not enough had been done to recognise the role of technology.

[…]

Among the issues of principle to be decided was whether there should be a case value limit below which parts of the new rule should not apply – the working group is acutely aware of the potential criticism that the new obligations will front-load costs on smaller matters.

[…]

… the system in England and Wales has always depended on lawyers doing the right thing. The US rules (or at least the practice) seems to an outsider to assume that one's opponent is going to behave badly and to "hide the ball" and conceal documents if possible. Americans already look with bewilderment on what they see as the present lax system of control ….

The clarification of express duties is designed to counter that and to help lawyers explain the duties to their clients. An express duty to act honestly is helpful when dealing with less-than-honest clients …

[…]

Solicitors perhaps need the lively apprehension that they and their firms will be criticised by name. This is more acceptable if it is clear where a line has been crossed.

[…]

The proposed new rule requires attention and understanding from judges. Quite apart from what is involved in giving them the necessary technical knowledge, there is already a drastic shortage of judicial time for case management …

[…]

… I am left with the feeling that the new rule will be predicated on an assumption as to judicial time and attention which will simply not be available.

[…]

Remember this though: most judges have spent their lives becoming experts today on things they had not heard of yesterday – that is what barristers do. Lawyers who learn

to articulate their position – the problem and the (proportionate) solution – succinctly will perhaps find benefit for themselves and their clients under the new regime.

64. Also reserved was the Law Society, expressing "concern that perceived issues relating to disclosure may exist only in high value commercial litigation". In its feedback to the Working Group on the proposed pilot scheme during the consultation stage, the Society said that:[113]

> 2. The working group should consider whether the Court has existing powers to deal with issues related to Disclosure without overhauling the process it in its entirety.
>
> 3. We consider the success of the proposals will depend heavily on Judicial buy-in and resource. Significant time and resource will be required to ensure the Judiciary are able to actively case manage and order appropriate disclosure on a case-by-case basis. The proposals will not have the desired impact without significant control from the Judiciary.
>
> 4. We have some concerns about the amount of Judicial time that will be required to accommodate the proposals. The resources of the Court are already overstretched. The need for additional Court time is likely to result in delays.
>
> 5. We are supportive of parties themselves giving greater consideration to what level of disclosure is required to achieve a just outcome. We support the stance that parties should not default to what was 'standard disclosure'.
>
> 6. We are concerned that the genesis of the working group and focus of road testing has been comprised of the GC100 and firms who deal with large scale litigation. The road testing has only been carried out by firms based in London and may not reflect the impact on litigation outside of London. Problems caused by the current disclosure rules may not be as prevalent in cases of more modest value or other types of cases, and there is a danger that curing a perceived malady in the biggest cases in the Business & Property Court could impact on access to justice in the many other cases proceeding through the Courts.
>
> 7. We are concerned that the proposals have not given full consideration to the value of disclosure in the vast majority of cases which do not proceed to trial. Disclosure is a hugely important tool in resolving cases, and the process reveals contemporaneous documents, which are often of significant probative value and result in cases settling. If the proposals are implemented in their current form then we are concerned that important documents, on which cases may turn, may not come to light. As a result, limiting Disclosure will increase the risk of miscarriages of justice.

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113 The Law Society *Response of the Law Society of England and Wales to the Disclosure Working Group Consultation – Disclosure: Proposed Pilot Scheme for the Business and Property Courts* (London, February 2018).

8. The costs of complying with the new Practice Direction (PD) may be prohibitive in some circumstances. These costs will often relate to the cost of discussions with opponents in relation to disclosure, the costs of completing the Disclosure Review Document, and the costs of preparing for and attending hearings to discuss disclosure Costs will be front loaded, and this will impact upon access to justice.

9. Due to our concerns, we suggest that the pilot be mandatory only where the Court determines a case to be sufficiently complex, or for cases where there is a claim of over £500,000. It should be a voluntary pilot for any cases of £500,000 or less.

[…]

14. We note there is provision for the use of specific software tools in conducting electronic searches. It would be useful to know what training the Judiciary will receive to ensure they are able to order the most appropriate electronic searches for relevant cases. Without significant training, we have concerns that the Judiciary will not be able to perform the active case management tasks that will be required of them to manage disclosure. We also have concerns that smaller firms or litigants in person will not be able to afford the specific software tools which may be required. The Working Group must give consideration to what will be done in circumstances where parties are unable to comply.

65. More specifically, the Law Society recommended that:

12. We are concerned that the obligation on parties to disclose adverse documents is limited to "documents it knows to be or to have been in its control and adverse to its case" (PD 3.1(2)). This could result in significant negative behavioural changes. At present, parties search for adverse documents at an early stage to assess prospects. Under the proposed system, it is left open for parties to stay ignorant and avoid conducting searches which might result in them locating adverse documents.

[…]

16. The Disclosure Working Group must give further consideration to how a Litigant in Person (LiP) will be able to interact with the proposals. Presently, there is no suggestion LiPs have been considered.

[…]

38. Paragraph 9.3(2) sets out that parties may need to carry out searches using certain types of software. There is an assumption that parties will have the requisite software to comply. The Working Group should give consideration on how to deal with parties who may not be able to comply. This could impact on smaller firms and Litigants in Person in particular.

66. At the 4 December 2018 Commercial Court Users Group Meeting, Teare J asked about monitoring of the pilot scheme. Mr Crosse explained that feedback will be collected as to the nature of orders being made and the costs of disclosure, and that Professor Rachael Mulheron of Queen Mary University of London Law School will provide a comprehensive statistical report at the end of the scheme, compiling all available data.[114] Males J emphasised the importance of parties and their representatives being polled as to whether they regard the orders being made as a cost-effective means of securing the production of relevant documents.[115]

Federal Court of Australia

Generally

67. There is no discovery as of right in the Federal Court of Australia, and parties are prohibited (under sanction of denial of costs or disbursements) from giving discovery without an order being made.[116] A party may not apply to the Court for a discovery order unless doing so will facilitate the "just resolution of the proceeding as quickly, inexpensively, and efficiently as possible".[117] It has been the clear policy of the Court, since 1999, has made it clear that orders for discovery going beyond the standard discovery requirements (non-standard and more extensive discovery, discussed below), will rarely be granted. Even where parties submit a consent order to that effect, discovery will not be ordered as a matter of course, and any order made will be moulded to the circumstances of the case in accordance with the overriding objective.[118]

68. These are that parties must disclose documents relevant, in the sense detailed in the next paragraph, to issues raised by the pleadings or in the affidavit evidence, that are or have been in their control, of which, after a reasonable search, they are aware.[119] The extent to which a party has undertaken a reasonable search is to be determined by reference to:[120]

    a. the nature and complexity of the proceeding;

    b. the number of documents involved;

    c. the ease and cost of retrieving a document;

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114 Teare J, Chair of the Commercial Users Group *Minutes of the Meeting of 4 December 2018* (Rolls Building, London) at 3.

115 At 4.

116 Federal Court Rules 2011 (Cth), rr 20.11-20.12.

117 Federal Court of Australia *Practice Note 14: Discovery* (1999) (Cth).

118 *Dennis v Chambers Financial Planners Pty Ltd* (2012) 201 FCR 321 at [14]-[15].

119 Rule 20.14(1).

120 Rule 20.14(3).

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

e. any other relevant matter.

69. The Federal Court of Australia followed the Woolf Reforms and replaced the *Peruvian Guano* test with a narrower relevancy test like that now found in New Zealand in 1999.[121] That is, parties must disclose documents:

a. on which they intend to rely;

b. that adversely affect their own case;

c. that support another party's case; and

d. that adversely affect another party's case.

70. If a party regards standard discovery as being insufficient, especially in complicated commercial litigation, an application can be made for non-standard or more extensive discovery. A party making such an application must identify how the search and scope of discovery will differ compared to standard discovery, any other criteria that should apply, the use the party intends to make of each category of document, and if a discovery plan should be constructed and adhered to.[122] The application must be accompanied by the categories of documents sought, the proposed electronic format for discovery (if any), a draft of any discovery plan that is sought to be used, and, if more extensive discovery than is required under standard discovery is sought, an affidavit stating why that is appropriate.[123] Orders may also be made for discovery of particular documents.[124]

71. Under the Federal Court's 1999 *Discovery* practice note, now repealed, the court took an active role in the discovery process, asking whether discovery was at all necessary, if so for what purposes, and whether a cheaper means was available, such as whether disclosure only in relation to particular issues or defined categories was appropriate.[125] In making this assessment, the court was also to consider:

a. whether discovery should be staged;

b. whether discovery should occur by general description rather than by identification of individual documents;

c. the issues in the case and the order in which they are likely to be resolved;

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121 Rule 20.14.

122 Rule 20.15(1).

123 Rule 20.15(2).

124 Rule 20.21.

125 *Federal Court of Australia Practice Note 14: Discovery* (1999) (Cth).

d. the resources and circumstances of the parties; and

e. the likely costs of discovery and its likely benefits.

