



eDiscovery in Litigation

An Outline on eDiscovery and the Practical
Application of the Federal Court of Australia's Practice
Note CM 6 (Formerly PN 17)

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Introduction

The explosion of information technology has fuelled the evolution of business practices across the world. Few business documents or communications now exist without leaving a digital footprint somewhere. This revolution has both positive and negative ramifications. On one hand it is easier to identify, track and record information that may be useful in litigation; on the other, the sheer number of “documents” an organisation generates can be almost impossible to process by traditional (and sometimes even cutting-edge) means.

To facilitate the use of information technology in the traditional discovery process, the Federal Court of Australia issued Practice Note 17 in January 2009. The Practice Note, which has since been re-issued as Practice Note CM 6, remains the preeminent note on eDiscovery released by the judiciary in Australia.

Whilst not being a binding directive, CM 6 highlights several key issues in the application of eDiscovery, and codifies the processes that the top-tier firms have been informally following over the last decade.

What is eDiscovery?

Electronic Discovery encompasses both the digitisation of paper documents for review and sharing, and more recently the collection of documents that originated in a native electronic form. Most commonly, these are emails (with their attachments), calendar items, and business documents.

Like traditional discovery, eDiscovery involves the collection, review, and sharing of documents deemed to be of importance in pending litigation. eDiscovery however allows firms and organisations to utilise software to present this information in a more user friendly, and much faster, way.

Reasons for eDiscovery

Cost

“Electronic documents must be managed efficiently to minimise the cost of discovery and the cost of the trial.”

The cost of electronic review of documents is far cheaper than regular paper-based review. Even in circumstances where a lawyer prints individual documents for review, the cost of consumables used in the review process is reduced by 90%.

Costs are also spared in the identification and culling of irrelevant documents early, which is a process better facilitated by technology. Keyword, author, titles, date filtering and the latest search technology, ‘concept searching,’ can all be used prior to the review of individual documents to cull a document load down quite considerably.

The ancillary costs associated with document transfers – for example postage and packaging - are also considerably reduced by the use of electronic documents.

Necessity

“Electronic documents, including e-mail, form an increasing proportion of discoverable documents in proceedings before the Court”

Necessity is a leading factor in the adoption of information technology in the discovery process. It is estimated that approximately 90% of all business communications are conducted via email and greater than 99% of business documents are created on a computer. Even documents that began their useful life as physical documents, such as executed contracts, more often than not find themselves stored in electronic format for record keeping purposes.

Printing these documents for review is simply adding an unnecessary (and costly) step in the process.

The Pre-Discovery Conference

The Court expects that the parties be aware of the issues involved in the electronic document management process in each particular matter, to better assist the Court in delivering an efficient resolution to the dispute. To this end, the Court has the discretion to order the parties to meet and confer, with the aim of reaching an agreement on the electronic exchange of documents and other issues – this conference is called the Pre-Discovery Conference.

The Court has released an attachment to CM 6, the Pre-Discovery Conference Checklist. This document outlines the expectations of the Court in regard to the discussion points at the Conference. Some key issues outlined in the checklist include:

- The scope of discovery
- Strategies for conducting a reasonable search for discoverable documents
- The management of documents that are privileged
- The establishment of a Document Management Protocol

For a full version of the Pre-Discovery Conference Checklist, please visit the Federal Court website, or click [here](#).

The Document Management Protocol(s)

The establishment of a document management protocol (DMP) is a key factor in ensuring the eDiscovery process runs smoothly for all parties involved. The DMP will allow each party to clearly understand how the documents will be managed, as well as allow service bureaus to help fulfil the goals of the process.

For document loads anticipated to be between 200 and 5,000 documents, the Court has issued a Default Document Management Protocol (DDMP). Document identification and management becomes exponentially more difficult as the number of documents increases, so for data sets over 5,000 documents, the Court suggests the implementation of an Advanced Document Management protocol (ADMP).

Document Identification – The level structure and ‘DocID’

As part of the document identification process, the DDMP suggests the assignment of a Document ID (DocID) to each document in the data set. This ID is unique to each document, and is usually ascertained through reference to a “level structure” throughout the data set. As well as DocID’s, each page in the set is also given an identifier, the PageID.

The level structure is based on the location the document is stored, in relation to the rest of the data set. Each level is given a unique alphanumeric code.

For example:

Documents located in the storage cabinets of John E. Smith would have, as their first level,	<i>‘JES.’</i>
Documents in the third box of that storage cabinet would be identified through	<i>‘JES.003.’</i>
Documents in the second folder of that box would be identified through	<i>‘JES.003.002.’</i>
The first document in that folder would have, as it’s DocID	<i>‘JES.003.002.0001’</i>
If <i>JES.003.002.0001</i> is a three page document, the first page would be stamped with <i>JES.003.002.0001</i> , the second page would be stamped with <i>JES.003.002.0002</i> and the third page would be stamped with <i>JES.003.002.0003</i> .	
The second document in that folder would have, as it’s DocID	<i>‘JES.003.002.0004.’</i>

This is an example of a 4 level document ID structure. Typically, the level structuring can extend up to 10 levels, and use any combination of numbers and letters as required and agreed between the parties.

