Discovery in the Digital Age

(Dangerous Days for Digital Dinosaurs)

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1. INTRODUCTION

Let me make a confession. I hate discovery.

For many of us discovery in complex litigation is painful. We have all heard stories of young law graduates being sent off to discovery gulags in the basements of CBD buildings where they spend long slow months trawling through hundreds of thousands of documents for the purpose of categorising them and identifying anything that might attract a claim of legal professional privilege. It is the legal equivalent of highly repetitive factory process work and beneath the dignity of real lawyers!

In the age of electronic communication and in the digital economy the challenge of discovery has increased significantly and the task of discovery has become more complex.

Whilst I make no claims to great expertise in this area, several recent episodes of commercial litigation have forced me to confront the fact that, behind my back and without my quite realising it, the world of discovery has moved on significantly. The complexity of the task has increased to the point where it is now of sufficient complexity as to command our attention as thinking lawyers.

For several reasons that I will address, discovery is no longer a task that we can comfortably delegate to the most junior person in the office because the consequences of getting it wrong can be catastrophic not only for our clients but also for ourselves as practitioners. There are serious legal consequences to getting it wrong.

So in this paper, my task is to:

- set a context;
- address the extended professional obligations that we now have;
- discuss some aspects of electronic discovery technology and its consequences for our approach to the task;
- explain how the technology can be applied to relieve the tedium of traditional discovery and to make possible more informed forensic examination of discovered documents.

And before your eyes all glaze over, I will finish off with some horror stories to make sure that you realize that this is serious stuff.

For your help I have also included a short glossary of common terminology from the realm of electronic discovery. The Supreme Court Practice Note referred to below has a more extensive glossary. I have also included a list of references if you care to read further.

2. CONTEXT

2.1 Old School Discovery

In the old days, the height of sophistication in commercial litigation was to be part of a phalanx of lawyers confidently striding out from counsels' chambers across William Street, Melbourne to the Supreme Court followed by some underling wheeling a trolley laden with multiple lever arch files collectively comprising the Court Book neatly indexed and paginated and produced at enormous expense by one of those Court Book providers.

Those Court Books in turn were the product of a lengthy process, often taking many months, of the parties making discovery of documents in printed paper format, occasionally scanning and coding those documents, tedious inspection which often took place at the office of the solicitors for the disclosing party, outrageous claims for copying the documents so produced, tedious arguments between Counsel as to what was relevant and appropriate for inclusion in the Court Book and then the time consuming process of collating it, paginating it and preparing multiple copies of it.

More often than not, the vast majority of the documents so produced proved to be irrelevant in the running of the trial. Further, more often than not there would be twists and turns in the trial, late changes of pleadings and late focus on documents that had not hitherto been discovered. It was all an extravagant, slow and expensive process and sometimes a complete waste of time in the final analysis.

2.2 New School Discovery

In the current age, things have changed. The growth in Electronically Stored Information ("**ESI**") has been extraordinary. An American Bar Association paper I read for the purpose of preparing this paper suggested that in 2003 (more than a decade ago) the number of emails sent in the USA in a single day nearly exceeded the number of mail messages handled by the US Postal Service in an entire year. It also estimated that 93% of all documents (including email) are nowadays created in electronic form. Significantly, a rapidly increasing proportion of these documents exist only in electronic form. And that was over 10 years ago!

So it follows that in relatively routine piece of commercial litigation the vast majority of discoverable documents will be electronic, rather than paper documents.

2.3 What is a document?

It has long been settled in law that the expression "document" goes well beyond paper documents. In the *Evidence Act 2008* the term "document" is defined to include, in addition to a document in writing:

- *Any book, map, plan graph or drawing;*
- *Any photograph;*

- *Any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;*
- *Any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;*
- *Any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment of being reproduced therefrom; and*
- *Anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them.*

The same definition appears in Section 38 of the *Interpretation of Legislation Act 1984.*

2.4 Why so many documents?

There are some aspects of electronically stored information that make the process of discovery fundamentally different from that involving traditional paper documents. They include:

- The sheer volume of ESI;
- The ease of duplication of ESI;
- The persistence of ESI (an email that is deleted is not necessarily erased);
- The ease of changing ESI;
- The automatic nature of some changes by computer systems;
- The existence of metadata, which can reveal telling information about the creation, authors and changes to documents and the timing of those changes;
- The potential of ESI to become unreadable due to changing technology;
- The ease with which ESI can be distributed to multiple parties.

Because of the sheer volume of ESI, many organisations deploy processes to archive and delete ESI at various stages. This can be particularly problematic if there is the threat of litigation, as we will discuss later.

3. RELEVANT LEGISLATION

It used to be the case that discovery was only required to be addressed after the commencement of civil proceedings and following service of a Notice for Discovery. The rules of civil procedure were then the key guide.

That has all changed. Extensive legislation now intrudes on and dominates the domain of discovery.

3.1 Civil Procedure Act 2010

In Victoria we now have the *Civil Procedure Act 2010*, which is replicated by like enactments in most other States and Territories.

Recently the *Federal Court of Australia Act 1976* was amended to incorporate an "overarching purpose" statement to similar effect. This can be found in Section 37M.