72. Under pt 10 of the currently in force *Central Practice Note*, the Federal Court has set out the following expectations in relation to discovery:[126]

> 10.3 Discovery can be extremely burdensome. Matters in some [practice areas] will rarely need discovery. Where discovery is necessary, the Court expects the parties and their representatives to take all steps to minimise its burden. This involves co-operation between the parties. Informal exchange of documents may minimise the use of formal procedures. Parties should also consider the possible benefits of utilising innovative discovery techniques, including the Redfern Discovery Procedure set out in paragraphs 8.4 to 8.7 of the Commercial and Corporations Practice Note.
>
> 10.4 By way of assistance to the parties, the guidelines below should be considered and where appropriate followed by the parties in order to minimise costs and unnecessary process and expense related to procedure.
>
> 10.5 Prior to the Discovery Applicant approaching the Court with a Request, the Court expects that the parties will have discussed discovery issues between them and, if possible, agreed on a protocol for discovery. Such a protocol may involve consensual measures agreed to by the parties which may obviate the need for strict compliance with the Federal Court Rules (such as avoiding the need for a list of documents). The Court will consider the parties' suggestions and may approve them if the Court considers them appropriate.
>
> 10.6 The Court will not approve expansive or unjustified Requests and will generally only consider approving a Request in one or more of the following circumstances where:
>
> (a) the Request facilitates the just resolution of the proceeding as quickly, inexpensively and efficiently as possible;
>
> (b) to do so will effectively facilitate a forthcoming mediation (or other ADR process);
>
> (c) the Court and the parties are sufficiently informed of the nature of the case and issues in dispute so that the appropriateness of the Request can be properly considered (eg. possibly only after key evidence has been filed);

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126 Federal Court of Australia *Central Practice Note: National Court Framework and Case Management* (CPN-1) (Cth) at pt 10.

(d) the Discovery Applicant has adequately justified the need for the Request, including demonstrating:

(i) the utility of the Request and the appropriateness of discovery occurring at that time;

(ii) the relevance and importance of the documentation or information sought;

(iii) the limited and targeted nature of the Request; and

(iv) that the documents sought are, or are very likely to be, significantly probative in nature, or the documents materially support, or are materially adverse to, any party's case in the proceeding.

10.7 A Request must be proportionate to the nature, size and complexity of the case – ie. the Request should not amount to an unreasonable economic or administrative burden on the Discovery Respondent.

10.8 If the Court approves a Request, a Discovery Respondent's search for and production of documents pursuant to a Request must be: made in good faith, uninfluenced by any negative impact on the Discovery Respondent (other than legitimate considerations such as genuine legal professional privilege or commercial confidentiality), and should be comprehensive, but proportionate.

10.9 If an order for discovery has been made, the parties have a continuing obligation to make discovery (in accordance with r 20.20 of the Federal Court Rules).

10.10 Where a Request has been approved by the Court, a Discovery Respondent must, if requested to do so by a Discovery Applicant, provide a brief description of the steps taken by the Discovery Respondent to conduct a good faith proportionate search to locate discoverable documents, such as what records have been searched for, what search criteria or terms have been used, or what databases have been searched.

10.11 Where a Discovery Respondent asserts that documents are unavailable or burdensome to access and discover, the Discovery Respondent must clarify to the Discovery Applicant (unless there is demonstrably no need to do so), how the Discovery Respondent manages, stores, accesses, destroys and disposes of documents. The Court may require a Discovery Respondent to depose to such information.

10.12 Where a genuine contest relating to discovery arises, the Court will likely apply the Federal Court Rules relating to discovery strictly (eg. how a party gives discovery: r 20.16).

> 10.13 How a discovery dispute is resolved by the docket judge will be a matter for him or her. It may be that the dispute can be the subject of a mediation or a confidential conference with a registrar. If there is to be a dispute, one possible approach is not to prepare what might be extensive and expensive affidavit evidence, but to brief the advocates who are to appear in the matter to address the docket judge orally as to relevance, necessity or oppression or any other relevant consideration. The Court expects the parties and their representatives to display common-sense and moderation in requests for discovery, in disputes about discovery and in expending costs on both.

Fast Track Proceedings

73. In the former Fast Track List managed in the Victorian Registry (the "rocket docket"), as operated until the introduction of the National Courts Framework on 2016, further reductions in discovery obligations were implemented.[127] Under this framework, parties were required only to discover documents on which they intended to rely and that had a significant probative value averse to their case, and were required to undertake only a good faith proportionate search pursuant to their discovery obligations. This required a good faith effort to locate discoverable documents, while bearing in mind that the cost of such searches should not be excessive, having regard to the nature and complexity of the issues raised by the case, including the relief sought and the quantum claimed. The Fast Track procedures allowed for additional management of discovery in the form of:

    a. the making of powers to order additional discovery in relation to discrete issues, such as the quantification of damages, and by inspection alone;

    b. requiring the parties to meet and confer and attempt in good faith to resolve a discovery dispute before approaching the Court, with the parties being required to present a certificate setting out that they had met and conferred earnestly.

74. Writing in December 2007, a better part of a year after the scheme was introduced, commentators noted that orders made in the list had been "narrowed and highly specific", and that there had not been, in fact, "any interlocutory applications regarding discovery disputes".[128]

75. With the introduction of National Practice Areas under the National Courts Framework in 2016, flexible and streamlined procedures were introduced in each of the National Practice Areas introduced as part of the framework.[129] Practically, in terms of the fast track procedure, this was mainly of consequence in relation to the

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127 Federal Court of Australia *Notice to Practitioners Issued by the Victorian District Registrar: Directions for the Fast Track List* (2007) at [7.1].

128 Victorian Law Reform Commission *Civil Justice Review: Report* (R 14, 4 March 2008).

129 Federal Court of Australia *Central Practice Note: National Court Framework and Case Management (CPN-1)* (Cth) at [6.5].

commercial list.[130] Accordingly, the fast-track procedure, "or other effective and commercially sensible methods of commencing or expediting proceedings or introducing informal pleadings processes", remains open to parties in the National Practice Area regulated by the Commercial and Corporations Practice Note (C&C-1). Whether fast-track procedures will apply to any proceeding will be determined at the first case management conference.

76. As noted in the extract from the Central Practice Note reproduced above, in the Commercial and Corporations National Practice Area, provision is made for the use of Redfern Discovery Procedures, as are now widely used in international commercial arbitration. These are applicable in both fast and non-fast track proceedings. The Practice Note describes the steps of the Procedure as being:[131]

a. the exchange of requests for specific documents or limited categories of documents;

b. the requests clarify why the documents are relevant and material in nature by specific reference to any pleading, affidavit, concise statement or evidence;

c. the other party to the request consents or objects to each request and provides reasons for objections;

d. the parties prepare a schedule containing the requests and responses; and

e. the Court determines each disputed request, with requests able to be rejected for a number of reasons, including where the request:

    (1) relates to documents that are insufficiently relevant or immaterial;

    (2) relates to documents that are specially protected (such as, for example, through legal professional privilege);

    (3) places an unreasonable burden on the party requested to provide documents; or

    (4) is disproportionate to the case or unfair in the circumstances.

77. The Redfern Discovery Procedure will be made available where doing so is an expeditious process proportionate and appropriate, having regard to the financial nd operational burdens on the parties and their representatives.

78. The Practice Note also makes provision for the use of a memorial procedure involving "the parties filing their pleading-related material together with key

130 At [6.4].

131 Federal Court of Australia Commercial and Corporations Practice Note (C&C-1) (Cth) at [8.5]-[8.6].

documents and evidence in one consolidated process at an early stage in the proceeding."[132] The Federal Court makes the following observations in relation to this procedure:[133]

> The memorial procedure may assist in identifying the real issues quickly and in promoting early and realistic case evaluations. This in turn may facilitate the early settlement of disputes, particularly for substantial commercial disputes that may otherwise be lengthy and expensive. However, the procedure also involves bringing forward some of the steps (and therefore the costs) which often occur later in a proceeding and may not be suitable for every commercial dispute.

New South Wales

The Equity Division of the New South Wales Supreme Court

79. In his recent speech to the NZBA-ABA Joint Conference,[134] Venning J (speaking extrajudicially) noted the practice of the Equity division of the New South Wales Supreme Court, which is quite different to that currently in place in New Zealand.

80. In the equity division, to help achieve the "just, quick, and cheap resolution of the real issues in dispute"[135], disclosure is not permitted unless it is necessary, and disclosure will not be ordered (except in exceptional circumstances) until evidence has been served.[136] The assumption is that parties can serve their evidence without the need for discovery, and that discovery will be ordered only where that would not be possible without discovery (such as where facts are not within the knowledge of the party applying for disclosure).[137] The granting of disclosure is ultimately a discretionary matter for the Court, which will be exercised in order to give effect to the overriding objectives of civil procedure, as noted above.[138]

81. From 2007, in the equity jurisdiction Commercial, Technology, and Construction Lists:[139]

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132 At [8.9].

133 At [8.11].

134 Geoffrey Venning, Chief High Court Judge "Greater Efficiency in Civil Procedure" (NZBA-ABA Joint Conference, Queenstown, 24 August 2019).

135 Practice Note SC Eq 11 – Disclosure in the Equity Division (NSW) at [3].

136 At [3]-[5].

137 *Bauen Constructions Pty Ltd v New South Wales Land and Housing Corporation* [2014] NSWSC 684 per Ball J.

