Abstract

Computers have had and will continue to have an increasingly pervasive role in commercial life and in society overall. Although it was only about fifty years ago that the first computer capable of using stored programs was developed, its progeny are now omnipresent. The result has been to revolutionise the way that we store information and communicate. The internet phenomenon, which has led to the ability to network globally and instantaneously, has meant the proliferation of electronic communication on an unprecedented scale.

However, there is a down-side. The conduct of litigation, now aided and abetted by the computer, has a bad name for generating gargantuan volumes of documents at great, and often disproportionate, cost to the parties. Computers are a major culprit in the excessive cost of civil litigation, particularly in commercial litigation. This presents a serious challenge to the administration of and access to justice.

The paper analyses approaches to the management of documents in modern commercial litigation. First, the recent 2014 amendments to the Civil Procedure Act 2010 (Vic) relating to discovery are considered in the context of the reforms to civil litigation that have developed over the last 20 years.

Second, the paper examines how the full power of the available technology may be harnessed with a view to making the computer work to the advantage of the Court, practitioners and litigants. The advantages of new developments in the use of computer assisted review (CAR) of documents in the discovery process are introduced and discussed.

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Introduction

1. Computers have revolutionized the way that we store information and communicate. The internet phenomenon, which has led to the ability to network globally and instantaneously, has resulted in the proliferation of electronic communication and the capacity to generate, store and retrieve information on an unprecedented scale.

2. Today the internet continues to grow day by day. This cutting edge technology has spawned a dynamic global village. The concept was popularized by Marshall McLuhan in the 1960’s. Almost thirty years before the invention of the World Wide Web, McLuhan artfully described how the globe had contracted into a village by ‘electric technology’ and the instantaneous movement of information ‘from every quarter to every point at the same time’.

3. How profoundly accurate McLuhan’s prophecy has become. In 1995 the number of internet users in the world was in the order of 16 million (or approximately 0.4% of world population). As at March 2014 an estimate is 2,937 million users (or approximately 40.7 % of world population). Spanning less than 10 years, this is a truly remarkable set of statistics. ‘Moore’s Law’ suggests that the processing power of computers doubles every 18 months, while at the same time, its cost halves in about the same period.

4. Technical development of computers is proceeding at a rapid rate.
In computing, a FLOP (or FLoating-point Operation Per Second) is a measure of computer performance. There is a super computer arms race on. The Chinese for the first time have surpassed the American engineers in this field. As of November 2014, China's Tianhe-2 supercomputer situated in Guangzhou, China, is the fastest computer in the world operating at 33.86 quadrillion floating point operations per second, or 33.86 petaflops. That is an aweful lot of Flops. To simulate the human brain will require a machine with a

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computational capacity of at least 36.8 petaflops per second. So we are just a few Flops away from replicating the human brain.

5. The conclusion that the information revolution is here and is here to stay is inescapable.

6. There is, however, a downside. ‘Mega-litigation’ has a bad name for generating gargantuan volumes of documents. Even litigation conducted on the usual scale is similarly affected. Computers in common use in large commercial projects and everyday transactions are major contributors to this syndrome. Disputes now generate vast volumes of documents at great expense to all participants, thus giving rise to the disproportionate cost of litigation. This in turn poses a serious challenge to access to justice and the timely and efficient disposition of cases.

7. The challenge to the legal system in terms of timeliness and cost arising from the discovery process, particularly in large scale or ‘mega-litigation’, has been well documented.4

8. The C7 case heard in the Federal Court of Australia, Seven Network Ltd v News Limited5 highlighted the syndrome. Proceedings commenced in 2002. The case form guide is alarming. The trial was one of the longest in Australian history and consumed 120 days. It produced 85,654 documents comprising 589,392 pages (only 12849 of which were admitted into evidence), produced 1,028 pages of pleadings, 1,613 statements from lay witnesses, 2,041 pages of expert reports (plus appendices), 2,368 pages of written closing submissions by Seven and 2,594 pages of written closing submissions from the Respondents, amply supplemented by outlines, notes and summaries. The trial transcript ran to 9,530 pages.

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5 Seven Network Ltd v News Limited Trial: [2007] FCA 1062; Appeal: [2009] FCAFC 166; (2009) 182 FCR 160; [2009] ATPR 42-301. The case arose out of claims that in the late 1990s and early 2000s, News Ltd, Fox Sports and others had acquired AFL and NRL rights in order to put C7 out of business so that Fox Sports could dominate the market for supplying sports channels to pay television suppliers and dominate the market for the supply of pay television services to subscribers. Sackville J of the Federal Court of Australia at trial dismissed Seven's case. An appeal to the full Federal Court failed.
9. The litigation generated more than $200m in legal fees, which was about the same amount as the claimed damages. The case described by the trial Judge, Justice Sackville, as ‘extraordinarily wasteful’ and ‘bordering on the scandalous’. He commented further: ‘The case is an example of what is best described as ‘mega-litigation’. By that expression, I mean civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form. An invariable characteristic of mega-litigation is that it imposes a very large burden, not only on the parties, but on the court system and, through that system, the community’. ⁶ Nevertheless, the 1,200 plus page trial judgment, which was delivered in July 2007, was able to be prepared and handed down in a timely manner due to the extraordinary diligence of the trial Judge.

10. Large scale or ‘mega-litigation’ can generate up to 1 terabyte of data. ⁷ By way of ‘meat-pie’ statistics, ⁸ one terabyte is equivalent to: an 8 foot stack of CD's or about 150 DVD's; it would hold all 350 episodes of The Simpsons; and contain the information found in 83,000 stacked telephone books.

