*Jessica March**

ARTIFICIAL INTELLIGENCE, REAL OBLIGATIONS: CAN PARTIES AND PRACTITIONERS USING TECHNOLOGY-ASSISTED REVIEW FULFIL THEIR DISCOVERY OBLIGATIONS?

I Introduction

Technological advancements constitute both the cause of and the solution to the perennial problem of modern discovery obligations: volume. As scholars have observed, 'the growth of electronically stored information … [has] led to an explosion in the scope of potentially discoverable documents', rendering the manual discovery process infeasible.[1] At best, the sheer volume of documents involved in most modern litigation imposes a significant burden — in time and expense — on parties.[2] At worst, it facilitates abuse, 'either by [parties] stonewalling the other party or by over inclusive discovery'.[3]

The advent of artificial intelligence ('AI') has led to the development of algorithmic, AI-based tools which automate the document review and classification processes required for discovery in litigation ('Technology-Assisted Review' or 'TAR'). This comment argues that lawyers can — and in some circumstances should — deploy AI-based tools to replace traditional manual review without breaching their discovery obligations.

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* LLB (Hons) Candidate, BEc (Adv) (Adel); Student Editor, *Adelaide Law Review* (2025).

1 Felicity Bell and Michael Legg, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 35, 44.

2 See generally: Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System* (Report No 89, February 2000) 431 [6.67]; Victorian Law Reform Commission, *Artificial Intelligence in Victoria's Courts and Tribunals* (Consultation Paper, October 2024) 18 ('*AI in Victoria's Courts and Tribunals*'); Jason R Baron, 'Law in the Age of Exabytes: Some Further Thoughts on "Information Inflation" and Current Issues in E-Discovery Search' (2011) 17(3) *Richmond Journal of Law and Technology* 9:1–33.

3 Bridgette Toy-Cronin et al, *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (Report, 2015) 116. See also Margaret Castles, Stacey Henderson and Anne Hewitt, *Ethical Resolution of Civil Disputes: South Australian Theory and Practice* (Lawbook, 2nd ed, 2023) 199 [7.165].

Part II elaborates on the nature of TAR in the Australian context. Part III explains the direct[4] and indirect[5] discovery obligations imposed on parties and lawyers under the *Uniform Civil Rules 2020* (SA) ('*UCR*'). Part IV analyses whether it is possible for parties and lawyers who employ TAR in the discovery process to satisfy those obligations. Part V concludes that the responsible use of TAR does not breach any direct or indirect discovery obligations and, in some circumstances, might even be required to fulfil them.

II Technology-Assisted Review in Australia

A *What Is TAR?*

Technology-Assisted Review[6] is defined as:

> a process for [p]rioritizing or [c]oding a [c]ollection of [d]ocuments using a computerized system that harnesses human judgments of one or more [s]ubject [m]atter [e]xpert(s) on a smaller set of documents and then extrapolates those judgments to the remaining [d]ocument [c]ollection.[7]

In the discovery context,[8] TAR procedure can be summarised as follows: (1) a lawyer reviews a set of documents, often referred to as a 'seed set', and categorises each document as 'relevant' or 'not relevant', and 'privileged' or 'not privileged'; (2) the seed set is fed into the TAR software, and it codes the broader set of all documents in the 'discovery universe'; (3) the lawyer reviews a sample of the coded documents, identifies any errors, and feeds those corrections back to the software; (4) that process is repeated until the program is sufficiently accurate.[9] Using machine

4 *Uniform Civil Rules 2020* (SA) r 73 ('*UCR*').

5 Ibid r 3.1.

6 This comment adopts the terminology outlined by leading scholars from the United States on the subject of AI-based e-discovery: Maura Grossman and Gordon Cormack, 'The Grossman-Cormack Glossary of Technology-Assisted Review' (2013) 7(1) *Federal Courts Law Review* 1. See also: Shannon Brown, 'Peeking inside the Black Box: A Preliminary Survey of Technology Assisted Review (TAR) and Predictive Coding Algorithms for E-Discovery' (2016) 21(2) *Suffolk Journal of Trial and Appellate Advocacy* 221, 253–85. Other terms frequently used include 'computer-aided review', 'content-based advanced analytics', and 'predictive coding': Bell and Legg (n 1) 44.