As a reminder, Part 2.3 of the *Civil Procedure Act* sets out one paramount duty and a further ten overarching obligations. The paramount duty is a duty to the Court to further the administration of justice in relation to any civil proceeding (Section 16). So far as discovery is concerned, the overarching obligations include the obligation to:

(a) Act honestly (Section 17);

(b) Only make claims that have a proper basis (Section 18);

(c) Only take steps to resolve or determine the dispute (Section 19);

(d) Cooperate in the conduct of the civil proceeding (Section 20);

(e) Not mislead or deceive (Section 21);

(f) Use reasonable endeavours to resolve the dispute (Section 22);

(g) Narrow the issues in dispute (Section 23);

(h) Ensure costs are reasonable and proportionate (Section 24);

(i) Minimise delay (Section 25); and

(j) Disclose the existence of documents critical to the dispute (Section 26).

It is not hard to see how these overarching obligations could be construed as relevant to the issue of discovery.

Section 26 of the Act is more focused. It imposes an obligation on a person to whom the overarching obligations apply (in other words all legal practitioners and all litigants) to disclose to each other party in a dispute the existence of all documents that are or have been, in that person's possession, custody or control and of which the person is aware or which the person considers or ought reasonably consider are critical to the resolution of the dispute. This duty of disclosure must be addressed 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. The usual carve-outs for privilege continue.

There are like general obligations in the Green Book governing Commercial Court matters in the Supreme Court.

In the context of electronic discovery this effectively imposes an obligation on a party, without awaiting a discovery request, to provide to the other parties the identity of each individual likely to have discoverable information and the subject of the information and a description by category and location of all documents, electrically stored information and tangible things that are in the possession, custody or control of the party and which the disclosing party may use to support its claims or defences. Without doing that the disclosure obligation cannot be fully satisfied.

Section 56 of the *Civil Procedure Act* provides the court with powers to award costs against practitioners personally for failing to comply with discovery obligations or engaging in conduct intended to delay, frustrate or avoid discovery of discoverable documents.

Sections 28 and 29 empower the Court to make "*any Order it considers appropriate*" upon finding a contravention of an overarching obligation. So, the power of the Court to deal with breaches by way of Cost Orders is broad.

In the Victorian case of *Yara Australia Pty Ltd & Ors v Oswal*, Justice Zammit held that the Plaintiff's solicitors had breached their overarching obligations regarding the extent of material provided to the court. Her Honour stated that "*where a large volume of material is provided to the Court that is unnecessary and excessive, there will be a prima facie case that the overriding obligation has been breached*."

The *Civil Procedure Act* was amended in relation to the issue of discovery and disclosure by the *Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014.* It deals quite broadly with the issue of discovery and makes possible orders specifying that documents are to be provided in a searchable electronic format, if practicable or in any other manner or format that the Court considers appropriate (Section 55A). Section 55B enables the Court to order that a party provide to the Court an Affidavit of Document Management. Such an Affidavit may include:

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

(b) The party's processes of document management.

The relatively new Section 56 of the Act allows for the imposition of sanctions or directions if the Court finds that there has been a failure to comply with discovery obligations. The range of sanctions available to the Court include:

(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 an indemnity Cost Order against any party or a legal practitioner who is responsible for, or who aids and abets, any offending conduct;

(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 offending conduct;

(h) In respect of any adverse influence arising from any offending conduct;

(i) In relation to the referral to an appropriate disciplinary authority for disciplinary action to be taken against any legal practitioner who is responsible for, or who aids and abets, any offending conduct.

So the duties imposed on legal practitioners and parties under the *Civil Procedure Act* are onerous. The powers available to the Court under the Act are extensive and can be draconian in their effect.

3.2 Crimes Act 1958

There are now criminal sanctions attaching to the destruction of documentary evidence. These changes were introduced in the wake of the McCabe case (referred to below).

Under Section 254 of the *Crimes Act* it is an indictable offence for a person who knows that a document is, or is reasonably likely to be, required in evidence in legal proceedings to destroy or conceal that document or to be involve in conduct that authorises or permits another person to destroy or conceal it. A conviction carries a penalty of up to five years imprisonment or a level six fine or both.

The term "*legal proceeding*" as appears in the Crimes Act is defined in Section 3 of the *Evidence (Miscellaneous Provisions) Act* to include *"any civil, criminal or mixed proceeding and any inquiry in which evidence is or may be given before any Court or person acting judicially including a Royal Commission or Board of Inquiry under the Inquiries Act 2014"*.

Section 255 of the Crimes Act goes further and deals with criminal responsibility for a corporation.

3.3 Evidence (Miscellaneous Provisions) Act 1958

In 2006 there were also amendments to the Evidence Act.

Under Section 89B of the *Evidence (Miscellaneous Provisions) Act 1958* a Court in a civil proceeding of its own motion or on the application of a party may make any order that it considers necessary to ensure fairness if it appears to the Court that:

"(a) A document is unavailable; and

(b) No reproduction of the document is available in place of the original document; and

(c) The unavailability of the document is likely to cause unfairness to a party in the proceeding."

The Section goes further by making clear that the ruling or order made be:

"(a) That an adverse influence will be drawn from the unavailability of the document;

(b) That a fact in issue between the parties be presumed to be true in the absence of the evidence to the contrary;

(c) That certain evidence not be adduced;

(d) That all or part of a defence or Statement of Claim be struck out;

(e) That the evidential burden of proof be reversed in relation to a fact in issue."