11. The diagram below illustrates the volumes we are talking about:

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⁶ Seven Network Ltd v News Limited Trial: [2007] FCA 1062, [2].
⁷ 1 Terabyte is 1000 gigabytes of data.
⁸ ‘Meat pie’ statistics is a phrase coined by Heerey J in the nine month trial of Russell Henderson & Ors v Amadio Pty Ltd [1995] FCA 1029. The term was no doubt inspired by interesting trivia arising from Grand Final football matches conducted in Melbourne each year (e.g. the number of meat pies consumed on the great day).
12. In one case a party was forced to settle at mediation simply because of the expense incurred by that party to that point. Without putting a foot into the door of the Court for a trial, that party had expended $18 million, principally on discovery. The settlement was entered into because, as that party said: ‘I simply cannot afford this’. The settlement had little or nothing to do with the merits of that party’s case. In such circumstances the proper administration of justice was not served.

13. The following conclusion is inescapable: In the context of modern commercial litigation, unless discovery is adequately controlled and administered it will pose a serious challenge to the administration of, and access to, justice.

Background to Civil Procedure Reform in Victoria

14. Civil Procedure reform in the modern era in Victoria can be traced back to 1994 when the Lord Chancellor of Great Britain instructed the Master of the Rolls, Lord Woolf, to report on options to consolidate the existing rules of civil procedure in England and Wales. On 26 July 1996, Lord Woolf published his report, *Access to Justice*. It identified a number of principles which the civil justice system should meet in order to ensure access to justice, and included draft rules to implement them.

15. According to Lord Woolf’s report, the system should:

   (a) be *just* in the results it delivers;
(b) be fair in the way it treats litigants;

(c) offer appropriate procedures at a reasonable cost;
(d) deal with cases with reasonable speed;
(e) be understandable to those who use it;
(f) be responsive to the needs of those who use it;

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

(h) be effective: adequately resourced and organised.

16. In May 2004, the Victorian Attorney-General, the Honourable Rob Hulls MP, issued a Justice Statement outlining directions for reform of Victoria’s justice system. One objective was the reform of the rules of civil procedure in order to streamline litigation processes, reduce costs and court delays, and achieve greater uniformity between different courts. On 4 September 2006, the Attorney-General asked the Victorian Law Reform Commission (VLRC) to provide broad-ranging advice about civil justice reform. The Terms of Reference asked the VLRC to identify, among other things, the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation.


18. One of the central planks of the Act is to provide for an ‘overarching purpose’ described in the following terms by s 7:

7 Overarching purpose
(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

(2) Without limiting how the overarching purpose is achieved, it may be achieved by –

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10 ALRC Report No 115, n 6, pp 32-33.
(a) the determination of the proceeding by the court;
(b) agreement between the parties;
(c) any appropriate dispute resolution process-
   (i) agreed to by the parties; or
   (ii) ordered by the court.

19. The Civil Procedure Act imposes overarching obligations and duties upon the parties and their lawyers to ‘advance the administration of justice in relation to any civil proceeding’. Further, the inherently wide powers of the court are given statutory recognition in the Act to effect its purposes, supported by sanctions for contravening the overarching obligations. The overarching purpose and obligations now apply to all civil proceedings commenced in Victoria after 1 January 2011. Recent authority in Victoria emphasises that the Act requires the court to be proactive and innovative in its approach to achieve its objects.

20. Any commentary on the movement towards reform of civil litigation practices in common law jurisdictions cannot ignore the notable contribution of Lord Justice Jackson. In November 2008, the then Master of the Rolls, Sir Anthony Clarke, appointed Lord Justice Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations in order to promote access to justice at proportionate cost. Lord Jackson’s preliminary report was published on 8 May 2009, identifying relevant issues for consideration during consultations. The final report sets out a coherent package of interlocking reforms, designed to reduce litigation costs and to promote access to justice.

21. A driving principle in Lord Jackson’s inquiry related to proportionality. His brief was to find ways of making costs more proportionate in relation to the sum or other remedy at stake in civil actions, while at the same time promoting access to justice.

22. Lord Justice Jackson published his final report in January 2010. A key recommendation of Lord Jackson’s report related to ‘Proportionality’ – ie. the costs system should be based on legal expenses that reflect the nature/complexity of the case (Chapter 3).

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12 Civil Procedure Act 2010 (Vic), s 16.
13 Civil Procedure Act 2010 (Vic), Pt 2.4, ss 28-29.
23. In Australia, another development of significance had occurred, namely in the common law. On 5 August 2009, the High Court of Australia handed down its judgment in *Aon Risk Services Australia Ltd v Australian National University*.16 This decision affirmed the importance, not only to the parties, but to the court and other litigants, of a ‘just but timely and cost-effective resolution of a dispute between the parties to a proceeding’.17 French CJ noted that there is ‘an irreparable element of unfair prejudice in unnecessarily delaying proceedings’.18 In particular, the Chief Justice drew attention to ‘the waste of public resources’, the ‘strain and uncertainty imposed on litigants’ and ‘the potential for loss of public confidence in the legal system’ arising from the adjournment of trials without adequate justification.19

24. Similarly, in *Aon*, Gummow, Hayne, Crennan, Kiefel and Bell JJ referred to the ‘ill-effects of delay’ upon employees and officers of corporations, as well as upon defendant corporations whose ability to plan financially may be affected by a contingent liability.20