7 Grossman and Cormack (n 6) 32.

8 Noting that TAR has other legal applications, such as in transactional due diligence: Lyria Bennett Moses, 'Artificial Intelligence in the Court, Legal Academia and Legal Practice' (2017) 91(7) *Australian Law Journal* 561, 575.

9 See generally: Bell and Legg (n 1) 46–7; Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie Law Journal* 39, 66–7; David Caruso, Michael Legg and Jordan Phoustanis, 'The Automation Paradox in Litigation: The Inadequacy of Procedure and Evidence Law to Manage

learning throughout that iterative process, the software creates a predictive model to estimate the probability that a particular document is relevant or not relevant (and privileged or not privileged).[10] That process is easily adapted for orders for discovery by category or specific discovery, so long as the lawyer 'training' the software applies the correct test(s).[11] Scholars identify three sub-species of TAR: 'simple passive learning';[12] 'simple active learning'; [13] and 'continuous active learning'.[14]

B *Availability of TAR Tools in the Australian Market*

Since the early 2000s, the use of TAR technology has increased worldwide such that the global industry is now worth over one billion USD.[15] There are at least four major providers of TAR technology in the Australian market.[16] Australian law firms have begun recommending its use,[17] and developing tailored in-house

Electronic Evidence Generated by the "Internet of Things" in Civil Disputes' (2019) 19 *Macquarie Law Journal* 157, 169; John Tredennick et al, *TAR for Smart People: How Technology Assisted Review Works and Why It Matters for Legal Professionals* (Catalyst, 3rd ed, 2018). See also *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* (2016) 51 VR 421, 425–6 [20] (Vickery J) ('*McConnell Dowell*'), citing *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch), [19]–[24] (Master Matthews) ('*Pyrrho*'); *ViiV Healthcare Company v Gilead Sciences Pty Ltd (No 2)* (2020) 155 IPR 490, 516 [134]–[139] (Beach J) ('*ViiV*'); *White v James Hardie New Zealand* [2020] NZHC 2202, [33] (Whata J) ('*White*').

10 Caruso, Legg and Phoustanis (n 9) 169.

11 Pursuant to *UCR* (n 4) rr 73.8–9.

12 Bell and Legg (n 1) 46–7.

13 Ibid.

14 Ibid.

15 Michael Mills and Julian Uebergang, 'Artificial Intelligence in Law: An Overview' (2017) 139 *Precedent* 35, 38.

16 Tony Nolan, 'Reform of Discovery in the 21st Century' (2017) 142 *Precedent* 20, 24. See, e.g.: *AI in Victoria's Courts and Tribunals* (n 2) 41, citing 'Nuix Discover Technology', *Nuix* (Web Page, 2024) <https://www.nuix.com/technology/nuixdiscover>; Relativity ODA LLC, 'Relativity — eDiscovery & Legal Search Software Solutions', *Relativity* (Web Page, 2024) <https://www.relativity.com/>; 'Intellidact AI Data Redaction', *Computing Systems Innovations* (Web Page, 2022) <https://csisoft.com/intellidact/>.

17 See, e.g.: David Benson, 'What is Technology Assisted Review and How Should It Be Used in Modern Discovery?', *Clayton Utz* (Blog Post, 24 July 2023) <https://www.claytonutz.com/insights/2023/july/what-is-technology-assisted-review-and-how-should-it-be-used-in-modern-discovery>; Luke Hastings, Andrew Eastwood and David Grainger, 'One Giant Leap for E-Discovery: Predictive Coding Approved by Australian Court', *Herbert Smith Freehills Kramer* (Blog Post, 6 December 2016) <https://www.hsfkramer.com/insights/2016-12/one-giant-leap-for-e-discovery-predictive-coding-approved-by-australian-court>.

TAR technologies.[18] As TAR software becomes cheaper and lawyers become more familiar with its use, its prevalence within the Australian legal industry is only expected to increase. Hence, examination of its compatibility with rules of civil procedure is paramount.