Section 89C addresses the matters that the Court must consider, but it is obvious that these sanctions are significant.

3.4 Consequences for Practitioners

This matrix of legislative provisions makes it clear, if there was ever any doubt, that the consequences for both clients and practitioners of intentional or inadvertent document destruction or inadvertent or intentional nondisclosure of relevant documents can be significant. Each of us as a practitioner involved in civil litigation assumes particular obligations under the *Civil Procedure Act* and these other Acts and we thereby put ourselves at risk.

To the extent that we fail to appropriately advise our clients about their document retention obligations we also expose them to civil and criminal risk and ourselves to negligence claims as well as the possibility of professional misconduct complaints.

4. PRACTICE NOTES AND CONDUCT RULES

In our time as practitioners, most Australian civil jurisdictions have moved away from allowing litigants effective control of proceedings. Nowadays the Court takes much greater control. In most jurisdictions we have case management protocols that involve increased judicial supervision of pre-trial procedures.

In the context of discovery there has been much greater judicial involvement in reining in the excesses of discovery, in large part as a consequence of early identification of key issues. That general approach to case management has been extended by the adoption in a number of jurisdictions of Practice Notes directed specifically at the issue of electronic discovery.

4.1 Federal Court /New South Wales

The most advanced Practice Note seems to be that of the Federal Court of Australia, followed closely by that in New South Wales. The Federal Court document is attached. It has several companion documents that are worth a look.

The Federal Court of Australia has prescribed a method of preparing electronically stored information (ESI) and so it is important that lawyers involved in litigation in that jurisdiction become familiar with it.

According to electronic discovery providers this approach is increasingly adopted as the default national standard because it most closely replicates the conceptual approach in the Electronic Discovery Reference Model ("**EDRM**") which is effectively an international model to which I refer below.

Essentially, the Practice Note is a principles based approach with accompanying draft protocols, a preparation check list and like documents. This has the advantage that the formal part of the Practice Note can be preserved, but the protocols can be varied simply from time to time as technology evolves.

The Federal Court approach is novel as it is the first time an Australian Court has mandated and prescribed the use of technology during discovery and a trial. The Court has recognised that "*electronic documents, including email, form an increasing proportion of discoverable documents in proceedings before the Court"*. Further, it expresses the view that "printing of electronic documents" and "further copying paper documents most of the time" is a waste of time and cost and generally not necessary. Hooray, for that!

4.2 Supreme Court of Victoria

In Victoria we have Practice Note 1 of 2007, which at the time was ambitious but is now pretty much out-of-date. It is enabling of agreed electronic discovery practices but not prescriptive. It primarily concerned with the conversion of hardcopy documents to an electronic format and the capture of objective data about each such document. It makes no provision for discovery of documents in native format. The net consequence is that industry practice has moved around and beyond the Practice Note and it is now largely an artefact of a bygone era, at least so far as electronic discovery is concerned.

4.3 USA

I have had a quick look at the position in the USA. In the Federal Courts parties are subject to the *Federal Rules of Civil Procedure*. Just as in Australia, the US Courts are struggling with the issue of discovery and the

scoping of discovery. On 1 December 2015 the *Federal Rules of Civil Procedure* were expanded in relation to discovery. Rule 26(b)(1) of the amended rules crystallises the concept of proportionality in relation to discovery and reads as follows:

"Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

4.4 Conduct Rules

Since the adoption of the Legal Profession Uniform Law we now have a new professional conduct rules in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, which took effect on 1 July 2015.

In large part the Rules replicate obligations already imposed under the *Civil Procedure Act.*

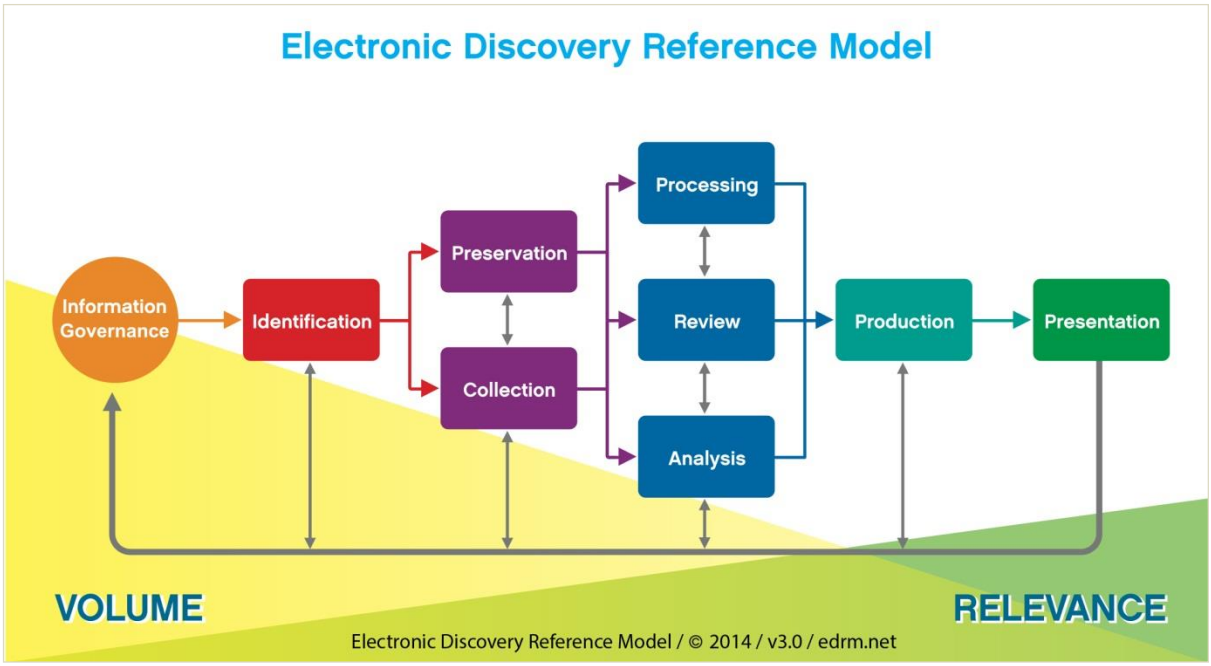
The Rules impose a paramount duty to the Court in the administration of justice and that duty prevails to the extent of inconsistency with any other duty. There are other fundamental ethical duties which include a duty to act in the best interest of a client, to be honest and courteous in all the dealings and to deliver legal services confidently, diligently and as promptly as reasonably possible.