25. Significantly, in *Aon*, the High Court accepted the principles of case management by the courts, saying:

> Such management is now an accepted aspect of the system of civil justice administered by courts in Australia. It was recognised some time ago, by courts here and elsewhere in the common law world, that a different approach was required to tackle the problems of delay and cost in the litigation process.21

26. The High Court in *Aon* also said that the rules concerning civil litigation are no longer to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants. As explained by Gummow, Hayne, Crennan, Kiefel and Bell JJ:

> In *Sali v SPC Ltd* [[1993] HCA 47; (1993) 67 ALJR 841 at 849] Toohey and Gaudron JJ explained that case management reflected:

> ‘[t]he view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions

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16 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 [93] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*Aon*).
17 *Aon* (2009) 239 CLR 175 [93].
18 *Aon* (2009) 239 CLR 175 [5].
19 *Aon* (2009) 239 CLR 175 [30].
20 *Aon* (2009) 239 CLR 175 [101].
21 *Aon* (2009) 239 CLR 175 [92].
in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard.’22

27. In this vein, their Honours also concluded:

In the past it has been left largely to the parties to prepare for trial and to seek the court’s assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.23

28. The Court of Appeal of Victoria in *Trevor Roller Shutter Service Pty Ltd v Crowe* [2011] VSCA 16 reinforced the reasoning in *Aon* when it observed:

As we construe *Aon*, it was about the impropriety of granting a party leave to make a late amendment to a pleading, in circumstances where that party had failed to act expeditiously, and where to allow the amendment was likely to be productive of wasted costs and resources. More generally, *Aon* may be thought to have re-invigorated the procedural paradigm, to some extent and for some time diminished by *JL Holdings*, that time, costs and limited judicial resources are relevant considerations in the determination of whether to allow late applications for amendment and invoke other interlocutory processes.24

29. Ronald Sackville, in his article ‘Mega-Lit: Tangible Consequences Flow from Complex Case Management’, opined on the implications of *Aon* in the following passage: 25

Thus, it is now clear that courts should exercise their power to utilise case management tools in ensuring that the interests of justice are served by minimising cost and delay for parties involved in litigation. Such a stance sees the ‘transformation of the judicial role from that of passive decision-maker to active manager of litigation’. [Footnote omitted]

30. Finally I turn to the work of the ALRC in the report *Managing Discovery: Discovery of Documents in Federal Courts* (the ALRC Report).26 This report is of significance in Australia on the issue of discovery and provides a valuable

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22 *Aon* (2009) 239 CLR 175 [93].
23 *Aon* (2009) 239 CLR 175 [113].
24 *Trevor Roller Shutter Service Pty Ltd v Crowe* [2011] VSCA 16 at [42] per Warren CJ, Ashley and Nettle JJA.
resource. The ALRC Report in final form was published in March 2011. It made a number of significant recommendations, some of which are specific to Australian federal courts, while others are of more general application.

31. Thus two major influences in the civil procedure reform process are discernible. The first, as exemplified by the Aon decision, is the transformation of the judicial role from that of passive decision-maker to active manager of litigation, particularly in large and complex cases. The second factor is the explicit endorsement by Australian legislatures and rule-makers of the principles underlying case management.

32. The result is that systems of civil litigation which have adopted the ‘adversarial’ approach have moved a great distance from the ‘sporting theory of justice’ criticised by Dean Roscoe Pound of Harvard Law School in 1906 where the role of the judge was relegated to that of being a mere ‘umpire’. Pound, in a perspicacious and somewhat scathing statement that was arguably well ahead of its time, observed:

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

33. It is against this background, and in the context of the legislative framework provided by the Civil Procedure Act and its recent amendments, that we can examine the management of documents in large cases.


28 Sackville, n 1 at 48.
34. The *Civil Procedure Act*’s impact on discovery in a proceeding is both general and specific. As mentioned already, the Act’s overarching purpose of promoting efficiency, cost-effectiveness and timeliness in the conduct of litigation (amongst other things) is patently relevant to discovery process.

35. The Overarching Obligations, equally, have been a fundamental feature of the CPA in practice, creating a standard for the conduct of parties in the form of a positive set of obligations and duties. This remains so notwithstanding the recent amendments to the Act.

36. The overarching obligations apply as soon as a party files its first ‘substantive document’ in a proceeding and they apply to all aspects of a civil proceeding including interlocutory proceedings and appeals.

37. For example, there are Overarching Obligations clearly relevant to the optimisation of the process of discovery of documents or information in a proceeding.

38. Although this obligation is not to be conflated with the disclosure and discovery at pre litigation stage or specifically ordered on discovery, a party must generally disclose to the other party all documents in the person’s possession, custody or control of which the person is aware and which the person considers or ought reasonably to consider are ‘critical’ to the resolution of the dispute, such disclosure to occur at the earliest reasonable time after the person becomes aware of the existence of the document or such other time as the court may direct but privileged documents are excluded from being exchanged.

39. Additionally the following obligations are relevant when considering how the *Civil Procedure Act* impacts discovery, especially when considering the method of delivery or provision of large amounts of data or documents which may be sought, as well as the usability of such information:

- Section 19: not take a step in a proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding
- Section 20: the obligation to co-operate with the parties to the civil proceeding to avoid obstructive conduct; and
- Section 24: the obligation to ensure that costs incurred in a proceeding are reasonable and proportionate.
40. Of course, there are also targeted provisions in the CPA directly on the topic of discovery. Prior to the recent amendments, the sections most relevant to my discussion here today were those in Part 4.3 relating to the orders which could be made by a Court, as necessary or appropriate, in relation to discovery in a proceeding.