III Discovery Obligations under the *UCR*

A *Direct Obligations*

Subject to court order or unanimous agreement amongst parties,[19] r 73 of the *UCR* imposes a positive obligation on litigious parties to 'make discovery of discoverable documents that are or were in their possession, custody or power'[20] by filing and serving a list of documents[21] within 28 days after the close of pleadings.[22] For the purposes of the general discovery obligation, '[a] document is a discoverable document … if it is *directly relevant* to an issue raised in the proceeding' as determined by reference to pleadings (if filed).[23] Courts retain the discretion to modify that discovery obligation, including by ordering discovery by category or specific discovery.[24]

B *Indirect Obligations*

The discovery obligations contained in *UCR* r 73 import the broader ethical obligations applicable to parties and lawyers pursuant to r 3.1.[25] Most relevantly, this includes the obligations to: (1) 'act honestly'[26] and 'not engage in misleading conduct';[27] (2) use reasonable endeavours to 'ensure that the time and costs incurred

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18 'MinterEllison Shortlisted in Six Categories at FT Innovative Lawyers Awards Asia-Pacific', *MinterEllison* (Blog Post, 6 April 2025) <https://www.minterellison.com/articles/minterellison-shortlisted-at-ft-innovative-lawyers-awards>.

19 *UCR* (n 4) r 73.7(1).

20 Ibid r 73.7(2).

21 Ibid rr 73.2–3 and in accordance with Forms 73A–73C.

22 *UCR* (n 4) r 73.7(4).

23 Ibid r 73.7(5) (emphasis added). Absent pleadings, relevance is assessed by reference to the originating application: *Bellara Aged Care Village Pty Ltd v Serafini* [2024] SASC 101, [5] (McIntyre J) ('*Bellara*'), citing *Ryan v Light Regional Council* [2020] SAERDC 45, [27] (Judge Burnett) ('*Ryan*').

24 *UCR* (n 4) rr 73.8–9.

25 Bell and Legg (n 1); Castles, Henderson and Hewitt (n 3) 40 [2.145], 199 [7.165]. See also *Clone Pty Ltd v Players Pty Ltd (in liq)* (2016) 127 SASR 1, 45–6 [214]–[216] (Blue J, Stanley J agreeing) ('*Clone v Players*').

26 *UCR* (n 4) r 3.1(1)(a). See also: Law Society of South Australia, *South Australian Legal Practitioners Conduct Rules 2011* (at 10 June 2025) r 4.1.2 ('*SALPCR*'); Law Council of Australia, *Australian Solicitors' Conduct Rules 2021* (at 10 June 2025) r 4.1.2 ('*ASCR*').

27 *UCR* (n 4) r 3.1(1)(b). See also: *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

are reasonable and proportionate'[28] and 'minimise delay';[29] and, in respect of practitioners, (3) 'deliver legal services competently' and 'diligently'.[30] Part IV analyses the compatibility of the use of TAR tools with the requirements of each of those three obligations in relation to discovery.

IV Compatibility of TAR and Discovery Obligations in South Australia

This Part considers whether the use of TAR in discovery breaches any of the obligations identified in Part III. The direct obligation of parties and practitioners to disclose all discoverable documents will be considered together with practitioners' obligation to ensure legal services are delivered competently, since persons utilising TAR will only meet their direct discovery obligation if the relevant TAR tool is accurate (i.e. 'competent'). It is noted that the use of TAR does not affect the initial collection of potentially discoverable documents for review. Parties' and practitioners' enduring obligation to 'file and serve a revised list of documents' should they become aware that a discoverable document has not been disclosed also remains unaffected by the use of TAR.[31] Those two considerations are thus beyond the scope of this comment.

A *Competence and Diligence*

Practitioners who review documents on behalf of a client for the purposes of discovery are delivering a 'legal service'. The relevant Conduct Rules therefore require that service to be delivered competently and diligently.[32] It follows that practitioners must only rely on the intelligence of another person (or entity) insofar as they are (or it is) competent to complete the relevant task. That requirement applies equally to reliance on *human* and *artificial* intelligence.

