



Understanding E-Discovery

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Today

- **Introduction**

- Your Presenter
- Your Presentation

- **Civil Litigation and Discovery**

- **Electronic Discovery**

- Definition
- Practice Guidelines (Notes and Directions)
- Electronic Discovery Reference Model (EDRM) Workflow
 - Information Management
 - Identification
 - Preservation and Collection
 - Processing, Analysis and Review
 - Production and Presentation

Your Presenter

Seamus E. Byrne

- Lawyer and Computer Forensics Expert (CISSP, CCE, EnCE)
- E-Discovery advisor to a number of S&P/ASX 200 companies
- Co-Author, LexisNexis *Federal Civil Litigation Precedents*
- Contributor, Federal Court of Australia's revised Practice Note 17
- HP 'Information Hero' for E-Discovery

Your Presentation

HP TRIM User Forum 22

- **Coverage**

- Discovery and Electronic Discovery
- Guiding Principles and Best Practice

- **Primary Audience**

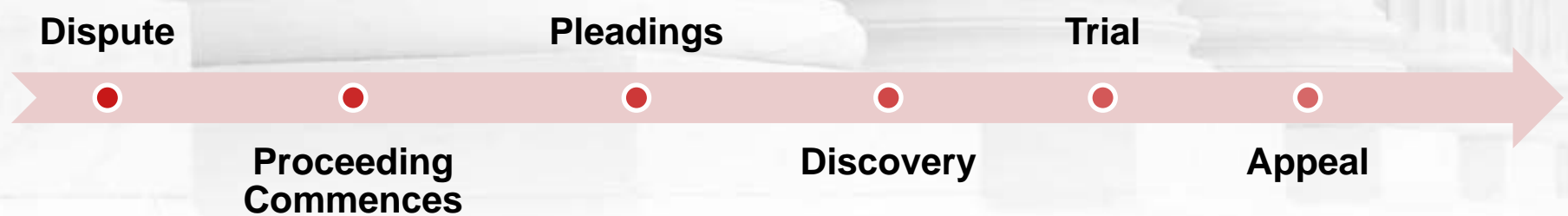
- Information Management Professionals

- **Key Themes**

- Recent **changes** to the **Australian e-discovery landscape**
- **Opportunities** to deliver **proactive support** within your organisation

Civil Litigation

Overview



- **Dispute arises** between two or more parties based on fact and/or law
- **Proceeding commences** by the **plaintiff** preparing, filing and serving a '**claim**'
- Upon service, the **defendant** makes an '**appearance**' which signals their intention to contest the claim
- **Pleadings** endeavour to settle undisputed matters by refining the **plaintiff's claim** and the **defendant's defence** (often over the course of multiple 'replies')
- **Pleadings focus the dispute**, and consequently, **the scope of any discovery**
- **Discovery** includes "*the disclosure, and subject to privilege, inspection of an opponent's documents*" ([Cairns, 2007](#))

Civil Litigation

Key Trends

- Volatile **economic climate**
- Increased **regulator activity**
- Rise of shareholder and investor **class actions**
- Continued shift towards **alternative dispute resolution (ADR)**
- Exposure to **litigation is a reality** for many organisations
- Defined as a '**contingent liability**' and exposure is not readily disclosed
- In 2007-08, the Commonwealth Government spent **A\$510M** on legal services
- **Discovery is still the most time and cost intensive litigation process**

Electronic Evidence

Historical Perspective

- Almost all of civilisation has relied upon physical information storage
- **Document** (*documentum* = proof)
 - Basic unit of **information storage**
 - **Information** may form a **document**
 - **Select documents** may form a **record**
- **Late 19th Century**
 - Second industrial revolution
 - Typewriters, carbon paper and filing cabinets
- **Today**
 - 98% of corporate documents are stored electronically
 - Most are never printed!

Electronic Evidence

Electronically Stored Information (ESI)

▪ Ever-Increasing in Volume

- What size was the hard drive in your first computer? (e.g. 10MB or 10GB)
- Today, you can purchase a 1TB (1000GB) hard drive for under AUD\$150
- Printing 1TB of electronic documents requires 50,000 trees of paper!