55 Court orders for discovery

(1) A court may make any order or give any directions in relation to discovery that it considers necessary or appropriate.

(2) Without limiting subsection (1), a court may make any order or give any directions—
   
   (a) requiring a party to make discovery to another party of—
       
       (i) any documents within a class or classes specified in the order; or
       
       (ii) one or more samples of documents within a class or classes, selected in any manner which the court specifies in the order;

   (b) relieving a party from the obligation to provide discovery;

   (c) limiting the obligation of discovery to—
       
       (i) a class or classes of documents specified in the order; or
       
       (ii) documents relating to one or more specified facts or issues in dispute;

   (d) that discovery occur in separate stages;

   (e) requiring discovery of specified classes of documents prior to the close of pleadings;

   (f) expanding a party’s obligation to provide discovery;

   (g) requiring a list of documents be indexed or arranged in a particular way;

   (h) requiring discovery or inspection of documents to be provided by a specific time;

   (i) as to which parties are to be provided with inspection of documents by another party;

   (j) relieving a party of the obligation to provide an affidavit of documents;

   (k) modifying or regulating discovery of documents in any other way the court thinks fit.

(3) A court may make any order or give any directions requiring a party discovering documents to—

   (a) provide facilities for the inspection and copying of the documents, including copying and computerised facilities;

   (b) make available a person who is able to—

       (i) explain the way the documents are arranged; and

       (ii) help locate and identify particular documents or classes of documents.

April 2014 Amendments to the Civil Procedure Act

41. In 2012 the Attorney-General established the Victorian Civil Procedure Advisory Group chaired by the Chief Justice, with Vickery J as Deputy Chair. A Discovery Workshop examined the need for discovery reform in Victoria. The Workshop enjoyed representation from all Victorian jurisdictions and concluded its work in December 2012.

42. There were significant differences between jurisdictions as to the need for discovery reform and the need for discovery at all.

43. The Workshop revealed that VCAT does not have discovery at all in the usual case; and the Magistrates’ Court and the County Court are not exposed to the
problems of large scale discovery to the same degree as the Supreme Court. This is a product of the vastly different types of work the courts do.

44. However, the Supreme Court did report a set of circumstances which called for reform. This jurisdiction, more than any other, faces regular problems caused by large scale discovery, particularly in commercial cases.

45. For example, some cases have the potential to produce a million or more discovered documents, with the largest discovery to date in the TEC List producing 1.7 million documents. This in part is due to the scale of the litigation which are the subject of the litigation in the Supreme Court - for example, the Great Southern and Bushfire class actions, and litigation involving large scale projects such as the SA Desalination Plant, the Otway Basin Oil Rig, the WA 420 km Parmelia Gas Pipeline, and the Perth Biovision Composting Plant to name a few. Computers generate documents on a vast scale in projects of this kind.

46. It is not unusual in such cases for the discovery bill to run into the tens of millions in the Supreme Court. Even in commercial litigation of a moderate scale, the process of discovery, if not adequately controlled, can give rise to excessive, disproportionate, and in many cases unnecessary costs for all parties.

47. This raises the question: Are we pricing ourselves out of existence for litigants who become legitimately ‘gun shy’?

48. The Civil Procedure Act discovery amendments in the form of the Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014 were formulated as a product of the work of the Civil Procedure Advisory Group. The Bill was read for a second time on 27 March 2014 (Second Reading Speech attached) and the relevant discovery sections of the Act came into operation on 12 May 2014. It designed to tackle the problem of discovery in commercial litigation on a number of fronts:

- To achieve flexibility in approach (applying the adage: ‘Let the forum fit the fuss’). This is achieved by making the reform package inclusive, and not mandatory;

- To fulfil an educative role by encouraging Judges and Legal Practitioners to consider discovery alternatives from a ‘smorgasbord’
of options, and mould a discovery regime to suit the particular needs of each piece of litigation;

- To encourage active consultation, where the legal representatives are directed to undertake consultation with opposing representatives to settle upon management regimes for the mutual benefit of the litigants;

- To encourage productive experimentation, where legal representatives are encouraged to devise, adapt and mould discovery techniques best suited for the case at hand; and

- To achieve an enforcement regime with ‘teeth’, where the managing Judge is given ample, clear, authoritative and well publicised powers to make necessary orders to control the discovery process.

49. To these ends, the amendments which follow were introduced to the *Civil Procedure Act*, with the goal of providing the Court with greater case management powers in relation to discovery and disclosure.

50. Some elements of the new provisions are novel. But, the Legislature considered that the present problems of large scale discovery and the consequent assault on the principles of the *Civil Procedure Act* called for such an approach.