Classification of documents for discovery often involves the application of highly technical principles, requiring considered professional judgement.[33] Practitioners' reliance on their practice instincts is particularly heightened in circumstances where, in the absence of pleadings, documents' future relevance must be predicted

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28 *UCR* (n 4) r 3.1(h). See also: *SALPCR* (n 26) r 4.1.3; *ASCR* (n 26) r 4.1.3.

29 *UCR* (n 4) r 3.1(k). See also: *SALPCR* (n 26) r 4.1.3; *ASCR* (n 26) r 4.1.3.

30 *SALPCR* (n 26) r 4.1.2; *ASCR* (n 26) r 4.1.2.

31 *UCR* (n 4) r 73.10.

32 *SALPCR* (n 26) r 4.1.2; *ASCR* (n 26) r 4.1.2. Note that unless otherwise specified, 'Conduct Rules' refers to SALPCR (n 26) and ASCR (n 26).

33 See, e.g.: *Quenchy Crusta Sales Pty Ltd v Logi-Tech Pty Ltd* (2002) 223 LSJS 266; *Rehn v Australian Football League* (2003) 227 LSJS 378; *Channel Seven Adelaide Pty Ltd v Lane* (2004) 234 LSJS 225; *Harris Scarfe Ltd (in liq) v Ernst & Young (No 4)* (2005) 93 SASR 300; *Morgan v Workcover Corporation* [2006] SADC 80; *Jennings v Idameneo (No 123) Pty Ltd* [2008] SASC 341.

by reference to the originating application.[34] Nonetheless, empirical research has shown that compared to manual review and classification by practitioners, the use of TAR software produces more precise and accurate results.[35] The risk of human error in the traditional manual review process should not be understated. That risk does not inhere in TAR tools except to the extent that human error is coded into the training process through misclassifications by the seed set reviewer. In that respect, an advantage of TAR is that the informed judgement of experienced senior practitioners can be extrapolated across the document set, so firms are not reliant on the judgement of junior (and less experienced) practitioners. Hence, to the extent that practitioners can rely on the work of other practitioners in the competent and diligent provision of legal services relating to discovery, they can also rely on AI-based TAR software.

The caveat is that scholarship also indicates that at least some TAR tools either do not work, or work less effectively, on certain classes of documents, such as 'old hard copies',[36] 'diagrams',[37] 'drawings',[38] and 'spreadsheets'.[39] Practitioners must therefore verify the competence of TAR technologies to accurately code those types of documents. The TAR 'training' stage provides a mechanism by which practitioners can make that assessment; training should continue until a particular accuracy confidence threshold is reached. So long as a practitioner has taken steps to verify the competence of a TAR tool, it is likely that this obligation would be satisfied.

B *Honesty and Not Misleading the Court*

UCR rr 3.1(1)(a) and 3.1(1)(b) jointly require parties and practitioners to act honestly and not engage in misleading conduct.[40] The Conduct Rules additionally require

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34 *Bellara* (n 23) [5] (McIntyre J), citing *Ryan* (n 23) [27] (Judge Burnett).

35 Maura R Grossman and Gordon V Cormack, 'Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review' (2011) 17(3) *Richmond Journal of Law and Technology* 11:1–48, 4. See also: Caruso, Legg and Phoustanis (n 9) 169; Elliott Cook, 'Blue Skies Still Ahead: A Retrospective and Prospective Look at Technology in the Legal Profession' (2021) 25(2) *Journal of Law, Information and Science* 176, 182; *Da Silva Moore v Publicis Groupe*, 287 FRD 182, 190 (SD NY, 2012) ('*Da Silva Moore*'), citing Herbert Roitblatt, Anne Kershaw and Patrick Oot, 'Document Categorization in Legal Electronic Discovery: Computer Classification vs Manual Review' (2010) 61 *Journal of the American Society for Information, Science and Technology* 70, 79; *Irish Bank Corporation Ltd v Quinn* [2015] IEHC 175, [12]–[48] ('*Irish Bank Corporation*').

36 Cashman and Ginnivan (n 9) 67.

37 Ibid.

38 Ibid.

39 Ibid; *Money Max International Pty Ltd v QBE Insurance Group Ltd* (2018) 358 ALR 382, 418 [166] (Murphy J) ('*Money Max*').