▪ Dynamic

- The content of an electronic document can change over time

▪ Deletion

- Routine system administration processes (e.g. [Disk Cleanup](#)) can delete or overwrite electronic documents without human intervention

▪ Distributed Storage

- If I send you an e-mail, in how many geographic and electronic locations will the e-mail be synchronised and stored to?

Electronic Evidence

Technical Introduction – Metadata

- Metadata is the **primary difference** between an electronic document in its native, electronic form and the same document printed to paper

Microsoft Word Document

- Formatting
- Text
- **Metadata**
 - Title
 - Author
 - Date Created
 - Date Last Saved and Last Saved By
 - Date Last Printed
 - Track Changes (Comments, Revisions)

E-mail Message

- Formatting
- Text
- **Metadata**
 - Sender
 - Recipients (To, CC, BCC)
 - Subject
 - Sent Date and Time
 - Attachment Information

Electronic Evidence

Technical Introduction – Electronic Formats

- The **same electronic document** can be produced in **multiple formats**

Native, Electronic Format

- **Native Format**
 - Microsoft Excel spreadsheet as 'XLS'
- **Searchable Text**
 - Typically searchable by default
- **Metadata**
 - Available, unless removed

Electronic Image

- **Image Representation**
 - Paper
 - Electronic
- **Common Formats**
 - Portable Document Format (**PDF**)
 - Tagged Image File Format (**TIFF**)
- **Searchable Text**
 - Can be made searchable
- **Metadata**
 - Complete metadata may not be available

- Formats vary for electronic databases, complex and proprietary file types

Electronic Evidence

Technical Introduction – Storage and Deletion

- A **file system** is used to store, organise and retrieve data (i.e. ESI) on a **storage media** (e.g. hard drive)
- A file system commonly references data using an **index table**
- The **index table** contains a **directory listing** for **each active data file** (i.e.accessible, not deleted), to reference the location of the data file on the storage media
- **When a data file is deleted**, only the directory listing for the data file is generally deleted, and not the actual data file itself
- Dependent on a number of variables, the ‘deleted’ data file **may be recovered**
- In contrast, **secure deletion** or **overwriting** endeavours to permanently delete both the directory listing and the actual data file, making any data recovery process difficult, if not impossible

Electronic Evidence

Legal Interpretation

- **Evidence Act 1995** (Cth) (*Dictionary, Pt 1; Pt 2, Cl 8*)
 - “**Document** means any record of information, and includes... **anything from which sounds, images or writings can be reproduced with or without the aid of anything else**”
 - Includes any **part, copy, reproduction** or **duplicate** of a document
 - Definition adopted by a number of Australian jurisdictions under the Uniform Evidence Law
- **Federal Court Rules** (O 1, r 4)
 - Commonwealth Evidence Act definition, and expressly includes:
 - **Any ...data or information stored or recorded by ...electronic means**

Electronic Evidence

Legal Interpretation – Relevant Case Law

- **The electronic storage medium is also a ‘document’**
 - ***Sony Music Entertainment v University of Tasmania*** [\[2003\] FCA 532](#)
 - *"Electronic records, such as computer files and CD-ROMs have been the subject of discovery orders in this Court"*

- **Metadata is ‘part’ of a ‘document’**
 - ***Jarra Creek Central Packing Shed v Amcor*** [\[2006\] FCA 1802](#)
 - *"It is clear that embedded electronic information in relation to relevant documents, including the information embodied in electronic metadata, is discoverable"*

Electronic Evidence

Evidentiary Considerations

- **Chain of Custody and Evidence Copies**
 - Manage in a documented manner without (or with minimal) alteration
 - Take appropriate evidence management procedures, including physical security
- **Expert Opinion and Testimony**
 - May require specialist expertise not readily possessed by in-house IT personnel
- **Best Practice**
 - *Guidelines for the Management of IT Evidence* (HB171-2003), Standards Australia