**Statement of Issues: Sections 50 and 50A**

<table>
<thead>
<tr>
<th>50 Statement of issues</th>
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<tbody>
<tr>
<td>(1) Without limiting any other power of a court under this Part, a court may order or direct that parties to a proceeding consult and prepare a statement of issues which identifies and summarises the key issues in dispute in the proceeding.</td>
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<tr>
<td>(2) The court may settle the contents of the statement of issues ordered or directed to be prepared under subsection (1) if the parties are unable to agree on the contents of the statement.</td>
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<tr>
<th>50A Use of statement of issues</th>
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<tbody>
<tr>
<td>(1) The court may use a statement of issues in a proceeding in any manner the court considers appropriate to further the overarching purpose in relation to the following— (a) pre-trial procedures; (b) the conduct of the proceeding at trial.</td>
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<tr>
<td>(2) Without limiting subsection (1), a statement of issues may be used for the purpose of discovery of documents.</td>
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<td>(3) A statement of issues does not displace the function of any pleadings in the proceeding.</td>
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</table>
51. The Court can order a statement of issues which identifies and summarises the key issues in dispute in a proceeding. If the parties cannot agree on the contents of the statement, it may be determined by the Court.

52. The Court can then limit discovery to a class or classes of documents specified in the order; or to documents relating to one or more specified facts or issues in dispute.

53. New Section 50A provides that such a statement of issues may be used by the Court in any manner considered appropriate to further the just, timely and cost-effective resolution of the real issues in the dispute. This may be in relation to pre-trial procedures as well as for use in the conduct of the trial.

**Directions Limiting Scope of Discovery : s 55(2)(c)**

<table>
<thead>
<tr>
<th>55 Court orders for discovery</th>
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<tbody>
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<td>1. A court may make any order or give any directions in relation to discovery that it considers necessary or appropriate.</td>
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<td>b. relieving a party from the obligation to provide discovery;</td>
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<tr>
<td>c. limiting the obligation of discovery to—</td>
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<tr>
<td>i. a class or classes of documents specified in the order; or</td>
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<tr>
<td>ii. documents relating to one or more specified facts or issues in dispute; or</td>
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<tr>
<td>iii. some or all of the issues set out in a statement of issues filed in the proceeding</td>
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</table>

54. Section 55(2)(c) of the Civil Procedure Act has been amended in order to enable the Court to more clearly define the scope of the information sought on discovery through the use of the statement of issues.

55. The obligation of discovery may be limited to a class or classes of documents specified in the order or to documents relating to one or more specified facts or issues in dispute.

56. There is an additional new subparagraph (iii) which introduces a specific power to make any order or give any directions limiting the obligation of discovery to some or all of the issues set out in the statement of issues filed in the proceeding.

**Orders for Payment of Discovery Costs of Another Party in Advance: ss 55(4) and (5)**
55 Court orders for discovery

(1) A court may make any order or give any directions in relation to discovery that it considers necessary or appropriate.

...

(4) A court may order or direct a party to pay to another party an amount specified or determined by, or in accordance with, the order or direction in relation to the costs of discovery in any manner considered appropriate by the court, including, but not limited to, payment in advance of an amount to the other party for some or all of the estimated costs of discovery.

(5) Without limiting any other power of a court to make costs orders, a court may order or direct that costs payable under an order or a direction under subsection (4) are recoverable as costs in the proceeding.

57. New subsections (4) and (5) have been added to s 55 of the Act. The new subsections do not limit the courts’ discretion to make a different costs order in the proceeding, but rather allows for greater discretion and an ability to take account of the parties’ respective outlays in the discovery process. It serves as a mechanism to ensure the general principle that a party whose conduct is responsible for incurring costs should be required to bear them and consequently encourage parties to avoid unjustified costs. A Court may be able to say to a party seeking discovery of unclear merit, ‘if you want it, you can pay for it’.

58. New subsection (4) enables the Court to order a party to pay a specified amount to another party in the proceeding, in relation to the costs of discovery in any manner the court considers appropriate. Notably, a Court may order that a party pay a specified amount in advance of discovery for some or all of the estimated costs of discovery.

59. New subsection (5) enables the Court to order that costs payable pursuant to subsection (4) are recoverable as ‘costs in the proceeding’, and payable as part of the final costs award made in the proceeding.

60. One purpose of this facility is to provide an incentive for parties to focus on producing documents which are clearly and directly of relevance to the case. A party may seek an indulgence to seek documents which fall outside this category or which appear to the Court to potentially fall outside this category, or to be excessively voluminous or repetitive, but if that party is granted such leave it may have a condition imposed to pay the costs of the opposite providing party in undertaking the exercise.
61. Another purpose is to equitably share the cost burden of undertaking discovery in the appropriate case, and to provide a disincentive to abusing the discovery process by using it as a tool of oppression against an opposing party.

62. New sections 55A-55C contemplate the manner and method by which discovered documents are provided to the Court or to parties to a proceeding.

**Order for ‘Pooled Discovery’: s 55A**

<table>
<thead>
<tr>
<th>55A Provision of all documents in party's possession to other party by consent</th>
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<tbody>
<tr>
<td>(1) Subject to subsection (2), if all parties to a proceeding consent, a court may order or direct a party to provide all documents in the party's possession or control which relate to the issues in the proceeding to any other party on the basis that privilege is not waived.</td>
</tr>
<tr>
<td>(2) The court may make an order or give a direction under subsection (1) if satisfied that—</td>
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<tr>
<td>(a) giving the receiving party access to the documents is not likely to give rise to any substantial prejudice to the party providing the documents; and</td>
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<tr>
<td>(b) the documents can be identified and located without unreasonable cost to the party providing the documents; and</td>
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<tr>
<td>(c) the documents are able to be identified by a general description or category.</td>
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<td>(3) An order or direction under subsection (1) may—</td>
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<tr>
<td>(a) specify that the documents are to be provided—</td>
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<tr>
<td>(i) in a searchable electronic format, if practicable; or</td>
</tr>
<tr>
<td>(ii) in any other manner or format that the court considers appropriate; and</td>
</tr>
<tr>
<td>(b) include any other order or direction that the court thinks fit, including, but not limited to, any order or direction in relation to the maintenance of privilege claims.</td>
</tr>
<tr>
<td>(4) Subject to subsection (5), if an order is made or a direction is given under subsection (1), the party providing documents to which the order or direction applies, at that party's own expense, may exclude any privileged documents prior to providing the documents to the other party in accordance with the order or direction.</td>
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<tr>
<td>(5) A party who excludes any privileged documents in accordance with subsection (4) must provide to the other party a list of the documents for which privilege is claimed which specifies the grounds on which privilege is claimed.</td>
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</table>