138 Practice Note SC Eq 11 – Disclosure in the Equity Division (NSW) at [19]; Civil Procedure Act 2005 (NSW).

139 Practice Note No SC Eq 3: Supreme Court Equity Division – Commercial List and Technology and Construction List (NSW).

a. parties were required to agree at an early stage about format, protocols, type and extent of discovery.

b. parties were required to agree on whether discovery will be made without the need to categorise documents into privileged and non-privileged materials and, relatedly, whether discovery will be made on a without prejudice basis, allowing a "quick peek" at discovered documents in the interest of expediency, with the disclosure of documents as part of this procedure not amounting to the waiver of privilege. Spigelman CJ explained that the purpose of this was that:[140]

> [it would be possible] to disclose all documents without spending time and money working out precisely what the other side is entitled to and precisely what needs to be protected under privilege … one of the difficulties with just handing over your electronic documents is that people often want to pay lawyers a lot of money to sort out what is relevant – particularly to protect legal professional privilege …. we have a specific rule: if you give access in a broad way, you won't waive privilege.

c. parties were required to notify each other of potential discovery problems and confer on a range of discovery issues.

d. parties were required to produce a joint memorandum setting out areas of agreement and disagreement and their best estimates of the contemplated costs of discovery, with the court then making orders having regard to the "overriding purpose of the just, quick, and cheap resolution of the dispute between the parties" and the contents of that memorandum.

e. the court was empowered to limit the amount of costs of discovery able to be recovered.

82. Practically speaking, this practice is such, Venning J quoted Bergin CJ as saying, that:[141]

> The ambit of that disclosure is confined to the real issues between the parties as defined by not only the pleadings, but also the evidence. This process will require the proofing of witnesses at a very early stage of the litigation with the need for forensic judgments to be made as to the existence of admissible evidence in support of the respective claims. This will of course require the client and/or witnesses to provide the relevant documents to the lawyers in support of the particular claims in their evidence. However, it is envisaged that the process will engender a far more disciplined analysis of the need for disclosure by reference to those real issues, compared to the carte blanche gathering in of every document the respective clients have generated in their

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140 As cited in Chris Merritt "Slashing paper chase expense" The Australian (Sydney, 27 July 2007).

141 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 at [66].

lengthy relationship for "review" by teams of lawyers and students in the absence of any knowledge of the proposed evidence.

Elsewhere in New South Wales

83. Otherwise, discovery in New South Wales is only by court order.[142] The court may order the party to give discovery of a class or classes of documents, or samples of documents within a class; each "class" being defined by the common relevance of documents within that class to the facts in issue or by the shared nature of the documents. An order for discovery may not be made if the document is not relevant to a fact in issue.[143] A matter is relevant to a fact in issue if it:[144]

> could or contains material that could rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness) regardless of whether the document or matter would be admissible in evidence.

84. Discovery, similarly to the English piloted proposals aimed at reducing the overall number of documents discoverable already in the possession of the receiving party, does not extend to (contrary to subject order of the court):[145]

    a. documents already filed in the proceeding;

    b. documents that came into existence wholly after the proceeding commenced;

    c. additional unmarked and unaltered copies of documents included in the party's original list of discovered documents and other copies of documents included in the list of documents generally.

85. The nature of the documents or classes of document included in the list of discovered documents given to the other side must be briefly described and, where described by group, the number of documents therein disclosed. Obligations related to documents no longer in the party's possession extend only six months in time. The present location of those documents must be stated.[146] The list must be verified by an affidavit and, where a party is represented, accompanied by a solicitor's certificate of advice. The deponent must state that reasonable inquiries were made as to the documents, that the list of documents is complete and accurate, and that no relevant document is omitted. The solicitor must certify that the party was properly advised, and that the solicitor is not aware of any other document that ought to have been included.

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142 Uniform Civil Procedure Rules 2005 (NSW), r 21.2.

143 Rules 21.2(3) and 21.2(4).

144 Rule 21.1.

145 Rule 21.1.

146 Rule 21.3.

86. The point of adopting these present rules, the New South Wales Court of Appeal has said, was to move the jurisdiction definitively away from the *Peruvian Guano* test and the associated burdens and costs of excessive discovery.[147]

Victoria

The Present Position

87. The Victorian Civil Procedure Act 2010 accommodates extensive discovery, but also authorises the court to manage discovery and control unnecessary discovery, the court being empowered to make any order regarding discovery that it considers appropriate or necessary.[148] These include powers to:

a. limit discovery to a class or classes of document;

b. relieve a party from the obligation to provide discovery;

c. direct that discovery occur in stages, including before pleadings close;

d. expand a party's obligation to give discovery;

e. set the times for discovery and inspection of documents;

f. order a party to provide facilities for inspecting and copying documents, including copying and computing facilities;

g. requiring a party to explain the way documents are arranged and locate and identify particular documents or class of document;

h. order a party to provide, in addition to their affidavit listing their discovered documents, describing their processes for managing and storing their discoverable documents;

i. order a party to provide all relevant documents in their possession to another party on the basis that privilege is not waived, except where that would prejudice the disclosing party and subject to the right of the party to withhold privileged documents.

88. Otherwise, discovery proceeds in accordance with the rules of court, which require the parties to disclose all documents on which they rely, that adversely affect their own case or another party's case, or that support another party's case of which they are aware, having undertaken a reasonable search to determine the existence of such documents. The extent of what is required to have undertaken a

147 *National Australia Bank Ltd v Idoport Pty Ltd* [2000] NSWCA 8 at [7].

148 Civil Procedure Act 2010 (Vic), ss 54-59.

reasonable search is to be determined having regard to, as in the Federal Court and New South Wales:[149]

a. the nature and complexity of the proceeding;

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.

The 2008 Victorian Reform Process

89. The Civil Procedure Act 2010 (Vic) was the result of the Victorian Law Reform Commission's major 2008 *Civil Justice Review: Report*. The Commission considered the question of discovery at length, as part of its theme of "Getting to the Truth Earlier and Easier".[150] The provisions of the 2010 Act, as briefly stated above, were heavily influenced by the, in the Commission's view, superior procedures already in place in New South Wales and the Federal Court compared to the *Peruvian Guano* approach still in place in Victoria at that time, under which the powers of the Court to regulate discovery were not clearly defined.[151]

90. The Commission's consultation revealed a widespread view that discovery process in Victoria were expensive and inefficient, particularly in larger and more complex civil litigation, but that there was little consensus as to what would amount to an effective reform.[152] The Commission cited a 2000 Australian Law Reform Commission Report that 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".[153] The concerns identified by the Victorian Commission were clustered under the headings "expense, scale, and delay" and "abuse of discovery obligations".

91. Under this first heading, the Commission noted comments 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 [AUD] 2 million [now 2.577

149 Rule 29.01.1.

150 Victorian Law Reform Commission *Civil Justice Review: Report* (R 14, 4 March 2008) at ch 6.

151 At [6.5.3]

152 At [6.5.1].

153 At [6.5.4], citing Australian Law Review Commission *Managing Justice: A Review of the Federal Civil Justice System* (ALRC R89, 2000) at [6.67].

million AUD on CPI adjustment], the position is simple not sustainable. [Spigelman CJ, New South Wales Supreme Court]

… [courts] need to take a more interventionist role to avoid having trolley loads of documents wheeled into court when hardly any of them are likely to be referred to and hen every page will add to the cost of litigation … the scope of discovery is generally where costs blow out: if you say you're going to discovery everything, the process essentially becomes endless [Black CJ, Federal Court of Australia] …

… the average person can't afford to get involved in substantial civil litigation, even a fairly well-off person; to me it would be an absolute nightmare personally to be involved in a significant civil case … discovery has become a scourge. We have to rein it in if we can [Doyle CJ, South Australian Supreme Court] …

… [d]iscovery, including review and coding documents, commonly comprises half the total expense of a case. The exorbitant costs involved in marshalling and assembling huge quantities of documents of varying degrees of relevance to a case are invariably accompanied by claims for inflated photocopying expenses. …

… 'anecdotal evidence suggests that [discovery] is one of the most expensive steps in the interlocutory process' … Many judges, legal practitioners, and clients agree that the rules on discovery should be amended, as the current rules are clearly distorting the delivery of justice significantly, with some plaintiffs and defendants using the costs associated with discovery to impose unreasonable cost (and resource) pressures on the other party. [Victorian Bar] …

… a culture within some sections of the legal profession … not to leave any stone unturned, or to search for the smoking gun … results in mountains of documents being produced (sometimes hundreds of thousands) that require weeks or even months to read, analyse, and digest, and then to copy and index. In the end, the usual result is that the number of those documents that are critical to the result of the trial are substantially less than fifty. [Ipp J] …

… the cost of executive and management time involved in complying with discovery obligations may be as great as, or greater than, legal costs. [Australian Law Reform Commission] …

92. The Commission also noted judicial criticisms of the costly, wasteful, and unmanageable nature of discovery in many cases, which are captured in Sackville J's comments in an application for further and better discovery that:[154]

all parties to this litigation have given insufficient attention to the need to control their own request for discovery in the interests of keeping the discovery process within

[154] At [6.5.4.1], citing *BT Australasia v New South Wales (No 10)* [1998] FCA 479.

manageable bounds. One consequence of the approach taken by the parties is that discovery in this case has assumed mammoth proportions. A second is that the parties are in continuous disputation as fresh discovery issues are raised, each said to require the time of the Court to resolve. Not only is this extraordinarily costly and, in my opinion, wasteful, but it diverts attention from the need, in a case that has now been going for three years, to prepare for trial. It also imposes a disproportionate burden on the Court.