40 *UCR* (n 4) rr 3.1(1)(a)–(b). For practitioners, see also: *SALPCR* (n 26) r 4.1.2; *ASCR* (n 26) r 4.1.2.

practitioners not to 'deceive or knowingly or recklessly mislead the court'.[41] These obligations apply equally in the discovery process.[42] The analysis in this sub-part is confined to formal discovery processes wherein parties provide documents to practitioners for review and classification.[43]

1 *Parties' Obligations*

Parties' involvement in such a process is not affected by the use of TAR. Their obligations to *honestly* provide their lawyers with: (1) all possibly relevant documents in their possession, custody or power;[44] (2) information about documents that used to be in their possession, custody or power;[45] (3) documents which come into their possession, custody or power[46] after a consolidated list of documents has been filed; and (4) instructions to the same effect,[47] remain unchanged by practitioners' use of TAR.

2 *Practitioners' Obligations*

Conversely, lawyers' obligations are impacted. It is trite to observe that practitioners must not intentionally exclude relevant documents — to do so would squarely contravene the obligation not to 'deceive or knowingly … mislead the court'.[48] That is particularly pertinent for the filing practitioner, who must certify that 'to the best of [their] knowledge or belief the client has fully discharged the client's discovery obligations'.[49] It follows that practitioners must not deliberately 'train' TAR software to exclude certain types of documents. To do so would be analogous to instructing a junior practitioner not to disclose a discoverable document.

The question of whether inadvertent non-disclosure due to the failure of TAR software to identify one or more relevant documents amounts to a breach is more complex. Such a scenario would not contravene the obligation not to 'deceive or knowingly … mislead the court', since both 'deceive' and 'knowingly mislead' entail

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41 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

42 See, e.g., *Clone v Players* (n 25) 45–6 [214]–[216].

43 It is noted that self-represented litigants are unlikely to use TAR due to the typical scope of their matters and the comparative cost of TAR software. In-house counsel using TAR are subject to the same obligations as other practitioners.

44 *UCR* (n 4) rr 73.1 (definition of 'discovery by category', definition of 'general discovery', definition of 'specific discovery'), 73.2(a), 73.3(2)(a)–(b), 73.7(3).

45 Ibid r 73.3(2)(c).

46 Ibid r 73.10.

47 For the purposes of the filing lawyers' certification of the list of documents prescribed by Forms 73A–73C: ibid r 73.3(6).

48 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

49 As prescribed by Forms 73A–73C: *UCR* (n 4) r 73.3(6). Courts may also order practitioners to verify a list of documents on oath: r 73.14(2)(k).

actual knowledge of the existence of the non-disclosed document(s).[50] Hence, the question is this: can inadvertent non-disclosure due to TAR amount to 'recklessly' misleading the court?

A practitioner will breach their ethical obligations if they are recklessly indifferent 'as to the truth or falsity' of a statement or representation.[51] The term 'reckless' invokes standards of professional conduct. A practitioner can be shown to be recklessly indifferent if they do not take *reasonable* steps — assessed by reference to professional standards — to verify that their discovery process has produced accurate results.[52]

The use of TAR technology has been judicially approved as a permissible tool for use in litigation in Australia[53] and internationally.[54] The Supreme Court of Victoria has issued a practice note stating that 'technology assisted review will ordinarily be an accepted method of conducting a reasonable search in accordance with the Rules of Court' and that 'the Court may order discovery by technology assisted review, whether or not it is consented to'.[55] In *Jenkins Sh v Australian Council for the Arts*, the respondent's submission that the discovery sought by the applicant was oppressive or disproportionate was rejected due to the availability of TAR tools,

50 *Macquarie Dictionary* (online at 10 June 2025) 'deceive' (def 1), 'knowingly' (def 3). See also the discussion of what amounts to 'misleading' conduct in *Clone v Players* (n 25) 45–6 [214]–[216].

51 *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115, [130] (Edelman JA); *LP 202012 v Council of the Law Society of the ACT* [2024] ACAT 12, [178] (McCarthy P).