63. Under new section 55A where there is the agreement between the parties, the Court can order that all related documents created in the course of a transaction or project in the possession of one or more parties are handed over to the other party or parties for examination in an electronically searchable format.

64. The advantage is that under a 55A order, the providing party will not be required to review all of its documents for relevance to issues prior to
production. This has the potential to save considerable time and money (potentially eliminating half of the costs of discovery in some cases).

65. To ensure the s 55A process is used only in appropriate circumstances, the Court can only make the order where it is satisfied that:

   a. the documents can be identified and located by the person providing the documents without incurring unreasonable costs in the process;

   b. the documents are able to be identified by a general description or category; and

   c. the party providing the documents will not be substantially prejudiced in giving the other party access to the documents.

66. Such an order may further specify the format of the documents to be provided, such as searchable electronic format.

67. Parties can still opt to exclude documents protected by privilege from discovery prior to providing them. Where documents are excluded on this basis the party claiming privilege must provide a list of the documents claimed to be privileged as well as the grounds for each claim.

68. A suggested Protocol for the management of documents under a s 55A order is attached as an annexure to this paper.

69. Of course, the risk of agreeing to this kind of order is that, despite the protection of privilege, once a document is seen, it cannot be unseen. On the other hand, this sort of order may avoid, or at least significantly reduce, excessive costs. The Court and the parties will need to engage in this balancing exercise when considering this kind of order, in light of the overarching purpose to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute under s 7 of the Civil Procedure Act 2010.

**Order for Affidavit of Document Management : s 55B**

55B Affidavit of document management

(1) For the purpose of assisting a court to make any appropriate orders or directions in relation to discovery, the court may order or direct that a party provide to the court an affidavit of document management.

(2) An affidavit of document management may include the following—

   (a) the volume, manner of arrangement or storage, type or location of discoverable documents;

   (b) the party’s processes of document management.
70. The amendments also introduce section 55B powers by which the Court may require parties to a proceeding to produce an ‘affidavit of document management’ in order to assist the Court to make appropriate orders in relation to discovery.

71. This section accepts the contemporary reality that commercial enterprises use a range of different business systems and database models to store and manage their records. Records are often stored in different electronic formats and are subject to different retention policies. Records can be stored in different location spread across the world. This provision may be used in aid of the Court making the appropriate discovery orders.

72. This affidavit may include information about the volume, manner of arrangement or storage, type or location of discoverable documents. It can also pertain to a party’s systems of document management.

73. In the Second Reading Speech to the amending Bill, it was observed that

[Complexity] can sometimes frustrate the efficient identification of discoverable documents and increase costs for parties where discovery orders do not take into account the systems being used. To assist a court to make appropriate discovery orders, the bill encourages the courts to order or direct a party to provide an affidavit which sets out the volume, manner of arrangement or storage, type or location of discoverable documents, or information about a party’s document management processes more generally…. If the courts and other parties have a better understanding of the document management systems, relevant documents can be more easily identified and discovery disputes minimised. This process will be particularly useful for large organisations with complex IT systems, as it will allow the court to ensure that a complete discovery process is conducted at a reasonable cost, for example, by specifying the methods to be used when searching for relevant documents.

Order for Oral Examination on an Affidavit of Document Management : s 55C

74. Section 55C provides that the Court can order that the deponent or an appropriate person (for example a records or information manager) be orally examined about the matters dealt with in the affidavit of document management.
75. Notably, the court can order that any party has to pay for the costs of an oral examination. Parties therefore have an incentive to prepare full, accurate and reliable affidavits of document management.

Enforcement of Discovery Orders under the Civil Procedure Act

76. The sanctions for contravention of the overarching obligations are relevant to discovery in a general way.

77. There are other enforcement provisions of the Civil Procedure Act specific to discovery, found in s.56. These are often overlooked and provide considerable scope for discretion to be exercised in the appropriate case.

56 Court may order sanctions

(1) A court may make any order or give any direction it considers appropriate if the court finds that there has been—

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

(b) a failure to comply with any order or direction of the court in relation to discovery; or

(c) conduct intended to delay, frustrate or avoid discovery of discoverable documents.