93. These consequences of an insufficiently restricted right to discovery, which can arise even without conscious malfeasance on the part of those involved, bleed into concerns about the potential for officious and abusive use of discovery requirements. The Commission noted that an "overly adversarial" approach to litigation, in which collateral advantages are sought through misuse of discovery processes, could be seen in many cases; particularly where there was a gross inequality between the means of each of the parties to the litigation.[155] The Commission's observation was that, so far as evidence was available, discovery abuse was primarily confined to large commercial and banking cases.[156] The Commission noted that these tactics can be summarised under three headings:

a. the making of unnecessarily broad requests for documents;

b. withholding or destroying information to which the requesting party is entitled, including through the abuse of legal professional and other forms of privilege in connection with discovery; and

c. providing many irrelevant documents, to overwhelm the other side or attempt to improperly conceal documents.

94. Having reviewed the position and initiatives in the other Australian jurisdictions, New Zealand, Hong Kong, Canada, and the United States,[157] the Commission noted the feedback it had received in relation to certain proposals and concerns under the following headings:[158]

a. Importance of Discovery: Submitters generally considered that discovery had an important, or even "vital", role to play in the civil justice system of Victoria, noting that plaintiffs would often be unable to progress their cases without access to documents in the hands of defendants. Furthermore, "documents [providing] evidence of contemporaneous events and, as opposed to oral evidence, [not being] subject to coaching or sanitisation", they were considered

155 At [6.5.4.2].

156 At [6.5.4.2].

157 At [6.5.5].

158 At [6.5.6].

"invaluable" by some practitioners. This was regarded as particularly important in relation to corporate misconduct and negligence cases.[159]

b. Ambit of Discovery: Many submitters were opposed to adopting the "direct relevance" test in the place of the *Peruvian Guano* test, many of whom noted that reforming the test would achieve little to address the concerns about discovery noted above, which were seen to stem primarily from the culture of litigation and abuses of the discovery process, while potentially endangering access to important documents. Others noted that the extravagant scope of discovery was partially a product of the use of paralegals and junior solicitors to undertake discovery, which meant that a more conservative (ie wider) approach to discover would result than if more senior, discerning, practitioners were involved; which was seen to relate, in part, to the "inherently imprecise test" for the ambit of discoverability. Many such submitters favoured "a differential approach to discovery, both across jurisdictions and having regard to the nature, value, or complexity of a particular proceeding or class of proceeding"[160], with some suggesting that discovery by categories or waves may be appropriate; supported by definition of issues at an early stage through case management. Equally however, many submitters favoured the adoption of a narrower ambit of discovery.

c. Availability of Discovery: Some submitters supported discovery not being available as of right, with discovery instead being viewed as a "privilege" available by order of the court only. Others preferred an approach by which discovery would remain available as of right, but subject to the Court's powers to limit that right where appropriate or limiting discovery as of right to certain categories of documents. The overall balance of submissions favoured discovery as of right being maintained in the majority of claim; it being thought "wrong to shape discovery reforms to suit only large complex litigation" and "flexible solutions and flexible reforms" being favoured.[161]

d. A Category Based Approach to Discovery: Some submitters expressed concern at using a category-based approach to discovery, noting that in the County [ie District] Court, where such an approach already applied, the combined effect of the separate schedules of categories submitted by each party's practitioners was to restate all the issues in the pleadings. Additionally, the need to determine in which category documents fall was thought to add additional costs. Submitters proposed that categorisation be used as a means of limiting discovery only if representatives were obliged to seek to align and limit their

159 At [6.5.6.1].

160 At [6.5.6.2].

161 At [6.5.6.3].

proposed categories, that this be subject to judicial management and review before discovery commences, and that categories be employed only where discovery would involve a substantial number of documents in any case. A number of other submitters, however, expressed a positive view of their use of category-based approaches to discovery in the Country Court, subject to concerns about the misuse of "catch-all" categories and experiences of time-consuming, and expensive, arguments regarding the correct categorisation of discovery. The greatest consensus appeared to be around limiting the scope of discovery in relation to quantum.[162]

e. Greater Co-Operation by Parties: Many submitters observed that intelligent and proportionate use of the discovery procedures by parties will require not only case management but the use of initiative and a good faith commitment by parties to achieving cost savings. Others, making similar observations, noted that judges are often worse placed than lawyers to look at the pleadings, understand the factual matrix of the dispute, and the relevant issues. Accordingly, it was considered essential that parties play a significant role in determining the parameters of proportionate discovery; including by reaching agreement on the issues for discovery and narrowing disputes before approaching the court.[163]

f. Interim Disclosure Orders: Submitters gave a muted reaction to a specific proposal that a court be able to order that a party make available for inspection all documents within a category without having to review the same, thereby saving costs associated with the reviewing, sorting, and listing of documents, certain to safeguards related to non-waiver of privilege and restrictions on the use of documents. Submitters thought that this would run contrary to the overriding principle of civil justice being "facilitating the just, efficient, timely, and cost-effective resolution of the real issues in dispute", as it would allow general, indirect, and 'fishing expeditionary' discovery.[164]

g. Referees and Special Masters: Submitters expressed support for the use of specialist personnel, especially specialist judicial personnel, as an incentive to parties to co-operate (the socially coercive nature of being seen to be unreasonable in discovery being noted by some submitters); particularly in relation to large and complex cases. It was considered that referees could offer a mixture of mediation and facilitation of the resolution of discovery disputes, together with significant encouragement towards that goal. People noted that the appointment of referees would act to reduce the resource burdens of

162 At [6.5.6.4].

163 At [6.5.5.5].

164 At [6.5.5.6].

discovery on the Courts, particularly if greater judicial management of discovery was suggested.[165]

h. Judicial Management of Discovery: There was widespread support for proposals that courts exercise more control over the discovery process, particularly in more complex cases, and especially in relation to interventions in defining core issues and defining appropriate categories for discovery or the orchestrating of wave-based discovery, with express reference to be had throughout the process to the principles of proportionately and case management. More express definitions of what amounts to "reasonable" discovery being included in the relevant rules of court was also widely popular. Reservations related to this subject area concerned mainly the details of any more clearly delineated and specific powers to facilitate proactive case management of discovery, and also the need, again, to recognise that "different considerations may apply in smaller matters in which one or both parties have limited resources."[166]

i. Disclosure of Funding, Financing, and Insurance Arrangements: Extensive submissions were received on this subject matter area. Those in favour of requirements for disclosure noted that all parties have an interest in the proper administration of justice, and, accordingly, all parties should be served details on litigation funding, financing, and insurance arrangements. This was considered important to being able to understand a party's attitude to litigation, and aid in settlement obligations; thereby curtailing, or avoid altogether, the need for discovery while allowing for more effective negotiation as to the appropriate scope of discovery and avoiding trial by ambush. Several submitters, however, expressed concerns about the mandatory disclosure of what they regarded as confidential information, and felt that disclosure should not be required, would not be beneficial or, at most, only certain essential matters should fall to be disclosed.[167]

j. Use of Document Repositories: Some submitters expressed concern that the use of documentary repositories in multi-party litigation would serve to further broaden the scope of discovery beyond the matters in dispute as between the parties.[168]

k. Sanctions and Compliance with Court Orders: It was widely considered that tougher sanctions were required to deal with discovery abuse and compliance with timetabling orders, and that orders needed to be more actively enforced

165 At [6.5.6.7].

166 At [6.5.6.8].

167 At [6.5.6.9].

168 At [6.5.6.11].

by the judiciary. Compliance with requirements need to be supported, submitters felt, by a strict rule against reliance on documents not disclosed, significant costs penalties for fishing expedition and unnecessary discovery requests and discovery, and penalties for failing to disclose documents in a timely manner. It was suggested that extreme forms of discovery abuse – primarily those involving the destruction of documents – should be penalised as criminal contempt, or that legislation creating a right to a remedy in tort be created.[169]

l. Limiting Costs of Discovery: In response to proposals that courts be empowered to limit the commercial costs incurred in connection with discovery by ordering that the costs able to be charged to clients or able to be recovered by way of costs orders be limited, submitters commented that discovery process costs were often marked up or otherwise non-representative of actual costs, and expressed concern for costs capping. Others, however, noted that such a proposal may disincentivise less well-resourced parties from bringing actions, and that imposing a financial limit on discovery would provide an arbitrary limit to fair trial rights.[170]

m. Limiting Discovery of Copies of Documents: Submitters were supportive of rules requiring applicants for discovery to provide those required to provide discovery with lists of the documents already obtained so as to avoid duplicate discovery; that greater specification of what "reasonable discovery" is should be given so as to avoid, for example, multiple copies of email chains sent on the same day being discovered; and, in a proposal now widely adopted elsewhere, that a copy of a document does not need to be disclosed by reason of mark or obliteration if that mark or obliteration is unlikely to affect the outcome of the proceedings.[171]