4.5 Practice Consequences

So it can be seen that both in Australia and in the USA, courts are becoming ever more vigilant in the digital era to manage and control the discovery process and look to practitioners to be creative and technologically adept in using technology to manage what might otherwise be a disproportionately expensive and cumbersome process that can dramatically slow the pace of commercial litigation.

5. ELECTRONIC DISCOVERY REFERENCE MODEL

As so often happens, technology moves remorselessly ahead of the law, with the consequence that legislation and court procedures are generally in catch-up mode. That is particularly the case in the realm of electronic discovery. For the best part of 10 years, there has been an industry standard known as the Electronic Discovery Reference Model which suggests a consistent conceptual approach to the electronic discovery process. The diagram below shows the process.



As you will see, the model has a series of steps, as follows:

5.1 Identification

This is the preliminary stage of locating potential sources of electronically stored information and determining its scope, breadth and depth. If you like, it is a discovery informed environmental scan of the dispute.

5.2 Preservation

This is a key step of ensuring that electronically stored information is protected against inappropriate or inadvertent alteration or destruction pending trial.

5.3 Collection

In the collection phase electronically stored information is gathered together for use in the new discovery process, as detailed below.

5.4 Processing

Using technology the volume of electronically stored information is reduced and converted, if necessary, to other formats more suitable for review, analysis and interrogation.

5.5 Review

In the review stage electronically stored information is evaluated for relevance to the matters in dispute and as to whether claims of legal professional privilege might be available.

5.6 Analysis

In the analysis stage, the distilled electronically stored information can be evaluated for content and context. By adoption of key terms, key patterns, key people and like criteria informed analysis is made possible.

5.7 Production

In the production phase the electronically stored information so massaged and rendered is delivered to appropriate recipients in acceptable format and using appropriate delivering mechanisms.

5.8 Presentation

In the presentation phase the distilled and coherently and consistently rendered electronically stored information is displayed before audiences (expert witnesses, Courts, tribunals etc.) and typically in native or near-native format.

5.9 Electronic Discovery Protocols

It is this Electronic Discovery Reference Model that has become the default international standard and which is in common usage by the vast majority of electronic discovery providers. It is invoked by the more adventurous Federal Court of Australia Practice Note.

6. ELECTRONIC DISCOVERY – CONCEPTS & PROTOCOLS

6.1 Court Requirements

As you will see from the Federal Court of Australia's Practice Note, for parties involved in civil litigation in that jurisdiction there is now a mandatory requirement for parties seeking electronic discovery to seek to reach early agreement on the protocols to be adopted. There are some common approaches to that process.

6.2 Unique Document Identifier

Given that most electronic discovery software applications are in substance a relational database there is a requirement for each discovered document to be given a unique identifier. This enables searching the database by reference to multiple criteria much more straightforward. This approach is in contrast to the old approach where Court Books would often have duplicate documents and inconsistent numbering.

6.3 Privilege

The application of electronic discovery does not change the fundamental position regarding privilege. However, it makes more challenging the task of identifying those documents that attract a claim for legal professional privilege. Danger arises when, for example, a party might discover something described as "A CD of electronic files" without inspecting each individual file as to whether it might attract a claim for privilege.

In the USA, there has developed a body of law about privilege and clawback. Essentially, parties dealing with electronic discovery under the *US Federal Rules of Civil Procedure* can derive some degree of protection by entering into an electronic discovery protocol with clawback provisions to protect inadvertent disclosure of privileged documents. This clawback process is

intended to streamline and make more economical the electronic discovery process, but it has its shortcomings.

From what I have been able to establish we do not have a similar protocol in Australia, but most of us as practitioners will be aware of the ethical guidelines that relate to the receipt of privileged communications inadvertently disclosed in the context of discovery.

6.4 Costs

The cost of electronic discovery can be huge. That is because there can be considerable expense involved in the three main steps, namely:

- Collecting the data;
- Processing the data into an electronic document review system and then further processing for privilege; and
- The cost of further reviewing the data.

A gigabyte of data typically comprises some 10,500 documents. A terabyte of data would comprise some 10.5 million documents.

On the issue of costs, the general position in Australia seems to be that costs follow the event, but with costs always being in the discretion of the court there is scope to depart from that position and it often happens.