Electronic Discovery

Definition

- **Traditional Electronic Discovery**
 - **Conversion** of paper documents into an electronic format for production
- **Modern Electronic Discovery**
 - **Management** of electronic documents in an electronic format for production
- **Today = Transitional Phase**

Electronic Discovery

Practice Guidelines (Notes and Directions)

| Jurisdiction | Practice Guideline | Mandated? |
|---|---|--------------------------|
| Federal Court of Australia | <u>PN 17 (2009)</u> | Yes, 200+ |
| Supreme Court of New South Wales General Equity Division (Select Lists) | <u>PN SC Gen 7 (2008)</u> <u>PN SC Eq 3 (2008)</u> | No, 500+ Yes, All ESI |
| Supreme Court of Victoria | <u>PN 1 (2007)</u> | No, 500+ |
| Supreme Court of South Australia | <u>PD 2.1 (2006)</u> | No, 500+ |
| Supreme Court of Queensland | <u>PD 8 (2004)</u> | No, 500+ |
| Supreme Court of the Northern Territory | <u>PD 2 (2002)</u> | No, 500+ |

- The Supreme Courts of Western Australia, Tasmania and the ACT are yet to formally release similar practice guidelines

Electronic Discovery

Revised Federal Court of Australia PN 17, Visual Guide

- **Subject to Court's discretion**, the Practice Note applies at discovery and trial where there is likely to be over 200 electronic documents
- **DOES** focus the attention of parties to discovery at the earliest opportunity
- **DOES** provide a framework for parties to agree upon and manage discovery
- **DOES NOT** impose new discovery obligations, **but re-emphasises:**
 - Need for parties to preserve discoverable electronic documents
 - Performance of a reasonable search per existing [Court Rules](#) and [PN 14](#)

Electronic Discovery

Revised Federal Court of Australia PN 17

- Court **may order** Pre-Discovery Conference (**PDC**)
 - Parties 'meet and confer'
 - Parties may appoint an expert to assist
 - Reference the Pre-Discovery Conference Checklist (**PDCC**)
 - Parties endeavour to provide Court with mutually acceptable Discovery Plan
- Court **may then order** parties to give discovery
- Please refer to [Visual Guide to Practice Note 17](#)