95. The objective of an effective discovery process, the Commission identified in tackling this problem, is to strike a balance, through the creation of procedures, between the (competing) goals of:[172]

a. ensuring that parties are fully aware of the case to be met at trial and have access to all relevant information that supports their case;

b. preventing ambush;

c. assisting in the expeditious and accurate calculation of quantum;

169 At [6.5.6.13].

170 At [6.5.6.14].

171 At [6.5.6.15].

172 At [6.5.2].

d. aiding in the assessing of credibility;

e. assisting the parties to determine if any other parties should be joined to the proceedings;

f. facilitating the narrowing of the issues in dispute to limit the scope, length, and costs of trial and, relatedly, promoting the early appraisal of a case as a means of facilitating settlement;

g. assisting the Court to have all relevant information before it, to be able to ensure disputes are determined on the merits, justly and fairly;

h. providing appropriate protections, such as through privilege and other restrictions, to important relationships and other interests;

i. ensuring sensible control of the expense and burdens associated with the process;

j. advancing the goal of "giving litigants a sense of empowerment in the fact-finding process."[173]

96. Having considered the above objectives, feedback, and the examples then available in other jurisdictions, the Commission made the recommendations noted below. These, as will be noted, were drawn more widely than the provisions of the Civil Procedure Act 2010 (Vic) eventually adopted.

> 80. The test for determining whether a document must be discovered should be narrowed. Discovery should be limited to 'documents directly relevant to any issue in dispute'.
>
> 81. Discovery should continue to be available as of right subject to any directions of the court.
>
> 82. Parties should be required to seek to reach agreement on discovery issues and to narrow any issues in a discovery dispute before making an interlocutory application.
>
> 83. In order to reduce costs and delays arising out of discovery of documents the court should have the discretion to order (on such terms including as to confidentiality or restricted access, as the court considers appropriate) a party to provide any other party (or an appropriately qualified independent person nominated by the other party and approved by the court) with access to all documents in the first party's possession, custody or control that fall within a general category or general description (regardless of whether some such documents are not relevant to the issues in dispute in the

[173] Citing Martin Redish "Electronic Discovery and the Litigation Matrix" (2001) 51 Duke Law Journal 561 at 600.

proceedings or do not fall within the description of documents that may be the subject of an order for discovery) where:

(a) the documents are able to be identified by general description or fall within a category of documents where such category or description is approved by the court;
(b) the documents are able to be identified and located without an unreasonable burden or unreasonable cost to the first party;
(c) the costs to the first party of differentiating documents within such 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;
(d) 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
(e) access is to facilitate the identification of documents for the purpose of obtaining discovery of such identified documents in the proceedings.

Where an order is made for access for inspection pursuant to this provision, the other party shall not be permitted to copy, reproduce, make a record 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 for the purpose of obtaining discovery of such identified document in the proceedings.

There is a need to make provision for any disclosure under this provision to be without prejudice to an entitlement to subsequently claim privilege over any information that has been inspected and is claimed to be privileged. In other words, disclosure pursuant to this provision does not give rise to waiver of privilege. The proposed protection against waiver of privilege should also extend to any document obtained as a result of a chain of inquiry arising out of the interim disclosure of documents.

84. The rules of court should be amended to provide that in appropriate cases the court may appoint a special master to manage discovery. A special master should be a judicial officer (of a lower tier than a judge) or a senior legal practitioner who will actively case manage the discovery aspect of a proceeding. The special master may make directions, give rulings and determine applications. The costs of any externally appointed special master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.

85. The court should have broad and express discretion in respect of disclosure [including powers to relieve or limit a party's obligations to provide discovery, order that discovery be provided in tranches, require discovery of specific documents prior to the close of pleadings, expand a party's obligation to provide discovery, modify or regulate discovery of documents in some other way, order that documents be provided

in a party manner, requiring discovery be provided by a certain time, and make any other direction the Court considers necessary.]

86. Parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or assisted party in the course of the proceeding. The court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.

87. The court should be given discretion to require the disclosure of all lists and indexes (including drafts) of documents in a party's possession, custody or control, even if such lists and indexes may be privileged, but only to the extent that those lists and indexes contain 'objective' information about the documents encompassed by the lists, including information such as date, subject matter, author, recipient, etc.

88. There should be legislative powers for courts to order the creation of document repositories to be used by parties in multi-party litigation.

89. The court should have broad and express discretion to deal with discovery default [such as, where satisfied that there has been a failure to comply with discovery obligations or conduct intended to delay, frustrate, or avoid discovery of discoverable documents, make orders or directions for the purpose of proceedings for contempt of court, the making of adverse indemnity costs orders, compensatory orders for resulting financial or other loss, the adjournment of proceedings, the revocation of rights to initiate or continue discovery, preventing parties from taking steps in a proceeding, the making of adverse inferences or the taking of facts as established, prohibiting or limiting the use of documents, or dismissing any proceeding or part of a proceeding.]

90. In order to reduce the costs of discovery, the court should have discretion to make orders limiting the costs able to be (a) charged by a law practice to a client or (b) recovered by a party from another party, to costs which represent the actual cost to the law practice of carrying out such work as may be necessary in relation to discovery (with a reasonable allowance for overheads but excluding a mark-up or profit component being added to such actual costs) or otherwise as the court sees fit.

91. Provision should be made for limitation on the disclosure of copies of documents.

97. The Commission also noted that the impact of imprecise pleadings on discovery were a considerable source of concern for many submitters, with pleadings couched in very general terms requiring wide ranging discovery.[174]

[174] At [6.5.7.4].

Canada

98. In 2014, the Supreme Court of Canada discussed the importance of proportionality in the Canadian civil justice system and the need for a corresponding change in litigation culture to ensure access to justice.

99. The case itself concerned a summary judgment application in a civil fraud proceeding. The first instance judge used his powers under r 20.04(2.1) of the Rules of Civil Procedure 1990 (Ontario) to weigh the evidence, evaluate credibility, and draw inferences, such that, he felt, no trial was required to make an award of damages. The Court of Appeal of Ontario held that the case was not an appropriate candidate for summary judgment but felt that the record supported the finding of civil fraud and dismissed the appeal.[175]

100. The Supreme Court of Canada dismissed the fraudulent party's further appeal. The Supreme Court noted that r 20 of the Ontario rules of procedure had been amended to improve access to justice by providing for the use of summary judgment as an improvement to the trial process, thereby obviating the need for extensive pre-trial procedures (such as discovery) where there was no genuine need for a trial. Accordingly, the Supreme Court found it appropriate for proceedings to be dealt with other than by trial where, for example, the hearing of oral evidence is not required, and all matters mean that the interests of justice mean that it is appropriate for Judges to exercise their extensive fact-finding powers under this procedure.[176]

101. In comments directly applicable to the question of the simplification of discovery obligations, and the need to close the "justice gap" generally, Karakatsanis J observed that (emphasis added):

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. *This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional*

175 *Hryniak v Mauldin* [2014] 1 SCR 87 at 87.

176 At 88-92.

> *procedures tailored to the needs of the particular case.* The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

102. The summary judgment procedure was introduced as part of the same wide-reaching reform of civil justice in Ontario, conducted in 2008-2010, that introduced significant changes to the discovery rules. Those reforms were the culmination of a reform process that began with a reference from the provincial government to Justice Coulter A Osborne in 2006, which resulted in his 2007 *Summary of Findings and Recommendations*.[177]

103. The Judge began by recapitulating the findings of a 2003 Task Force, which had emphasised (to limited avail) the importance of:[178]

    a. the development of best practices to promote among lawyers a broader acceptance of the value of collaboration and a better appreciation for cost-effective and efficient ways to conduct discovery, in recognition of the fact that many problems with the discovery process arise from a culture of litigation that rule amendments would not be able to remedy;

    b. amendments to the Rules of Civil Procedure, including a narrower scope of discovery and default time limits on oral discovery.

104. He noted that discovery problems were most pronounced "in larger, complex cases and most frequently in large urban centres such as Toronto. They rarely exist in smaller communities where the bar enjoys a spirit of collegiality and cooperation."[179] Accordingly, his proposed reforms were:

> not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process. Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive "semblance of relevance" analysis.

105. Accordingly, following these recommendations' adoption into the Rules of Civil Procedure 1990 (Ontario), parties must agree to a "Discovery Plan" within the

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177 Justice Coulter A Osborne *Civil Justice Reform Project: Summary of Findings and Recommendations* (Department of the Attorney-General of Ontario, Toronto, November 2007).

178 At 56.

179 At 57.

earlier of 60 days after the close of pleadings or when discovery begins.[180] The plan, which must be agreed in writing, must detail:[181]

a. the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;

b. dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;

c. information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

d. […]

e. any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

106. The parties are subject to continuing duties to update and revise the plan as the situation develops.[182] Should the parties fail to agree to a plan, the Court is empowered to impose such limits on discovery are just in imposing a discovery plan on the parties,[183] and the court may refuse to grant any relief or to award any costs if the parties have failed to agree or update a discovery plan.[184]

107. The policy behind requiring discovery planning, which was based on procedures in place at that time in Texas, New York, and Arizona, was that, according to Justice Osborne:[185]

> parties should be encouraged to discuss early in the litigation how discovery will unfold, when and how production will occur and when oral discoveries will take place. It would be prudent to document areas of agreement and disagreement, if any. Early discovery/production planning will reduce costs in the long run.