(2) Without limiting subsection (1), a court may make an order or give directions—

(a) that proceedings for contempt of court be initiated;

(b) adjourning the civil proceeding, with costs of that adjournment to be borne by the person responsible for the need to adjourn the proceeding;

(c) in respect of costs in the civil proceeding, including indemnity cost orders against any party or a legal practitioner who is responsible for, or who aids and abets, any conduct referred to in subsection (1);

(d) preventing a party from taking any step in the civil proceeding;

(e) prohibiting or limiting the use of documents in evidence;

(f) in respect of facts taken as established for the purposes of the civil proceeding;

(g) awarding compensation for financial or other loss arising out of any conduct referred to in subsection (1);

(h) in respect of any adverse inference arising from any conduct referred to in subsection (1);

(i) compelling any person to give evidence in connection with any conduct referred to in subsection (1), including by way of affidavit;

(j) dismissing any part of the claim or defence of a party who is responsible for any conduct referred to in subsection (1);

78. The section 56 provisions provide for considerable flexibility in enforcement of discovery orders. Real alternatives are created to the traditional approach of making a self-executing order. In the event of a breach of discovery obligations, self-executing orders can give rise to particular problems when it comes to enforcement. A failure to embark upon or undertake the required exercise may
be readily established. However, problems of proof arise where the issue turns on the adequacy of what is done in purported compliance with a discovery order. Section 56 provides a range of orders which may well be more appropriate to the case at hand as a means to enforcement than the traditional self-executing order.

**Document and Information Management Systems in the Spotlight**

79. What is apparent is that the benefits arising from use of these powers are largely prefaced on the assumption that a party’s evidentiary documents are being managed under an effective records or document management system.

80. Potential litigants in large projects should be advised that a robust electronic records management system should be in place at the outset of a large scale transaction or project to enable cost-effective retrieval of the information sought in the event of litigation. In addition, the Court must be able to navigate the information for evidentiary purposes. This may require the Court to direct that documents are provided in a searchable electronic format, or any other format that the Court requires such as via a hyperlinked index, or other navigation system. A party *must* be able to comply with such an order and thus must have the systems in place to do so in an efficient manner.

81. These new provisions will likely open up records management practices and systems of a party’s business to greater scrutiny during pre-trial processes. Hence, clear and efficient record keeping and document management systems have become increasingly important for clients embarking on large projects. This may be seen as part of a preventative or harm minimisation scheme to cap the risk of expenditure in the event of litigation.

**Computer Assisted Review (CAR)**

82. One other technique which must be seriously entertained to curb the malady is to use electronic means to efficiently manage documents in the course of litigation with a view to making the computer work to the advantage of the court, practitioners and litigants. In other words, we need to consider beating the computer at its own game by fully harnessing its resources and potential.

83. Computer Assisted Review (CAR) is a new discovery technology which uses ‘predictive coding’ to review and predict the level of relevance of documents to

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30 See for example: *ACN 092675164 (in liq) v National Builders Group Pty Ltd* [2014] VSC 530.
particular defined issues. The system uses a sample of a subset of documents to ‘train’ computer algorithms to review and predict what other documents fall within the defined categories of discoverable documents. The sample subset of documents is derived from a human examination.

84. On 24 February 2012, a federal court in the United States in *Da Silva Moore v Publicis Group* (United States District Court – Southern District, New York) 287 F.R.D. 182 endorsed the use of computer assisted review using predictive coding in electronic document production. This appears to be the first court approval of computer assisted technology in discovery.

85. In his Opinion, Judge Peck described the process in the following terms:

   By computer-assisted coding, I mean tools (different vendors use different names) that use sophisticated algorithms to enable the computer to determine relevance, based on interaction with (i.e., training by) a human reviewer.

   Unlike manual review, where the review is done by the most junior staff, computer assisted coding involves a senior partner (or [small] team) who review and code a “seed set” of documents. The computer identifies properties of those documents that it uses to code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer’s coding. (Or, the computer codes some documents and asks the senior reviewer for feedback.)

   When the system’s predictions and the reviewer’s coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents. Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer.

   Some systems produce a simple yes/no as to relevance, while others give a relevance score (say, on a 0 to 100 basis) that counsel can use to prioritize review. For example, a score above 50 may produce 97% of the relevant documents, but constitutes only 20% of the entire document set.

   Counsel may decide, after sampling and quality control tests, that documents with a score of below 15 are so highly likely to be irrelevant that no further human review is necessary. Counsel can also decide the cost-benefit of manual review of the documents with scores of 15–50.

86. In *Da Silva Moore* the document collection of potentially discoverable documents extended to over three million emails and other electronically stored information. The defendants had proposed using predictive coding, and the parties reached agreement on the use of the software, subject to the plaintiff’s right to object.
87. In his reasons in the *Da Silva Moore* case, Judge Peck took a number of factors into account in making his order for computer assisted review:

a. the parties’ agreement on the use of computer assisted review;

b. the large number of electronic files to be reviewed;

c. the demonstrated superiority of predictive coding over traditional alternatives;

d. the need for cost effectiveness and proportionality called for by case management principles; and

e. the transparency in the search protocol proposed by the defendants.

88. Judge Peck concluded that ‘What the Bar should take away from this Opinion is that computer assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review’.

89. However, Judge Peck’s decision does not require that computer-assisted search and coding be used in all cases, or even suggest that it will be approved in all cases. The appropriateness of using computer-based tools still must be determined on a case-by-case basis.

90. As to the degree of accuracy in the CAR process, Judge Peck further observed ‘So the idea is not to make this perfect, it's not going to be perfect. The idea is to make it significantly better than the alternatives without nearly as much cost.’ In the course of his Opinion, Judge Peck cites to research suggesting that computer-assisted search and review actually has been shown to be more effective and more economical than employing linear manual review or keyword searches to cull large volumes of electronic documents.