52 *Prothonotary of the Supreme Court of New South Wales v McCaffery* [2004] NSWCA 470, [53] (McColl JA), citing *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 199–200 [22] (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ); *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108, [100]–[102] (Martin CJ, Newnes and Murphy JJA).

53 The use of TAR was first approved in Australia by Vickery J in *McConnell Dowell* (n 9). See also: *Money Max* (n 39); *McConnell Dowell Constructors (Aust) Pty Ltd v Santam (No 2)* [2017] VSC 640; *Cantor v Audi Australia Pty Ltd (No 3)* [2017] FCA 1079; *Peterson Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 2)* [2017] FCA 1231; *Parbery v QNI Metals Pty Ltd* (2018) 358 ALR 88; *ViiV* (n 9); *Queensland Motorways Pty Ltd v CPB Contractors Pty Ltd* [2023] QSC 107; *Bogan v Estate of Peter John Smedley* [2023] VSC 105.

54 In the United States, see, e.g.: *Rio Tinto Plc v Vale SA*, 306 FRD 125 (SD NY, 2015); *Da Silva Moore* (n 35). In the United Kingdom, see, e.g.: *Pyrrho* (n 9); *Brown v BCA Trading Ltd* [2016] EWHC 1464 (Ch) ('*Brown*'). In Ireland, see *Irish Bank Corporation* (n 35). In New Zealand, see *White* (n 9).

55 Supreme Court of Victoria, *Practice Note SC Gen 5: Technology in Civil Litigation*, 29 June 2018, [8.7]. Further, the Federal Court of Australia website indicates that parties should collectively consider the use of TAR prior to the first case management hearing: 'Litigation Using Electronic Discovery', *Federal Court of Australia* (Web Page) <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-tech/electronic-discovery>.

reflecting the pragmatic approach adopted by the judiciary.[56] Hence, the responsible use of TAR falls — and is even encouraged — under modern professional standards.

Practitioners may therefore discharge their burden to take reasonable steps to verify the accuracy of TAR results by critically evaluating the appropriateness and precision of the software in each case, including by repeating the 'training' process until the TAR program is consistently highly accurate. A necessary precursor is that practitioners must possess a sufficient understanding of the operation of TAR software and should seek out professional education on the technology before utilising it. In complex cases, it may be appropriate to engage an e-discovery expert for those purposes.[57] Having taken those steps, a practitioner may still inadvertently mislead the court if the TAR software erroneously excludes a relevant document, but the practitioner will not have done so 'knowingly or recklessly'.[58] Therefore, the practitioner will not have breached their ethical obligation under r 19.1 of the relevant Conduct Rules.[59]

C *Delay and Expense*

Parties and practitioners are required to use reasonable endeavours to 'ensure that the time and costs incurred [in proceedings] are reasonable and proportionate'[60] and to 'minimise delay'.[61] Discovery is a notoriously time-consuming and expensive process.[62] Scholars observe that discovery 'is often the most expensive … step' in litigation[63] and that 'the objectives of the [discovery] process are either not being achieved or can only be achieved at great cost'.[64] For that reason, '[t]he commercial realities of discovery … represent a significant barrier to justice for many litigants'.[65]

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56 [2024] FCA 309, [11] (Horan J).

57 See, e.g.: *McConnell Dowell* (n 9); *White* (n 9).

58 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

59 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

60 *UCR* (n 4) r 3.1(1)(h).

61 Ibid r 3.1(1)(k). For practitioners see also: *SALPCR* (n 26) r 4.1.3; *ASCR* (n 26) r 4.1.3.

62 Nolan (n 16) 24; Cashman and Ginnivan (n 9) 65; Toy-Cronin et al (n 3) 116, citing Danya Shocair Reda, 'The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions' (2012) 90(4) *Oregon Law Review* 1085.

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

64 Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) 434. See also James Spigelman, 'Access to Justice and Access to Lawyers' (2007) 29(2) *Australian Bar Review* 136.