By contrast, in the USA there has developed a body of jurisprudence to address with the issue of cost allocation. There is a landmark decision that is often quoted of a Judge Scheindlin in *Zubulake v UBS Warburg LLC* where the court set out a series of factors to be applied in assessing how to allocate costs of electronic discovery. Whilst that decision has been endorsed in a New Zealand case, I am not aware of any like body of jurisprudence in Australia.

6.5 Filtering

Given the sheer volume of electronically stored information, the process of filtering in electronic discovery is critical. There are a number of software applications that enable the massive data to be filtered and sorted by reference to key criteria. Those filters include:

- Identifying key custodians of data and focusing on the location of their documents;
- Identifying relevant dates and timespans;
- Identifying and eliminating exact duplicates; and
- Key word metrics.

It is well beyond the scope for this paper to go into the detail of those processes, but they are quite complex to such an extent that the involvement of an electronic discovery expert is commonly required.

6.6 Document Review

Once documents have been collated and filtered, they need to be reviewed so as to exclude all those that are not relevant and to identify also those that attract a claim for privilege.

6.7 Spoliation

Spoliation is a term that we do not encounter much in Australia, but it is becoming a term in wide usage in the USA. Spoliation of evidence is the intentional, reckless or negligent withholding, hiding, altering, fabricating or destroying of evidence relevant to our legal proceeding.

In the context of electronic discovery, spoliation of evidence becomes an ever more important issue as often records in electronic form can be difficult to retrieve, preserve or monitor. Furthermore, many software applications are configured so as to regularly perform a scheduled purge of data that may have no continuing business purpose but which, in the context of litigation, might still be relevant.

In the USA, there is a rapidly developing body of jurisprudence about the issue of spoliation of evidence and an evolving set of ethical and practice guidelines to assist attorneys in ensuring that clients establish a legal hold over electronic documents as soon as there is some intimation of a dispute. Quite evolved protocols have developed whereby the legal departments of larger organisations will issue prescribed legal hold orders to relevant employees to retain and preserve discoverable documents such as emails and other electronically stored information.

6.8 Production

There are multiple ways in which discovered electronically stored information can be produced in native format or otherwise as searchable images. Given that TIFF format does not allow for searching, there is a preference for PDF format images which are searchable. Likewise there is an increasing move for electronically stored documents to be produced in their native application so that, for example, spreadsheets will be produced in a searchable format, typically MS Word and so on.

7. CONCEPTUAL APPROACH

Before embarking on a process of electronic discovery parties involved in litigation and their legal practitioners need to engage in an environmental scan in order to scope the discovery process. This involves an analysis of the dispute by reference to time, players, the nature of data and keywords or concepts that might help in the analysis of an otherwise overwhelming array of documents.

7.1 Key Dates

Key dates will include the relevant timeline for the dispute, the period that data remains accessible or potentially retrievable within the party's

electronic infrastructure, and perhaps also litigation deadlines imposed by the court or procedural rules.

7.2 Key Players

The key players are the likely material witnesses or the persons with knowledge or information relevant to a party's claims or defences. This may extend to third parties who have documents on behalf of the party and be working as an agent of the party. Interrogation of the scope of discovery may involve questions about current and past usage of, or storage on all of the following:

- Office computers;
- Laptop computers;
- Home computers;
- Tablet devices;
- Flash drives;
- Zip drives;
- Cloud based storage services;
- Text messaging services;
- Instant message services;
- Emails;
- CDs;
- DVDs;
- Floppy disk media;
- Voicemail or other voice files; and
- Video conference or teleconference reporting;
- Social media.

7.3 Key Data

Key data constitutes the electronically stored information one would expect to be relevant. Of course, there is a wide variety of software files that goes well beyond word files, accounts, web processing files, spreadsheets to include multiple other public domain and proprietary applications.

7.4 Key Words

It is often necessary to negotiate key words so as to enliven a search engine application leading to the discovery of admissible, relevant evidence.

8. ORDER 50 – SPECIAL REFERENCE

The cost of discovery in mega litigation can be absolutely astronomic. Back in 2007, when Justice Ronald Sackville was presiding over the litigation in *Seven Network Limited v News Limited*, there were estimates that the cost of discovery would be about $200 million in a proceeding where the damages estimate was in the range of $195 million to $212 million. The Judge commented that the cost of discovery "*borders on the scandalous*".

Like problems arise in other large litigation, including in Victoria. So let us look at a creative example of judicial management of complex discovery in Victoria.

8.1 General Procedure

Order 50 of the Supreme Court (General Civil Procedure) Rules 2015 allows for the Court to refer any question to a special referee for the referee to either decide the question or give the referee's opinion. Practitioners who deal with commercial litigation in the Commercial Court of the Supreme Court will also be aware of the requirement in the Green Book (Paragraph 10.6) which encourages the use of special references where it would be practical to do so.

These procedures are quite commonly used in litigation concerning building disputes or disputes involving scientific or technical issues.

8.2 Special Reference for Electronic Discovery

In the context of electronic discovery, there has been an innovative and apparently quite successful use of the Order 50 appointment of a special referee to deal with electronic discovery issues. This occurred in the Great Southern litigation.