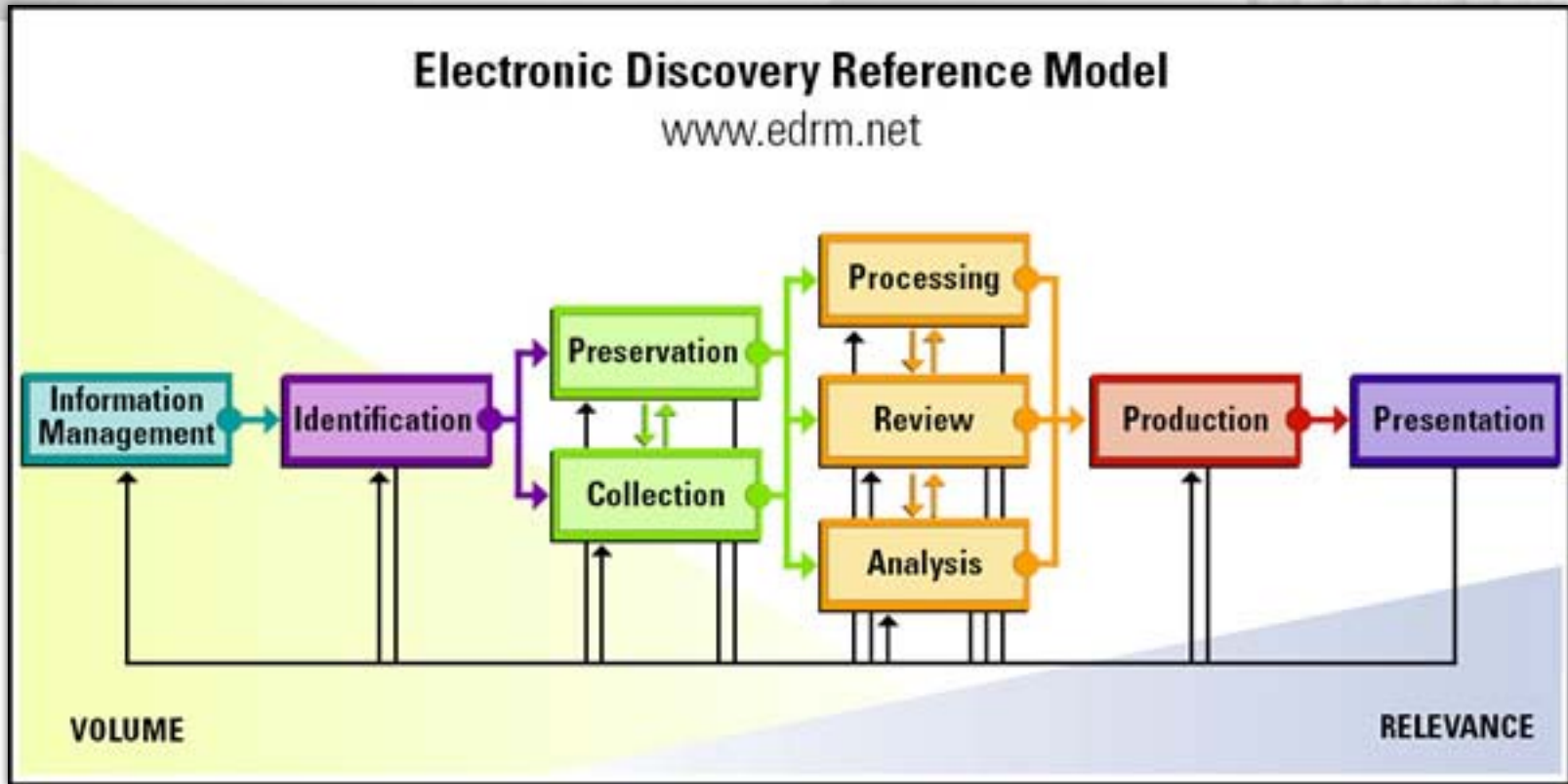
Electronic Discovery

Revised Federal Court of Australia PN 17 – Pre-Discovery Conference

| Issue | Key Outcome |
|--------------------|---|
| Scope of Discovery | •Mapping pleadings to discoverable documents |
| Reasonable Search | •Planning a reasonable search for discoverable documents •Identifying reasonably inaccessible documents |
| Preservation | • Preservation strategy for 'potentially discoverable' documents before, during and after discovery |
| Time and Cost | •Understand the time and cost implications of discovery • Production schedule for discoverable documents |
| Privilege | •Agreement on privilege management |
| Document Exchange | •Default, Advanced or Agreed DMP |
| Areas of Dispute | • Are there any unresolved issues? |

Electronic Discovery

EDRM Workflow



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See also: [EDRM Evergreen Project \(2008-2009\)](#)

Electronic Discovery

Information Management

- If your '**electronic house**' is not in order, the potential to appropriately manage litigation is **significantly reduced**
- **There is no need to keep everything!**
- The Court understands **proportionality**, provided you can **justify your retention and destruction actions**
- Ensure that the majority of your electronic documents are reasonably accessible – and know what it would take to access the rest
- **Proactive information management practices** act as a measure of good corporate governance and risk mitigation

Electronic Discovery

Information Management – Proactive Strategy

- Concise and Relevant **Document Retention Policy (DRP)**
- Employee **Training**
- Appropriate **Technology Infrastructure** (Implementation or Upgrade)
- Appropriate **Technology Documentation** (Network and Storage)
- **Regular Compliance Reviews**
- 'E-Discovery **Champions**' (RM, IT, Legal and Risk)
- **Litigation Notice Checklist** and '**Legal Hold**' Procedure
- **Preferred Suppliers** (External Consultants and Service Providers)