65 Australian Law Reform Commission (n 2) 67.

TAR is often significantly less expensive and time-consuming than manual review,[66] notwithstanding the additional expenses incurred in disputes over its application or in retaining e-discovery experts.[67] In *Da Silva Moore v Publicis Groupe*, it was observed that

> "technology-assisted reviews require, on average, human review of only 1.9% of the documents, a fifty-fold savings over manual review," thus establishing significant cost savings with TAR over manual review.[68]

Writing extracurially, Vickery J of the Supreme Court of Victoria estimated that the expense of TAR is 'one fifth of the cost' of manual review.[69] In that context, it is arguable that parties and practitioners have an ethical obligation to elect to use TAR where it would be cheaper and faster than manual review.[70] Such an interpretation of the obligations contained in rr 3.1(1)(h) and 3.1(1)(k) coheres with the overarching object of the *UCR*, being 'to facilitate the just, efficient, timely, cost-effective and proportionate resolution or determination of the issues in proceedings'.[71] Furthermore, the cost of litigation continues to impede access to justice.[72] The labour intensity of legal work, including discovery processes, has been identified as one of the drivers of high legal costs.[73] It follows that widespread adoption of TAR for discovery could improve access to justice insofar as it reduces litigation expenses.

66 Caruso, Legg and Phoustanis (n 9) 169; Peter Cashman and Amelia Simpson, 'Costs and Funding Commissions in Class Actions' (Class Actions Research Paper No 5, University of New South Wales Law, 11 December 2020) 35, citing Erick Gunawan and Tom Pritchards, 'Technology Assisted Review' (Research Paper, Law Institute of Victoria, 24 November 2017) 1; Cook (n 35) 186–7; Nolan (n 16) 2–3; Bennett Moses (n 8) 30.

67 Nolan (n 16) 24; *McConnell Dowell* (n 9) 424 [10], 427 [23]; Frank Pasquale and Glyn Cashwell, 'Four Futures of Legal Automation' (2015) 63 *UCLA Law Review Discourse* 26, 41.

68 *Da Silva Moore* (n 35) 190, citing Grossman and Cormack (n 35) 43.

69 Peter Vickery, 'New Horizons for the Bar in the Age of Technology' (Conference Paper, Australian Bar Association Conference, 7 July 2017) 17.

70 Clive Freedman, 'Technology Assisted Review Approved for Use in English High Court Litigation' (2016) 13 *Digital Evidence and Electronic Signature Law Review* 139, 141, referring to *Brown* (n 54) and *Pyrrho* (n 9). See also *Golden Vision Gold Coast Pty Ltd v Orchid Avenue Pty Ltd* [2022] QSC 49, [50] (Ryan J).

71 *UCR* (n 4) r 1.5.

72 Michael Duffy, Andrew Coleman and Matt Nichol, 'Mapping Changes in the Access to Civil Justice of Average Australians: An Analysis and Empirical Survey' (2021) 42(1) *Adelaide Law Review* 293, 303.

73 Ibid, citing Chief Justice Wayne Martin, 'Access to Justice' (2014) 16(1) *University of Notre Dame Australia Law Review* 1, 5.

V Conclusion

This comment has established that parties and practitioners who understand, critically evaluate, and responsibly use TAR in discovery do not contravene r 73 of the *UCR* or the ethical obligations that rule imports. Conversely, where TAR is more efficient than manual review, there may be an ethical obligation to adopt the former approach. It has been observed that 'in almost all studies of litigation, discovery is singled out as the procedure most open to abuse'.[74] Because the discovery process is opaque to counterparties and it is difficult to establish breach of a discovery obligation,[75] compliance 'depends on ethical self-management'.[76] To that end, notwithstanding the conclusion reached in this comment, practitioners and parties alike should continuously self-reflect on whether their use of TAR tools coheres with their broader civil litigation obligations.

74 Australian Law Reform Commission (n 2) 431 [6.67].

75 A party filing a list of documents is presumed to have discharged its discovery obligation; the onus falls upon the party seeking further discovery to displace that presumption: *Betterway Health Care International Group Pty Ltd v Ferngrove Pharmaceuticals Pty Ltd* [2023] SADC 107, [48] (Judge Slattery).

76 Castles, Henderson and Hewitt (n 3) 199 [7.165].