Following the collapse of the Great Southern Group there were some 16 group proceedings issued against Great Southern Managers Australia Ltd which by that stage was in liquidation. There were multiple additional parties which included former directors. All up there were scores of proceedings that have been commenced in Victoria and in New South Wales and ultimately all of these were transferred to the Supreme Court of Victoria to be case managed by Justice Croft. Not surprisingly, the issue of discovery loomed large. It is reported that there were some 3000 boxes of "hardcopy" documents and in addition some 10 million documents, files or emails that have been retained in an electronic database.

The parties collectively acknowledged that traditional discovery would have taken years to complete, resulting in significant delays to the trial and imposing a significant burden on the liquidators.

In an innovative move Justice Croft suggested the appointment of a special referee to act as a facilitator to assist in managing the discovery issues. With the agreement of the parties Anthony Nolan QC was appointed as that special referee.

In a process that looks somewhat akin to a rolling mediation, the special referee first met with the parties lawyers to seek agreement on a scoping

exercise and then convened a number of subsequent meetings which culminated in an agreed common protocol for dealing with the otherwise overwhelming electronic discovery issue. Along the way the special referee was required to and did provide a number of reports to the Court. Whilst the Court was not bound by the special referee's decision or opinion, in the event it was adopted.

8.3 Special Referee Process

As part of the process, the special referee was requested by the parties and the Court to assist in the resolution of various interlocutory processes, including:

- The categories of documents to be discovered;
- The investigation of the company's documents management system;
- The timeframe for discovery;
- The redaction of documents;
- Privilege claim;
- Consequential matters.

Whilst ordinarily, the cost of such a reference would follow the event, in the Great Southern proceedings the Court ultimately ordered that the cost of the special reference be shared according to the representation of the parties. As a consequence the Plaintiffs in the various group proceedings (who were all represented by the one law firm) bore one half share of the costs and the Defendants who shared legal representation bore the other half share.

Without going into great detail, the experience in the Great Southern proceedings demonstrates that in appropriate cases Order 50 provides a useful means for breaking the Gordian knot of complex electronic discovery issues which might otherwise provide an intractable obstacle to the preparation of a matter for trial.

9. ELECTRONIC DISCOVERY HORROR STORIES

9.1 Arthur Andersen LLP v United States

This is probably the most dramatic decision.

In June 2002, Arthur Andersen was convicted of obstruction of justice for shredding documents related to its audit of Enron, resulting in the Enron scandal. Later on the conviction was reversed by the Supreme Court in the USA, but the impact of the scandal combined with the findings of criminal complicity ultimately destroyed the firm. The collapse of one of the world's largest accounting firms because of its handling of electronic data

demonstrates the importance of knowing the electronic discovery landscape and the obligation to retain documents.

9.2 Zubulake v UBS Warburg LLC

This decision is quoted extensively in writing on the subject of Electronic Discovery. It addressed to wide range of issues, including the issue of a litigation hold. The Court, they held the obligation to preserve relevant documents arises "once a party reasonably anticipates litigation". So, when a party reasonably anticipates a dispute, the party "must spend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents".

9.3 Rolah McCabe v British American Tobacco Australia Services Ltd

The decision by Justice Geoffrey Eames in this case led to the enactment of new Victorian civil and criminal legislation relating to document destruction.

The Plaintiff had lung cancer and sought damages against the Defendant for its negligence in the manufacturing and marketing of its cigarettes. In April 2002, Eames J struck out the defence after finding that "the process of discovery in this case was subverted by the Defendant and its solicitor…with the deliberate intention of denying a fair trial to the Plaintiff." Eames J found that the Defendant had deliberately destructed thousands of relevant documents to keep them from the Plaintiff and any other prospective plaintiffs and mislead the court about what had become of the missing documents.

Although this decision was overturned on appeal, the Victorian Government added new provisions into the *Crimes Act* and *Evidence Act* giving the courts wide powers in proceedings affected by the unavailability of relevant documents. These legislative provisions have been touched on earlier.

9.4 Sony Music Entertainment (Australia) Ltd v University of Tasmania

This Tasmanian case raised an issue of alleged contempt of Court. The Plaintiff claimed that the university's policy of overwriting data on backup tapes, after it became aware the data was sought in conjunction with proceedings, might constitute a contempt of Court.

Tamberlin J, in the Supreme Court of Tasmania, essentially dismissed the application because the Plaintiff had been given the opportunity to meet the costs of preserving the existing backup tapes, but had declined. But you can see the trend and the potential risk to practitioners unless they are vigilant in ensuring that clients preserve data as soon as there is some intimation of a claim.

9.5 Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd and Ors

This was a 2015 decision of the Supreme Court of Victoria which addresses the paramount duties of experts, solicitors and Counsels owe to the Court when obtaining, tendering and relying on expert reports and the consequences that arise if that paramount duty is breached.

In what seems to be a somewhat comical episode it emerged during the trial that there were three different versions of an expert report from the Plaintiff that were doing the rounds and not everyone knew. There was a first report dated 9 April 2010, a second and amended report with the same date and then a third report dated 12 November 2010 with changes as requested by the Plaintiff's counsel. This third report had been provided to the Plaintiff's counsel, but not to the instructing solicitors and it was not served on the Defendant. The inconsistencies in the various reports came to light in the course of cross examination of the expert.