108. Every document relevant to any matter in issue in an action that is or has been in the possession, control or power, of a party is required to be disclosed, whether or

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180 Rules of Civil Procedure 1990 (Ontario), r 29.1.03(1).

181 Rule 29.1.03(3).

182 Rule 29.1.04.

183 Rule 29.1.05(2).

184 Rule 29.1.05(1).

185 Justice Coulter A Osborne Civil Justice Reform Project: Summary of Findings and Recommendations (Department of the Attorney-General of Ontario, Toronto, November 2007) at 64.

not privilege is claimed in respect of the document,[186] and all such documents (except those in respect of which privilege is claimed) must be produced for inspection.[187] If requested, parties must also disclose and produce for inspection any insurance policy under which an insurer may be liable to satisfy all or part or a judgment in an action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment, to the extent relevant to an issue in the action.[188] Additionally, a party may be ordered to disclose any documents in the possession of all of its subsidiary or affiliated corporations, or any corporation controlled directly or indirectly by the party.[189]

109. Parties are obliged to serve on every other party an affidavit of documents, in a prescribed form, disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power. The affidavit must list and describe, in separate schedules, all documents relevant to any matter in issue in the action:[190]

a. that are in the party's possession, control or power and that the party does not object to producing;

b. that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

c. that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

110. Where a party is represented by a lawyer, the lawyer is required to certify on the affidavit that they have explained to the deponent their obligation to make full disclosure, and to state what kinds of documents are likely to be relevant to the allegations made in the pleadings.[191]

111. If a party fails to properly disclose a document in an affidavit of documents, or fails to produce for inspection a document in accordance with the rules of court, a court order, or an undertaking, the party is precluded from relying on that document if it

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186 Rules of Civil Procedure 1990 (Ontario), r 30.02(1).

187 Rule 30.02(2).

188 Rule 30.02(3).

189 Rule 30.02(4).

190 Rule 30.03(2).

191 Rule 30.03(4).

is favourable without leave of the court and, if it is unfavourable, is subject to such order as the Court thinks just.[192]

112. In determining whether a party or other person must answer an interrogatory or produce a document, the Court is required to consider whether an order for discovery would result in an excessive volume of documents being ordered produced to the requesting party,[193] and must also consider whether:

a. the time required for the party or other person to answer the question or produce the document would be unreasonable;

b. the expense associated with answering the question or producing the document would be unjustified;

c. requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

d. requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

e. the information or the document is readily available to the party requesting it from another source.

113. The corresponding provisions of the Rules of Court (New Brunswick), r 31 and the Supreme Court Civil Rules (British Columbia), are broadly identical to those of Ontario, subject to the absence of a requirement for discovery planning or an express provision empowering the Court to have regard to the proportionality of the costs of discovery like that described immediately above. The provisions in Ontario are also largely like those in place in the Federal Court of Canada under the Federal Courts Rules. In several other Canadian provinces and territories (typical amongst these being, for example, Saskatchewan and Quebec), oral and written examinations for discovery (interrogatories and depositions) are significantly more prominent than in New Zealand; reflecting the influence of United States practice and, in the case of Quebec, that province's unique civilian heritage.

114. Also of note is the requirement, found in the British Columbia civil procedure rules, as well as those of Quebec, for the parties to make proposals with respect of the discovery of documents where a case planning conference is requested by a party or directed by the Court.[194]

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192 Rule 30.08(1).

193 Rule 29.2.03(1).

194 Supreme Court Civil Rules 2009 (British Columbia), r 5.1.

115. Looking more generally across Canada, in summarising trends in access to justice research and reforms in June 2008, the Subcommittee on Access to Justice (Trial Courts) of the Administration of Justice of the Canadian Judicial Council noted in relation to discovery that:[195]

a. rules of civil procedure attempting to address perceived issues with discovery most commonly attempt to reduce cost and delay by means such as:

(1) limiting the time frame in which discovery takes place;

(2) narrowing the scope and standard of relevance in both oral and document discovery;

(3) capping the number of discovery events that can be undertaken by the parties;

(4) expediting the scheduling of discovery;

(5) eliminating oral discovery in expedited or simplified procedure rules;

(6) penalizing duplicative or cumulative discovery;

(7) introducing a mandatory discovery conference between counsel and/or before a judge; and

(8) creating a more effective process for resolving conflicts as they arise in the discovery process, through case management and other civil procedural rule reform;

b. the most common trend was the adoption of rules placing time limits on discovery, and even prohibiting discovery outright for simplified procedure cases, such as Quebec's prohibiting discovery examinations in claims under $25,000; Ontario for claims under $50,000 managed under the Simplified Procedure; and Nova Scotia, Alberta, and Manitoba on discovery in expedited track rules;

c. it was also increasingly common for rules of civil procedure to contain a statement of a principle encouraging judges to intervene with discovery if it appears to be "abusive, vexatious or futile", with such reforms having been introduced in Quebec, Alberta, Nova Scotia, and Manitoba; and

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195 Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee *Access to Justice: Report on Selected Reform Initiatives in Canada* (Canadian Judicial Council, Ottawa, June 2008) at 12 and following.

d. initiatives such as one in the Tax Court of Canada, which adopted a default requirement of partial disclosure, requiring only documents that the party might introduce into evidence, based on the Quebec example.

The New Zealand Law Commission's 2002 Proposals

The Law Commission Report

116. In recounting the Law Commission's 2002 report, I note that, of course, the Commission was responding to the *Peruvian Guano* type disclosure regime then in place (which remained in place until 2012), that the High Court Rules are substantially different generally from those in place in 2002, and that, in particular, we now have considerably more active case management in New Zealand than in 2002.

117. This means that, in some respects, the Commission's thoughts in 2012 are of limited relevance. For example, in 2002, the Commission demurred from the proposal to rechristen "discovery" as disclosure, as had then been done only 3 years earlier in England and Wales.[196] This on the basis that "disclosure" was a word of unclear meaning, and that "unnecessary tinkering with nomenclature is not to be encouraged."[197] Nonetheless, the Commission's general observations regarding the objectives that the law of disclosure should achieve, and the mechanisms available for obtaining those objectives, remains of use in responding to contemporary problems regarding disclosure.

118. As the Commission noted, discovery is of the utmost practical importance in civil litigation, and "great injustice" can result where the rules of civil procedure allow prevent party A from obtaining access to documents on which party B was siting that party A needed to prove its case or know the case it would face at B's hands at trial.[198] Relatedly, the Commission thought, avoiding ambush was another key purpose of the discovery rules.[199]

119. The problem with which the Commission sought to grapple, as was the case in the English context above, was that the *Peruvian Guano* formula was concerned with hand-written and mechanically printed documents and that, during the ensuring 12 (now 14) decades, the creation of "new techniques for creating and reproducing

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196 Law Commission General Discovery (NZLC R78, 2002) at [28].

197 At [28]. Interestingly in this respect, the Commission noted the potential definition of disclosure as the "making known that which was previously unknown to the person to whom the statement is made" (per Latham CJ in *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606 at 615) which, practically speaking, is very much the emphasis of the present English disclosure pilot.

198 At [1].

199 At [5].

documentations and of new methods for communication" can easily mean that "the cost of discovery can be disproportionately high when measured against its benefits".[200] Also:[201]

> A connected problem is the ability of a defendant bent on either exhausting a plaintiff's war chest or obstructing proceedings for some other purpose to achieve these ends by making contrived and inordinate discovery demands.
>
> […]
>
> In most contemporary civil litigation, the parties seek either to gain an economic advantage of to avoid an economic disadvantage. The law should not impose or permit procedures that result in expense or delay disproportionate to what is at stake. A compromise has to be struck between perfection and cost.

120. Even in the absence of malice, the Commission noted:[202]

> The cost includes the time of the parties … and the time (for which the client pays) of the solicitors involved in the process. It is sufficient for present purposes to note that in large commercial and intellectual property cases, the number of documents requiring consideration can be huge, the time required can run into months, and the cost to the parties of the whole process can be enormous.

The comment of Telecom New Zealand on this passage was:

> > … Telecom's experience is that the time required to complete the discovery process of major commercial litigation can run into years, not months, at a cost at times in excess of $100,000 per month [$144,426.28 in Q2 2019 on the basis of CPI adjustment]. The discovery costs alone of major commercial litigation may exceed $1 million [$1,444,262.80 in Q2 2019 on the basis of CPI adjustment]. Almost invariably, only a tiny proportion of that cost, perhaps as little as 10%, represents discovery of documents of any material benefit to any party.

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.

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200 At [3].