As well as through DocID’s, the documents are to be identified by their:

Identifier	Example
Title	Subject line of emails or objective heading
Type	Agreement, Diagram or Expert Report
Date	Objective date or estimated date
Author	Objective author
Recipient	To’s, CC’s and BCC’s in emails, recipients of letters
Host/Attachment status	Any documents that are hosts or attachments to the document in question (identified by their DocID)
Folder and Filename	Typically the level structure of the DocID

Other parameters for document identification can be added where relevant. Typically service bureaus such as Lexdata can provide the indexing of this data as part of their eDiscovery services.

Documents that originated in electronic form, such as emails, often carry much of the above data in the 'information section' of each file, the 'metadata.' This metadata can be extracted and used to populate a list for discovery automatically, with human intervention only for data validation and quality control. Documents that were scanned from paper, or where the metadata is missing or incomplete, can be coded objectively with the relevant data.

De-Duplication

The DDMP outlines that the culling of duplicates, where appropriate, be conducted as early as possible. Service bureaus are able to use customised software to conduct de-duplication of documents that originated in electronic format. This de-duplication can be customised and set to a confidence level of your choosing.

Documents that originated in hard copy are more difficult to de-duplicate. Often this de-duplication is done before the files are digitised to avoid errors in the de-duplication process. Where such documents need to be de-duplicated after the fact, software can be run to test the content of each PDF, and the results presented as a 'percentage match' figure.

The List of Documents

Because of the limited scale of eDiscovery covered under the DDMP (200 to 5,000 documents), a list of documents that identifies each document by the above identifiers is a sufficient way of completing discovery. This list is, of course, to be delivered in electronic format, typically as a spreadsheet.

Document Imaging

In order to make the exchange of documents as efficient as possible, the DDMP suggests the exchange of documents in the ISO standard PDF format wherever possible. The PDF format allows for searchable files and minimises the file size of each document.

Typically, as part of the imaging process, each page of a document is stamped with its PageID, with the first stamp being the DocID for that document.

For quality purposes, images of documents are typically provided as searchable PDF, single page TIFF and sometimes in native format.

Sensitive Documents

If documents are subject to a claim of privilege or confidentiality, it is the claiming party's responsibility to protect such documents. Under the DDMP, such documents will still be given a DocID and PageIDs where appropriate, but the relevant data will be redacted prior to discovery.

Redaction can occur prior to digitisation where documents originated in hard copy. Where documents originated in native electronic format, special redaction software can be used to protect sensitive information. Keyword and concept searching can be utilised to find and redact sensitive information quickly and efficiently, before intensive review is undertaken.

The Advanced Document Management Protocol

The DDMP offers a simplified guide to the conduct of eDiscovery where a set of documents is small and straightforward. Where document sets are larger, stored across several jurisdictions (logistical and legal issues may arise here), or are likely contain irregular document types, the Court expects the parties to proactively agree on an Advanced Document Management Protocol (ADMP). The ADMP is typically similar to the DDMP.

Case Management Software Platforms

Case Management Software (CMS) platforms are specialised software that facilitate the eDiscovery process. They operate much like standard file management software such as Microsoft Windows, only with functionality that allows for collaborative case management and document review.

Typically, these platforms are operated through a web style interface, and the most common platforms are web or intranet based, which allows all members of a litigation team to access the data sets where appropriate.

The data is uploaded into these platforms through a database that contains the document identifiers, and any other customised information objectively gleaned from the documents. The images (PDF and TIFF) are also uploaded into the platform. This is collectively called the load file. Because obtaining, culling and then coding these documents can be a very resource intensive exercise, and data sets will often contain documents that require expert attention, firms typically engage service bureaus to create the load files.

For firms not willing or able to invest in a specialised CMS, bespoke platforms can be tailored that allow much of the functionality of the most common CMS in use in Australia. These systems are typically compatible with the larger CMS and provide a viable alternative for smaller and mid-sized firms.

e-Registrars

The Court has nominated e-Registrars in each registry. They are intended to be subject matter experts, and lawyers are encouraged to contact an e-Registrar for assistance in the application of the Practice Note. To find your nearest e-Registrar, please visit the Federal Court website, or click [here](#).

Final Note

Practice Note CM 6 is merely a framework of recommendations, and is limited in scope to matters before the Federal Court. It is significant, however, in being the first court-wide framework on electronic document management, and a useful stepping stone towards the future.

Inevitably, all courts in Australia will move towards electronic document management, following the trends in America and the United Kingdom. Ultimately, the onus will fall upon legal professionals to understand and adjust to this transition.

For more information on the eDiscovery services that Lexdata provides, please visit our website at www.lexdata.com.au.

For a full version of Practice Note CM 6, please visit the Federal Court website, or click [here](#).

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