Justice Dixon, considered the application of the Civil Procedure Act and found that the Plaintiff's barrister breached his paramount duty to the Court, in particular the overarching obligation to disclose the existence of documents (Section 26 of the Act) and not to engage in misleading or deceptive conduct in a civil proceeding (Section 21 of the Act). Not stopping there, the Judge also found that the expert have breached his obligations under the Act and had failed to comply with the Expert Code of Conduct.

In the ultimate judgment Dixon J ordered that the expert indemnify each of the Plaintiff's solicitors and barristers for part of the costs they were liable to pay arising out of an appeal and that the Plaintiff's expert, solicitors and barrister each pay part of the Defendant's cost.

10. CONCLUSION

This has been a fairly cursory overview of a rapidly developing area of Law.

What emerges is that electronic discovery now looms has a much more significant issue for those persons who are involved in civil litigation of all kinds. It can be anticipated that this issue will reverberate well beyond commercial litigation into other areas of law likely including:

- Family Law property disputes;
- Estate disputes;
- White collar crime matters;
- Personal injury claims;
- Insurance related litigation.

It also seems reasonable to conclude that the burden of costs in litigation is moving remorselessly to the front end, rather than the back end. The heavy lifting in relation to discovery will have to occur much earlier in the litigation process. This has significant implications for access to justice because the costs will be a significant barrier to entry for many prospective litigants.

In my view it follows that lawyers who fail to come to groups with this change in the law and the associated technology leave themselves very much at risk of a negligence claim or a professional misconduct complaint. It is a sleeping giant and it is not going away.

11. ACKNOWLEDGEMENTS

The writer acknowledges the assistance in the research for this paper by Rosanna Roberts, a law graduate with Burke & Associates Lawyers who is due to be admitted to practice any day now.

Further assistance has been provided by Neeraj Chand, a lawyer and electronic discovery expert with LitSupport.

12. REFERENCES

Legislation

Civil Procedure Act 2010 (Vic)

Crimes Act 1958 (Vic)

Evidence (Miscellaneous Provisions) Act 1958 (Vic)

Evidence Act 2008 (Vic)

Federal Court of Australia Act 1976 (Cth)

Federal Rules of Civil Procedure 2014 (USA)

Interpretation of Legislation Act 1984 (Vic)

Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014 (Vic)

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic)

Supreme Court (General Civil Procedure) Rules 2015 (Vic)

Cases

Arthur Andersen LLP v United States 554 U.S 696 (2005)

Clarke v Great Southern Finance Pty Ltd (in liquidation) [2014] VSC 569

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd and Ors [2014] VSCA 78

Rolah McCabe v British American Tobacco Australia Services Ltd [2002] VSC 73

Seven Network Limited v News Limited [2005] FCA 142

Sony Music Entertainment (Australia) Ltd v University of Tasmania [2003] FCA 532

Yara Australia Pty Ltd & Ors v Oswal [2013] VSCA 337

Zubulake v UBS Warburg LLC 217 F.R.D. 309 (S.D.N.Y. 2003)

SCHEDULE A

GLOSSARY OF ELECTRONIC DISCOVERY TERMS

For the lawyer who is unfamiliar with e-discovery terms, there are many resources available. The following terms were adopted from the Sedona Conference Glossary: E-Discovery and Digital Information Management, May 2005. This was a pivotal conference in the USA on the topic.

1. Active Data

Active data is information residing on the direct access storage media of computer systems, which is readily visible to the operating system and/or application software with which it was created and immediately accessible to users without restoration or reconstruction.

2. Backup Data

Backup data is an exact copy of system data that serves as a source for recovery in the event of a system problem or disaster. Backup data is generally stored separately from active data on portable media.

3. Data Filtering

Data filtering is the process of identifying for extraction specific data based on specified parameters (e.g. by key word, file type, or name).

4. De-Duplication

De-duplication is the process of comparing electronic records based on their characteristics and removing or marking duplicate records within the data set.

5. Legacy Data, Legacy System

Legacy data is information that an organization may have invested significant resources developing, and while it has retained its importance, the information has been created or stored by the use of software and/or hardware that has become obsolete or replaced. Legacy data may be costly to restore or reconstruct when required for investigation or litigation analysis or discovery.

6. Metadata

Metadata is information about a particular data set or document that describes how, when, and by whom it was collected, created, accessed, modified, and how it is formatted. It can be altered intentionally or inadvertently. It may also be extracted when native files are converted to image. Some metadata, such as file dates and sizes, can be seen easily by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed.

7. Native Format

Electronic documents have an associated file structure defined by the original creating application. This file structure is the document's native format.

8. PDF (Portable Document Format)

A PDF captures formatting information from a variety of applications in such a way that they can be viewed and printed as they were intended in their original application by practically any computer, on multiple platforms, regardless of the specific application in which the original was created. PDF files may be text-searchable or image-only.

9. PST

PST is a Microsoft Outlook email store. Multiple .pst files may exist and contain archived email.

10. Sampling

Sampling usually refers to the process of testing a database for the existence or frequency of relevant information. It can be a useful technique in addressing a number of issues relating to litigation, including decisions about what repositories of data are appropriate to search in a particular litigation and determinations of the validity and effectiveness of searches or other data extraction procedures.

11. TIFF (Tagged Image File Format)

A TIFF file has a .tif extension. Images are stored in tagged fields, and programs use the tags to accept or ignore fields, depending on the application.