91. Other cases have followed the lead set by Judge Peck in *Da Silva Moore*. 

92. There is a growing body of evidence which tends to demonstrate that the traditional approach to discovery – that is a ‘linear’ document-by-document human review, even if aided by the use of keyword searches – is considerably

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31 See: *EORHB Inc et al. v HOA Holdings LLC* C.A. No. 7409-VCL (Del. Ch. 15 October 2012); RE: *Actos (Pioglitazone) Products Liability Litigation* – a Federal case management order of Judge Hanna Doherty (Western District of Louisiana).
less efficient, and also is likely to be less accurate, than computer-assisted review.


94. The Grossman and Cormack research also showed that considerable efficiencies (with commensurate savings in legal costs) can be achieved using CAR processes. In terms of efficiency, the five technology-assisted reviews well surpassed the manual reviews. The exercise demonstrated that 70% of the relevant documents could be identified from a seed set of less than 1% of the corpus using CAR processes. Importantly, in terms of the final outcome, the technology-assisted reviews required, on average, human review of only 1.9% of the documents to determine relevance – a fifty-fold saving over exhaustive manual review.

95. Further, the Grossman and Cormack research offers evidence that such technology-assisted processes, while indeed more efficient, can also yield accuracy results superior to those of an exhaustive manual review. The evidence was derived from an analysis of data collected from eleven participating teams, each using their own CAR processes to categorise 800,000 documents. In addition, manual reviewers were set the same task for subsets of the 800,000 documents. Two of the top performing CAR teams were selected and their performance compared against that of the manual reviewers. In terms of accuracy, the CAR teams outperformed the manual reviewers in four of the five selected simulated document requests.

96. The article on the research concludes:

   Overall, the myth that exhaustive manual review is the most effective – and, therefore, the most defensible – approach to document review is strongly refuted. Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort.

   …..

Future work may address which technology-assisted review process(es) will improve most on manual review, not whether technology-assisted review can improve on manual review.
97. In Victoria, there is at least one firm which is able to provide the software and training for computer assisted review of electronic documents – KordaMentha Forensic – and there may be others.

98. Supreme Court Practice Note No. 1 of 2007 (Guidelines for the Use of Technology in any Civil Litigation Matter) provides ample facility for the making of discovery Orders in a proceeding using CAR technology. 32

99. In the appropriate case, taking into account for example the kinds of factors considered in Da Silva Moore, the Court may make a case management order (with or without the consent of the parties) for electronic discovery incorporating a CAR process along the following lines:

Discovery in this proceeding is to be conducted using Computer Assisted Review (CAR) (the ‘CAR technology’) using the training and software provided by------------------------ (the ‘Appointed training and software provider’).

The parties or their lawyers or their IT consultants, in conjunction with the Appointed training and software provider, meet to discuss and determine how best to use the CAR technology in making discovery in the proceeding.

The parties or their lawyers or their IT consultants, with or without the Appointed training and software provider, meet to discuss and determine how best to use technology generally in the management of discoverable documents and at trial in the proceeding.

The discussions referred to in the preceding paragraphs are to be non-privileged and open discussions. The parties or their lawyers are to report to the Court on or before --------------------------------2015 on the outcome of these discussions.

Parting Thoughts

100. Judges now have extensive powers to manage modern litigation in most common law jurisdictions. The role of the Judge in managing cases to ensure timeliness, manage the paper and thereby control costs, cannot be emphasised enough. Justice Ray Finkelstein remarked in a 2008 paper ‘Discovery Reform: Options and Implementation’ 33 that:

The key to discovery reform lies in active and aggressive judicial case management of the process. The most effective cure for spiralling

32 Supreme Court Practice Note No. 1 of 2007 (Guidelines for the Use of Technology in any Civil Litigation Matter) paragraphs 2.2; 2.3; 2.4; 2.5.4; 2.7; 2.8; 2.8.2; 2.8.3; 2.8.5; 2.9.2.
costs and voluminous productions of documents is increased judicial willingness to just say no.  

101. To this observation I would add: Another key to discovery reform lies in the willingness of the legal profession to say ‘yes’ to embracing the facilities which are now available to actively manage documentation in litigation. It is clearly interests of clients and the public to do so. Otherwise the risk is that, in the face of astronomic discovery costs, a party will simply pull up stumps and not proceed with even meritorious litigation. Justice will not be served in this circumstance.

102. By way of conclusion, I return to the central role of the modern judge in managing delay and ensuring timeliness. Without strong judicial management all the technology in the world will not ensure timeliness- the modern common law needs both. The judge is needed to overcome what are endemic tendencies in an adversarial system of justice - cost and delay. Technology is a very important tool for the Court in this endeavour, but it is not the only answer.

103. What then of a glimpse into the future? In this rapidly changing era of advancing technology, perhaps the most that can be said is that no IT system or innovation can freeze future development. Conceptually this must apply to the current forms of CAR as much as to any other electronic management process. Open mindedness to embrace new developments must prevail. As eloquently expressed by Richard Susskind in his challenging book ‘The End of Lawyers? Rethinking the Nature of Legal Services’:  

‘Lawyers, in common with much of humanity, tend to find it difficult to grasp that there is no finishing line when it comes to IT and the Internet. For the tidy mind and the control-freak alike, it is hard to accept that there are no clear parameters, limits, or finite pigeon-holes. Perhaps there is some pathological aversion, hardwired into the legal mind, to the inevitability of ongoing advancement in technology, to the notion that no system or innovation can be the last word.’

Hon. Justice Peter Vickery

Judge-in-Charge, TEC List, Supreme Court of Victoria

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