Electronic Discovery

Information Management – Document Retention and Destruction

- 80+ pieces of legislation impose retention (and destruction) obligations
- **Retention** obligations typically rise from **contract** and **legislation**
 - **Financial and business records** (7 years+)
 - *Corporations Act 2001* (Cth) ss 286, 1306-7
 - *Financial Transactions Report Act 1988* (Cth) s 23
 - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
 - **Tax records** (5 years+)
 - *Income Tax Assessment Act 1936* (Cth) s 262A, [Tax Ruling TR 2005/9](#)
 - **Product liability** (11 years~)
 - *Trade Practices Act 1974* (Cth) s 75AO
 - **Government commerce**
 - *Electronic Transactions Act 1999* (Cth) and State-level equivalents
 - **Personal information**
 - *Privacy Act 1988* (Cth), including 2001 private sector amendments
- Also consider **relevant limitations legislation** (6 years~)
 - e.g. *Limitation Act 1969* (NSW)

Electronic Discovery

Information Management – Document Destruction

- **Current Australian common law test**
 - *McCabe* [\[2002\] VSC 73](#); [\[2002\] VSCA 197](#)
 - The Court may **draw adverse inferences** or **impose severe sanctions**
 - Sanctions will typically apply where the conduct of document destruction is prejudicial to another party and amounts to an attempt to pervert the course of justice (or contempt of court)
- **Victorian legislative response**
 - *Crimes (Document Destruction) Act 2006 (Vic)*
 - *Evidence (Document Unavailability) Act 2006 (Vic)**

Electronic Discovery

Westraint Resources v BHP Iron Ore (No 4) [2009] WASC 17

- Highlights the critical relationship between the business process of information management, and the legal process of discovery
- Westraint requested order for further discovery of particular documents
- BHPIO successfully persuaded the Court **against such an order**
 - Filed multiple affidavits outlining extensive searches made for discoverable documents
 - Made extensive documented enquiries to current and former personnel, within multiple departments and jurisdictions
 - BHPIO's Records Manager and external legal counsel collaborated to undertake additional searches

Electronic Discovery

BT v State of New South Wales & Anor [1998] FCA 363

- Your organisation must diligently manage their electronic documents – or else!
- Failure to adequately disclose your information management practices in a timely manner may lead to more onerous discovery obligations

Electronic Discovery

C7 'Mega-Litigation'

▪ Evidence of News Limited General Counsel

- Outlined personal 'print or delete' retention policy
- Backups of deleted e-mails were retained for three (3) days only
- Only produced 50 relevant internal e-mails for the five (5) year period
- Admitted to destroying relevant handwritten faxes

Electronic Discovery

C7 'Mega-Litigation'

■ In Court

- News Limited (Hutley SC): *“What policy should a commercial organisation in the early 21st century, with the ubiquity of e-mails, adopt?”*
- Sackville J: *“Keep them, or don’t engage in a systematic process of removal of them so that in a case like this the end result is that ... as far as the trier of fact is concerned, I simply don’t know what the contemporaneous communications were within News [Limited]”*

■ Judgment

- *“[General Counsel’s] actions show that he was perfectly prepared to destroy documents he considered to be detrimental to his interests or to those of News”*
- *“Deliberately dishonest conduct”*
- Sackville J ordered a copy of the judgment to be given to the Law Society of NSW
 - *Legal Profession Regulation 2005 (NSW) [Reg 177](#)*
 - No public findings released by Office of Legal Services Commissioner as at March 2009

Electronic Discovery

Identification – Federal Court Guidance

Order 15, rule 2(5) provides the matter-specific variables a party may consider in 'making a reasonable search':

- (a) the nature and complexity of the proceedings; and*
- (b) the number of documents involved; and*
- (c) the ease and cost of retrieving a document; and*
- (d) the significance of any document likely to be found; and*
- (e) any other relevant matter.*

Order 15, rule 2(6)

If the party does not search for a category or class of document, the party must include in the list of documents a statement of the category or class of document not searched for and the reason why.