201 At [3] and [5].

202 At [3].

121. Accordingly, the Commission framed its goal as being to propose reforms that attempted to uphold access to all documents capable of affecting the outcome of proceedings, but by means of processes "not more costly than is demanded by what is at stake … the aim is to be sparing and thrifty rather than wasteful."[203] The relevant considerations in this respect were, the Commission thought:

a. at that time, the excessive width of the *Peruvian Guano* test.[204] It was noted that jurisdictions that, at that time, had abandoned the *Peruvian Guano* test had confined the obligation on general discovery to "the documents on which a party relies" and "documents adversely affecting the case of that party or supporting the case of another party".[205] This was as opposed to also establishing a right to "documents that do no more than provide background" (Narrative Documents in the English pilot framework) and documents leading to a train of inquiry enabling a party to advance that party's case or damage another party's case. This, of course, was the essence of the reforms subsequently adopted in New Zealand (and now found in r 8.7). The Law Commission's recommendation was modelled on the Uniform Civil Procedure Rules 1999 (Queensland), r 211(1)(b); the Australian Federal Court Rules O15, r 2(3); and the Civil Procedure Rules 1998, r 31.6 (England and Wales). Additionally, the court was to be given the power to specify the means of compliance with discovery obligations; anticipating a major concern of the current English initiative.

b. the availability of general discovery as of right.[206] The Commission, noting the (then) limited extent of active case management in New Zealand, noted that jurisdictions with comparatively more sophisticated case management regimes had limited the availability of general discovery as of right, noting the example of the Australian Federal Court at that time. Given the limited extent of case management practiced in New Zealand at that time, the Commission considered it better not to make the availability of general discovery a matter of contention. The situation has now of course, changed drastically. However, the Commission's observations here reinforce several the observations that have been made elsewhere (as noted in my other papers to the Working Group) regarding the importance of how one conceives of the proper role of a Judge in civil litigation, and the related notion of the adversarial model, to considering how to approach other civil justice reforms.

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203 At [6].

204 At [7]-[9].

205 At [7].

206 At [10].

c. **the extent of the obligation to list documents.**[207] The Commission accepted submitters' views that a major cost of discovery was the need to compile a written list of documents, involving, as it did, the culling of the discoverable from the irrelevant and assigning a description to all discoverable documents. Submitters thought it would be sufficient to instead simply produce the documents for inspection, number them sequentially, and certify that all documents produced are discoverable. The difficulty the Commission took with this proposal was that it would be likely to produce time-consuming arguments at trial as to whether a document had been discovered. To the extent that the costs of discovery were disproportionately increased by over-discovery, the submitters' proposals would have, in the Commission's view, merely further aggravated the mischief that the Commission was attempting to combat.

d. **the need for a more precise definition of the issues in the proceeding.**[208] Submitters expressed the view, with which the Commission agreed, that as the scope of discovery derives from the formulation of the parties' pleadings, "fuzzy and imprecise pleadings unnecessarily widen the scope of discovery and so add wastefully to its cost." The Commission agreed, therefore, that it should be a ground for an order enforcing a discovery obligation that the pleadings of the party seeking enforcement were inadequately defined. This proposal, interestingly, mirrors the policy of separating the Issues for Disclosure from the issues arising from the parties' pleadings found in the current English initiative.

e. **the need for provision for ad hoc variations.**[209] The Commission, anticipating the "menu" approach adopting in England and Wales following the Jackson reforms, noted that there would be certain cases in which general discovery obligations – even limited in the manner suggested at (a) above – would be excessively burdensome. The Commission therefore considered that Judges should be given a clearer power to relieve list-makers of some part of their discovery obligations, either in whole or in part, where the court was satisfied that not doing so would interfere with the expeditious disposal of the proceedings or result in disproportionate costs. Additionally, the court was to be given the power to specify the means of compliance with discovery obligations; again anticipating a major concern of the current English initiative.

122. It is interesting to note that, even though the Commission was addressing a very different Rules context to that which we face today, the Commission's proposals noted the same concerns as those that arise at present, and considered reforms touching on the same aspects of the discovery process that changes to are now

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207 At [11]-[14].

208 At [15].

209 At [16]-[17].

being piloted in England. In summary, these were a concern to promote the earlier and clearer definition of issues on which discovery was available and limit the size of searches required so that they are proportionate to the circumstances of each case, while also avoiding ambush and ensuring that parties had access to all necessary documents. Relatedly, there was an apparent recognition that the appropriate model and obligations for discovery may differ in cases of different sizes and complexities,[210] both in terms of the scope of the discovery obligation and the way that obligation had to be complied with in terms of the mode of production.[211] Also anticipating the current English initiatives, the Commission was concerned to ensure that effective sanctions for non-compliance with discovery obligations, including financial, professional regulatory, and costs sanctions.[212]

123. Interestingly, going further than the current English initiatives, the Commission recommended that the presumptive remedy for wilful defaults in complying with discovery obligations should, absent good read to the contrary, be the stay, dismissal, or striking-out of a party's statements of claim or defence.[213] While noting that lawyers can, on the whole, be expected to comply with their discovery obligations in good faith, the Commission considered that it necessary to ensure a strong disincentive to clients be implemented to ensure commitment to the objectives of discovery from both legal representatives and the represented.[214]

124. The inter-relationship between the law of discovery and, more generally, the extent to which parties are in control of the presentation of their case, and the corresponding role of the Judge, also emerges as clearly from the Commission's report as it does more recent discussions.

The Fate of the Commission's 2002 Proposals

125. The Committee first considered Commission's final report at its June 2002 meeting. The Committee, before committing to accepting the Commission's recommendations (which had been made to the Committee as the relevant legislator), decided that research should be undertaken as to the experience in England, Queensland, and New South Wales; the jurisdictions from which the Commission had drawn most heavily.

126. Having made no progress on the matter by November 2002, the Committee agreed that any reforms should initially be confined to the High Court. A majority of the Committee was in favour of recommending the Commission's recommendations as

210 At [19].

211 At [20].

212 At [23].

213 At [24].

214 At [23].

they related to limiting the scope of discovery (to that we now have), but that the then-current procedure of the listing of documents would remain in place. Additionally, relevant to other reform activities presently underway, the Committee felt that it would be appropriate to include a rule specifically providing that the proposition for which *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA) stands as authority would no longer be appropriate as a general proposition insofar as it related to the "train of inquiry" reasoning. Considering, separately, the position in the District Court, an embryonic suggestion was made that no discovery be available as of right in the District Court for claims involving less than $30,000.

127. At its February 2003 meeting, the Committee began considering the minutiae associated with the introduction of new rules on discovery. This appears to have occurred the better part of the Committee's attention at that meeting. Salient points that arose during discussion included:

a. the need to delay the crystallisation of discovery obligations to allow for those to be, potentially, tailored or reduced at the first case management conference;

b. that imposing discovery obligations prior to that stage may inappropriate distract parties from other case management obligations;

c. the general desirability of both relying on prior concepts familiar to practitioners in developing new rules, such as by matching definitions from previous rules or prior common law, in encouraging a smooth transition from old practice to new, while also, even at the risk of being overly prescriptive, ensuring that all relevant concepts and procedures under any rules are adequately defined in order to avoid contests between the parties, and the associated costs, as to whether obligations had been complied with; and

d. the desirability (in the eyes of the majority of the Committee) of the primary obligation for complying with discovery obligations residing with the party, but with their solicitor having clearly defined personal obligations 'bringing home' their responsibility for ensuring their clients' compliance with discovery obligations.

    (1) However, a significant minority view (which was accepted by the majority in relation to the proposed wording that had been put forward) was that obligations on parties are potentially difficult to enforce or sanction breaches of, and it was thus necessary to not frame the rule too sternly.

    (2) Views on this appear to have been finely balanced, with a majority of the Committee accepting (following a change in membership) in

> October 2004 that, particularly given the rejection of the tort of the spoliation of evidence as part of the law of New Zealand, it was important that a potent contempt-based sanction to deliberate attempts to defeat discovery obligations (ie document shredding) remain in place, and be applicable, and widely known amongst, both practitioners and parties. There would need, relatedly, to be clear definition of the period for which documents should be held before being destroyed, where document destruction is appropriate, and the required level of deliberateness before contempt proceedings would be considered.

128. Based on the consultation paper and draft rules circulated following these discussions, the Committee took submissions from the profession through 2003. At its November 2003 meeting, the Committee agreed not to adopting the "direct relevance" test for discovery proposed by the Commission. This largely on the basis that the Committee accepted concerns that the new test would not help reduce the cost for discovery as, in all likelihood, documents would need to be assessed for relevance by more senior solicitors than the *Peruvian Guano* test. In support of this decision, the Committee noted (in an internal memorandum by the then Clerk of 26 November 2003) the anecdotal evidence of solicitors from Russell McVeagh in that firm's submission on the draft disclosure rules:

> [T]his firm has recently had experienced solicitors return from the United Kingdom who practised under the Civil Procedure Rules. They are of the view that the narrowing of the Peruvian Guano test under CPR 31.6 made no discernable difference to the amount of documents listed and disclosed because the test was unworkable in practice. In many London based firms, the task of producing relevant documents for disclosure is usually entrusted to teams of paralegal staff who, although broadly aware of the issues, are unable to distinguish between "directly relevant" and "background" documents. It was seen as not cost effective for senior solicitors to review the disclosure in minute detail and therefore in reality, CPR 31.6 made little if any difference.