SCHEDULE B

FEDERAL COURT OF AUSTRALIA

PRACTICE NOTE CM 6

ELECTRONIC TECHNOLOGY IN LITIGATION

1. Introduction

1.1 This Practice Note applies to any proceeding in which the Court has ordered that:

- discovery be given of documents in an electronic format;
- discovery be given in accordance with a discovery plan; or
- a hearing be conducted using documents in an electronic format.

1.2 An order of the nature mentioned in paragraph 1.1 may be made in any proceeding in which:

- a significant number (in most cases, 200 or more) of the documents relevant to the proceeding have been created or are stored in an electronic format; and
- the use of technology in the management of documents and conduct of the proceeding will help facilitate the quick, inexpensive and efficient resolution of the matter.

1.3 Existing Court rules and Practice Notes governing discovery and other litigation processes continue to apply.

1.4 Technical expressions used in this Practice Note and Related Materials are defined in the Glossary.

1.5 This Practice Note and the Related Materials mentioned in paragraph 11.1 below are available from the Court's web site at http://www.fedcourt.gov.au

2. Purpose

2.1 The purpose of this Practice Note and Related Materials is to encourage and facilitate the effective use of technology in proceedings before the Court by:

- setting out the Court's expectations of how technology should be used in the conduct of proceedings before it; and
- recommending a framework for the management of documents electronically in the discovery process and the conduct of trials.

3. Principles

3.1 This Practice Note is to be applied in a manner that best promotes the overarching purpose of the civil practice and procedure provisions of the Court which are to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible – see section 37M of the *Federal Court of Australia Act 1976* (Cth) ("**the Act**").

3.2 The parties and their lawyers must conduct the proceeding in a way consistent with the overarching purpose, in particular, by identifying documents relevant to the dispute as early as possible and dealing with those documents in the most efficient way practicable – see section 37N of the Act.

4. Application of these Principles

4.1 The Court expects the parties to a proceeding and their legal representatives to consider, at as early a stage in the proceeding as practicable, the use of technology in the management of documents and conduct of the proceeding. In particular, it is expected that consideration will be given to the use of technology for:

- creating lists of discoverable documents;
- giving discovery by exchanging electronically stored information;
- inspecting discovered documents and other material;
- lodging documents with the Court;
- delivering Court documents to, and otherwise communicating with, each party; and
- presenting documents and other material to the Court during a trial.

5. Efficient Document Management

5.1 This Practice Note and the Related Materials are based upon the following observations concerning efficient document management:

- Electronic documents, including email, form an increasing proportion of Documents in proceedings before the Court.
- Electronic documents must be managed efficiently to minimise the cost of discovery and the cost of the trial.
- Printing electronic documents for the purpose of discovery will generally be a waste of time and money.
- Photocopying paper documents multiple times for the purpose of discovery will generally be a waste of time and money.
- Wherever possible, parties should exchange documents in a usable, searchable format or in the format in which the documents are ordinarily maintained. The exchange format should allow the party receiving the documents the same ability to access, search, review and display the documents as the party producing the documents.
- Lawyers should endeavour to use technology to ensure that document management is undertaken efficiently and effectively.
- Parties should plan for appropriate discovery as early as possible in the proceedings.

6. Discovery plans

Before the Court makes an order that discovery be given using documents in an electronic format, it will expect the parties to have discussed and agreed upon a

practical and cost-effective discovery plan having regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.

7. **Document management**

7.1 The Court expects the parties to meet and confer for the purpose of reaching an agreement about the protocols to be used for the electronic exchange of documents and other issues relating to efficient document management in a proceeding.

7.2 The Court may require the parties to address these issues at a Directions Hearing or a case management conference.

7.3 A checklist identifying issues that the parties are expected to consider is included in the Related Materials.

8. **Document Management Protocols**

8.1 The Default Document Management Protocol is to be used in all proceedings to which this Practice Note applies and in which the number of Discoverable Documents is reasonably anticipated to be between 200 and 5,000, unless an alternative Document Management Protocol is agreed by the parties and accepted by the Court.

8.2 Where the number of Discoverable Documents is reasonably anticipated to exceed 5,000 Documents, the parties should agree to an Advanced Document Management Protocol in consultation with the Court.

8.3 An example of an Advanced Document Management Protocol is included in the Related Materials.

9. **Use of technology in a hearing**

9.1 In a proceeding to which this Practice Note applies, the Court will expect the parties to use technology efficiently and effectively in preparation for, and in the conduct of, the trial.

9.2 A checklist identifying issues that the parties are expected to consider is included in the Related Materials.

10. **eRegistrars**

In each registry one or more registrars have been nominated to provide advice and assistance in relation to the implementation of the Practice Note. These registrars are referred to as 'eRegistrars'. Lawyers or parties requiring information or assistance about the application of the Practice Note or the use of technology in litigation in the Court are encouraged to contact an eRegistrar. Contact details for the eRegistrars can be found at http://www.fedcourt.gov.au

11. **Related materials**

11.1 The following Related Materials are released with this Practice Note:

- Pre-Discovery Conference Checklist
- Default Document Management Protocol
- An example of an Advanced Document Management Protocol

- Pre-Trial Checklist.

11.2 The Related Materials will be reviewed and updated by the Court from time to time in light of feedback from interested parties and changes in technology.

PA KEANE
Chief Justice
1 August 2011