Electronic Discovery

Galati v Potato Marketing Corporation [2007] FCA 919

- The CEO of the Potato Marketing Corporation advised that the party had **not undertaken a search** due to the burden arguably imposed by searching approximately 100,000 documents
- The CEO advised that he believed a search for those documents would be "*very onerous, time consuming and expensive*"
- Due to the apparent admission that no reasonable search had been performed, and that the categories of documents likely to be discovered were of significance, **the Court ordered further discovery by the Potato Marketing Corporation**
- A '**reasonable search**' varies upon circumstances and an organisation is best positioned to proactively seek external expertise if they consider discovery to be burdensome

Electronic Discovery

Slick v Westpac (No 2) [2006] FCA 1712

- Parties gave discovery
- During the relevant time, Quadrant only discovered a very small number of e-mails and no electronic calendar entries
- Quadrant had upgraded their technology infrastructure, including e-mail server, during the relevant time
- Unfortunately, Quadrant's CFO, as representative, was **unable to explain their searches and clarify the impact of the migration on their electronic documents**, specifically whether any documents could have been potentially deleted or no longer reasonably accessible as part of the process

Electronic Discovery

Leighton Contractors v Public Transport Authority [2007] WASC 65

- Reaffirmed the *NT Power* principle that the burden of discovery must be **proportionate** to the potential value of the electronic documents sought
- Time, cost and inconvenience are to be considered **in the context** of the litigation and financial resources available to the party
- The burden and obligation of discovery is **greater for a large organisation** due to the volume of electronic documents they manage
- Whilst discovery for a large corporation **may be onerous**, proportionality should ensure that it is **not oppressive**

Electronic Discovery

Identification - Types

- Legal counsel to consult with RM, IT and external experts (as required) to assist in identifying sources of 'potentially discoverable' ESI
- Includes, but is not limited to:
 - E-mails
 - Documents
 - Spreadsheets
 - Databases
 - Presentations
 - Images
 - Logs (e.g. Activity, Transaction, Instant Messaging)
 - Audio (e.g. Voicemail)
 - Video

Electronic Discovery

Identification - Sources

Common ESI Sources

Personal Computers

- Desktop
- Notebook

Computer Servers

- File Servers
- E-mail Servers
- Fax Servers
- Remote Access Servers

Archival Storage

- Network Attached Storage (NAS)

Backup Storage

- Tape Backups

Potential ESI Sources

Communication Devices

- Mobile Phones and BlackBerry
- Personal Digital Assistants (PDAs)

Consumer Devices

- iPod/MP3 Players
- Digital Cameras
- Digital Voice Recorders

Portable and Removal Storage

- Optical Media (CD/DVD)
- USB Storage

Internet-Based Repositories

- Hosted Applications ([Salesforce CRM](#))
 - Hosted Storage ([MobileMe](#))
 - Social Networking ([Facebook](#), [MySpace](#))
-

Electronic Discovery

Identification - Locations

- **Location is both electronic and physical (geographical)**
- Understand **common environmental synchronisations** of ESI sources (i.e. multiple locations where the same ESI exists) in anticipation of having to advise upon and/or prioritise locations for preservation and collection
- **Examples**
 - Microsoft Outlook (Client) and Microsoft Exchange (Server)
 - Apple iPhone (Mobile Phone) and
 - Microsoft Exchange (Server); or
 - MobileMe (Internet-Based Repository, Cloud Computing)

Electronic Discovery

Preservation and Collection

- Determine the most efficient method of preserving and collecting the 'potentially discoverable' ESI sources
- Understand the options available, their respective merits and resource requirements
- **Copy Type**
 - File Copy
 - Physical Forensic Imaging
 - Logical Forensic Imaging
- **Copy Method**
 - Dead (Traditional)
 - Live (Emerging)