129. Other concerns, shared by Russell McVeagh, Chapman Tripper, and Bell Gully, and other submitters, were that:

a. at least in the short term after any significant change to the scope or practice associated with discovery, the narrowing of the scope of general discovery will increase the number of applications for further discovery and thereby increase the overall costs and delay in litigation;

b. as a matter of fact, in the English experience after the 1999 Woolf Reforms (as noted above), the introduction of the narrowed test did not create a change in litigation culture, with lawyers continuing to habitually disclose all potentially relevant documents on a wide conception of potential relevance, thereby

avoiding the expense and risks of complaint from the other side of making judgment calls while being fully aware of the minimal likelihood of being penalised on costs for providing excessive disclosure (the Committee arriving at this view based on the research of Mr Chris Finlayson, who was then a member of the Committee appointed for special purposes, as documented in C 14 of 2004);

c. a narrower test will risk the non-disclosure of certain important documents, particularly where the standard for disclosure excludes what would, under the present English initiative, be termed Narrative Documents, which have an important function in providing necessary context, colouring relevant documents, and providing important material for determining truth through cross-examination (in the submission of Mr James Farmer QC);

d. in a point also relevant to current initiatives around witness briefs, the profession's view of the comparative desirability, generally, of documentary evidence as the more reliable form of evidence (compared to oral testimony), particularly given the extensive use in litigation practice of written briefs, the crafting of which is reliant on the availability of all documents;

e. the risks of cheating in discovery meant that, particularly in the view of Bell Gully, there is a concern that a narrower test of relevance is thought would provide the unscrupulous with more latitude to hide key documents as there is more scope to rationalise the non-disclosure of important documents, which view, Bell Gully noted, was also that of the Law Society of Hong Kong in its 2002 review of the law of discovery, which view the Committee did not agree with on the basis that one should make rules assuming those rules will be complied with rather than disregarded;

f. in regards the modification to listing requirements ultimately recommended by the Committee (of requiring the description only of documents whose nature is not evident on their face), the Committee noted Russell McVeagh's submissions in support of its proposal:

> 16 In our experience, it is the listing of the documents that takes up the most time when, in reality, the list is rarely referred to in any detail, aside occasionally from the description and dates of documents where a claim to privilege has been made (we recommend retaining the listing requirement for privileged documents). That aside, what is important is simply being provided with access to the discoverable documents, as quickly as possible, so that each can be considered in the light of the issues. Laboriously listing and describing each document adds no appreciable value to this process. Basic sorting and an explanation of that process is entirely adequate.

17 Accordingly, we suggest dispensing with the inflexibility of draft Rules 297(d) and 298(a)-(b) and, instead, adopting an approach similar to Rule 217 of the Queensland Uniform Civil Procedure Rules 1999. Rule 217 does not stipulate the method by which the documents need to be made "…easily accessible to, and capable of convenient inspection…". We believe that in the majority of cases, each party should be able to agree in advance on the manner in which documents are to be provided for inspection, using a similar rule to Queensland's Rule 217 as a framework.

18 We submit that this would significantly reduce the time and cost of discovery. We do not share the Law Commission's reservations about reducing the obligation to list documents set out at paragraph 12 of its Report. Challenges to documents produced at trial without being discovered are rare and there are other ways in which to demonstrate that a particular document was discovered, aside from producing the list (especially in an age where the electronic exchange of documents will become more prevalent). To be more specific so as to dispel any notion that a list is indispensable to successful objections to production of undiscovered documents:

(a) A party having had documents for inspection will order the documents as they see fit. A gap in production where the now sought to be produced document does not appear ought to be obvious;
(b) In larger discoveries documents are and will be exchanged electronically and software exists to sort the documents in any manner the party sees fit. Again, the gap will readily appear;
(c) In our standardised list format (which is similar to others) we do not necessarily list documents in date order but, rather, in the order they appear on individual files (this has never been subject to objection). Therefore, even with a list, it will not necessarily be a simple matter, using the list as a sole reference point, to pinpoint and prove that a document has not been discovered.

…

20 We would, however, advocate providing a full list as required under the existing Rules for documents over which privilege is claimed in order to (potentially) facilitate any challenges over such a claim. Our experience is that the principal use to which we put an opposing party's list is to scrutinise what they are or may be hiding as "privileged" documents. Description of the privileged documents with rigour is useful and sensible here.

130. Similarly, the Committee did not support the introduction of pre-action protocols such as those found in England. The Committee proceeded to consider more limited changes within the revised, much narrower, scope for reform that remained following that decision. These included changes to the listing requirements (as

noted above) and, again anticipating the considerable conscious focus the current English initiatives are applying to the role of technology, the drawing up of rules for electronic discovery.

131. However, momentum appears to have then collapsed in relation to general discovery reform. Work on the creation for rules relating to electronic discovery was devolved to a sub-committee, which reported back in 2005, and the revision of discovery rules was subsumed by the Committee's longer-term work programme on the recapitulation of the High Court Rules (which resulted, eventually, in the current structure). The Law Commission, in a 2003 report, describes the Committee as having retreated from adopting the Commission's initiatives following "sustained opposition from practitioners." The Committee's records from this period (in the archive available to me) are insufficiently complete to allow me to properly assess this assertion. Indeed, the submissions recorded above, while seeking to nix the gravamen of the Commission's proposals, were not all implacably hostile to reform in all aspects.

Summary and Conclusions

132. As the above survey across several jurisdictions, and across time, indicates, New Zealand's model of discovery, and the perceived problems with that model in terms of ensuring access to justice, are neither new nor unique to this jurisdiction. Related concerns around the abuse of the discovery process to exact collateral advantages, and concerns around the inadequacy of rules of court to ensure that the costs and scope of discovery are proportionate and targeted at the doing of justice in the individual case, have motivated reform efforts in several jurisdictions for at-least the last twenty years.

133. Also common to several of these examples have been resistance from practitioners and other submitters to reform processes to the narrowing of discovery obligations out of a concern that doing so will interfere with the, submitters feel unique, ability of the adversarial system to get to the truth. Certainly, a concern to balance the interests of cost effective and expediency with the need to do justice according to the merits of the case has been an appropriate, if occasionally perhaps excessively favoured (given that no widespread loss in confidence in the courts' ability to do justice has followed, for example, the last round of New Zealand reforms), countervailing consideration.

134. Other concerns have clustered around, in summary, the possibility for additional expenditure and time wasting on disputes around the scope of more narrowly defined discovery obligations; relatedly, concerns about the abuse or exploitation for collateral advantage of such reforms; and the importance of ensuring that the discovery process applicable to each case is appropriate to that case in terms of

complexity and scale, such as by allowing flexible procedures and ensuring that procedures responsive to the needs of large and complex commercial litigation are not wrongly applied to all cases, regardless of scale. Another recurrent theme is statements opposing rules reform on the basis that any such reform will trigger the above negative consequences while not addressing the underlying litigation-cultural sources of the problems with discovery. Those expressing these views seem, overall, balanced as between

135. Equally however, there is considerable conference in the areas in which reforms have been suggested and implemented in the reports and rules noted above around several recurrent suggestions, most commonly:

a. the narrowing of the scope of discoverable documents;

b. the imposing of positive obligations on parties to identify and attempt to limit the issues for which discovery is required, as opposed to (and more narrowly than) all the issues in the proceeding, as part of the early good faith co-operative efforts between parties to ensure the proportionality of procedural obligations in each case, as part of a heavily prescribed and clearly set out discovery negotiation procedure;

c. relatedly, the adoption of category-based approaches to discovery limiting disclosure obligations in relation to, for example, evidence touching on the quantification of damages;

d. the implementation of "quick look" type procedures in which documents are disclosed without need for review by the disclosing party, subject to procedural safeguards around the use of such documents, so as to save reviewing costs;

e. as part of a more proactive style of case management, increasing the role of the judiciary in either mediating or directing parties' definition of the issues in dispute and in agreeing as to the proportionate scope of discovery;

f. relatedly, the introduction of clearer principled statements, in the form of overriding objectives, obliging judges to promote proportionality in discovery obligations and to exercise powers in relation to the granting of discovery in a manner conscious of and subject to that objective;

g. relatedly again, removing the right of parties to have discovery and placing discovery within the power of the court to grant or withhold;

h. the capping of costs, or costs recoverability, in relation to discovery, either in conjunction with, or separately to, the imposition of related professional ethical obligations limiting the charging of fees to clients in relation to discovery;

i. the introduction of sharply limited rights to discovery in cases falling within certain clearly defined fast-track or low-value procedures; and

j. the introduction of severe penalties for abuse and non-compliance with discovery obligations, aimed at both lawyers (in the form, for example, of professional ethical ramifications and costs sanctions), parties (in the form, for example, of the dismissal of proceedings or the adjourning of hearings), and both (in the form, for example, of criminal and civil contempt proceedings).

136. More generally, in the context of the other reports that I have produced for the Access to Justice Working Group recently, the above examples underpin the need for a holistic and co-ordinated approach to civil justice reform encompassing not only specific obligations – such as in relation to discovery – but also seeking to change litigation culture in terms of both practice and the assumptions about the requirements of "justice" stemming from New Zealand's adversarial system heritage.