Electronic Discovery

Processing

- Processing 'potentially discoverable' documents into a **readable and usable** form for analysis and review
- May be undertaken in-house using e-discovery processing software or by an external service provider
- Process **ESI**
 - Automated extraction of document and e-mail metadata
 - Extract compressed data (e.g. documents stored within ZIP archives)
 - Extract password-protected or encrypted data
- Scan **paper** to electronic image format (e.g. TIFF, PDF)
 - Manual extraction of document metadata (e.g. Title, Author, Date)
 - Optical Character Recognition (**OCR**) enables searchable text

Electronic Discovery

Analysis

- Analysis of processed 'potentially discoverable' documents for **filtering prior to detailed legal review**
- May be undertaken in-house using e-discovery processing software or in collaboration with an external service provider
- Diligently consider:
 - 'Sampling' to validate keyword searches and other filtering methods
 - Agreement on filtering methods with other parties
 - Filtering methods for non-text content (e.g. voicemail)

Electronic Discovery

Analysis – Filtering Methods

- **Search Queries**
 - Keywords
 - Concept Searching
- **De-Duplication**
 - Exact De-duplication
 - Near De-duplication
- **Key Custodians or Repositories**
- **File Types**
- **Date Ranges**

Electronic Discovery

Review

- Legal counsel review the filtered set of documents
- Documents may be ‘hosted’ in-house using an e-discovery **document review platform** or via an external service provider
- Select an document review platform which supports simplified document search, review and classification for lawyers
 - Cost
 - Scalability
 - Relevant Features
 - What are the other parties using?
- At this time, you may also **redact** (i.e. mask) part-privileged and/or part-confidential documents
- **Most time and cost intensive stage of discovery if not done properly!**

Electronic Discovery

GT Corp v Amare Safety [2007] VSC 123

- Inadvertent disclosure of privileged electronic documents
- Privilege not waived under circumstances
- Exchanged electronically and inspected by opposing Counsel
- Opposing Counsel restrained from taking any further part in proceedings
- *“I have no doubt that the manner in which [the applicant’s] electronic discovery was provided, together with the complete lack of any index, has contributed significantly to the problems which have subsequently arisen”* (per Hollingworth J)

Electronic Discovery

Production

- Produce a **set of discoverable documents**
 - Assign a Document ID to (each page) of a document
 - Undertake final validation and quality assurance
 - Provide affidavit and document list in appropriate form
 - Produce documents in accordance with Document Management Protocol (**DMP**)
- Technical elements of production (i.e. electronic document stamping and 'load file' creation) may be undertaken in-house using e-discovery processing software or by an external service provider

Electronic Discovery

Jarra Creek Central Packing Shed v Amcor [2006] FCA 1802

- Unfortunately for Jarra Creek, their application to use a new DMP was dismissed in the interests of avoiding “*unnecessary discovery*”
- Reiterates the need to proactively agree upon a DMP, with all other parties, at the earliest opportunity
- Ensure that you **fully understand the DMP, and its implications**
- Be prepared to offer to pay the costs to other parties if you require anything above or beyond the agreed DMP to ensure that your lawyers can efficiently review discoverable documents

Electronic Discovery

Presentation

- If the matter proceeds to trial, consider the use of an electronic courtbook to efficiently manage and display documents within the Court
- **Federal Court of Australia**
 - PN 17, Pre-Trial Checklist
 - 'e-Registrars'

Electronic Discovery

Further Resources

- External Consultants and Service Providers
- In-House Legal Counsel or Litigation Support Department
- *'In Pursuit of Relevance'* Blog (<http://www.elitigation.com.au>)
- [HP Information Management Digital Hub](#)

Closing Remarks

- Unfortunately, the discovery process is not yet as easy, fast, or cost effective as it should or could be!
- Any efficiency (and conversely, delay) to be derived from fulfilling your **discovery obligations** is largely dependent upon your **information management practices**
- Technology **should** assist and provide efficiency – not hinder!
- Consult specialist expertise where required to avoid e-discovery pitfalls
- **Be informed – Instant knowledge is power!**

Thank You

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