

DRAFT Practice Note No 17

**Document Management, Discovery and the use of Technology in the conduct of
Litigation**

1. Introduction

- 1.1 This Practice Note replaces Practice Note No 17 issued by the Chief Justice on 20 April 2000.
- 1.2 This Practice Note will apply to all proceedings commenced after 1 July 2008 unless varied by **Court** order.
- 1.3 This Practice Note will apply to all proceedings where the number of **Discoverable Documents** is reasonably anticipated to exceed 200 **Documents** or where the proceeding is to be run electronically.
- 1.4 Existing Court Rules and Practice Notes governing discovery and other litigation processes continue to apply unless the Court expressly dispenses with the need to comply.
- 1.5 Words represented in bold font within this Practice Note are defined in the Glossary.
- 1.6 This Practice Note, the protocols and, other documents to which it refers ("**Related Materials**") are available from the Federal Court's web site at www.fedcourt.gov.au.
- 1.7 The Court may give directions about whether, and in what way, technology should be used in the conduct of all or part of a proceeding.

2. National Management

- 2.1 In each registry one or more registrars are nominated to coordinate electronic hearings, the implementation of this Practice Note and related matters within the Court. These registrars are referred to as 'eRegistrars'. Lawyers or parties requiring information or assistance in relation to the application of this Practice Note or **Related Materials** or to the use of technology in litigation in the Court generally are encouraged to contact an eRegistrar. Contact details for the eRegistrars can be found at ([insert link to FCA website](#))

3. Purpose

- 3.1 The purpose of this Practice Note and Related Materials is to:
 - (a) achieve efficient practice through the use of technology in proceedings before the Court and improve the efficiency in the conduct of litigation generally;

- (b) inform the parties and their lawyers about the Court's expectations as to how technology should be used in proceedings before the Court; and
- (c) recommend a court-approved framework for managing discovery of both hard copy and electronic documents and for the conduct of electronic trials.

4. Best practice

4.1 The parties and their lawyers must consider, prior to the commencement of any proceeding, the use of technology as a means of assisting the efficient conduct of the proceeding. In particular, consideration should be given to the use of technology for:

- (a) lodging **Documents** with the **Court**;
- (b) delivering **Court Documents** to, and otherwise communicating with, each party;
- (c) creating lists of **Discoverable Documents**;
- (d) giving discovery by exchanging electronic information;
- (e) inspecting **Discovered Documents** and other material;
- (f) presenting **Documents** and other material to the **Court** during a trial.

5. Discovery Assumptions and Principles

5.1 The following assumptions apply:

- (a) **Electronic Documents**, including e-mail, form an increasing proportion of **Discoverable Documents** in proceedings before the **Court**;
- (b) **Electronic Documents** must be managed in a way (set out below) designed to minimise the cost of discovery;
- (c) Printing of **Electronic Documents** is a waste of time and cost and is rarely necessary;
- (d) Photocopying **Paper Documents** multiple times is a waste of time and cost and is rarely necessary;
- (e) Parties should, wherever practicable, convert **Paper Documents** into **Searchable Images**;
- (f) Parties are expected to exchange **Electronic Documents** as **Searchable Images** (or, where agreed, as **Native Electronic Documents**) as this is

considered to be a more efficient and effective method of exchange and a closer representation of the original **Document**; than photocopies or **Unsearchable Images**;

- (g) Legal practitioners are expected to use technology to ensure they perform **Document Management** activities efficiently and effectively;
- (h) Parties must plan for discovery as early as possible in the proceedings and
- (i) In planning for discovery, parties should take into account the cost, effort and complexity of **Document Management** options when balanced against both the probative value of the potential evidence likely to be contained in or derived from discovered **Documents** and the quantum involved in the case at hand. This balancing of all relevant considerations in order to determine a pragmatic, cost effective discovery plan is often referred to as “proportionality”.

6. Pre-Discovery Conference

- 6.1 A **Pre-Discovery Conference** is to be held prior to the commencement of discovery. This will be held before the Judge to whom the proceeding is allocated or a Registrar on behalf of that Judge.
- 6.2 The purpose of the conference is to assist and direct the parties about how to manage discovery efficiently and within an electronic environment.
- 6.3 The parties must deal with the issues recorded on the **Pre-Discovery Conference Checklist (PDCC)** and record agreement reached. Any outstanding issues need to be resolved and agreed between the parties within 14 days of the completion of the **Pre-Discovery Conference**.
- 6.4 The completed PDCC may be required to be filed in the **Court**.
- 6.5 The **Pre-Discovery Conference** is expected to produce an agreement between the parties as to the scope of discovery and the determination of the **Document Management Protocol** and procedures to apply to the proceedings.

7. Pre-Trial Conference

- 7.1 A **Pre-Trial Conference** is to be held prior to the allocation of a trial date. This will be held before the Judge to whom the proceeding is allocated or a Registrar on behalf of that Judge.

- 7.2 The parties must deal with the issues recorded on the **Pre-Trial Conference Checklist (PTCC)** and record agreement reached. Any outstanding issues need to be resolved and agreed between the parties well before the commencement of the trial.
- 7.3 One of the key outcomes sought from the **Pre-Trial Conference** is the extent to which the parties will use an **Electronic Court Book** during the trial.
- 7.4 A **Pre-Trial Conference Checklist** filed by the parties will be considered and, wherever possible, accommodated by the **Court**, having regard to such factors as:
- (a) the volume of **Paper Documents** and **Electronic Documents** likely to be tendered;
 - (b) the likely duration of the trial;
 - (c) the availability of **Court** or other resources to facilitate an **Electronic Court Book**; and
 - (d) any other factors the **Court** considers relevant.

8. Document Management Protocols

- 8.1 The **Default Document Management Protocol (DDMP)** applies to all proceedings where the number of **Discoverable Documents** is reasonably anticipated to be between 200 and 5,000 **Documents** unless an alternative **Document Management Protocol** is agreed by the parties and accepted by the **Court**.
- 8.2 Where the parties agree to use an alternative **Document Management Protocol** they must file it with the **Court** as an attachment to the **Pre-Discovery Conference Checklist**.
- 8.3 Any alternative protocol will only apply upon acceptance by the **Court**.
- 8.4 Where the number of **Discoverable Documents** is reasonably anticipated to exceed 5000 **Documents**, the **Court** recommends that the parties agree an **Advanced Document Management Protocol (ADMP)**.
- 8.5 A **(Sample) Advanced Document Management Protocol** accompanies this Practice Note by way of example only.

9. List of Documents

9.1 Each party must produce their **List of Documents**, electronically, and in compliance with the applicable form¹ and the **Document Management Protocol**.

10. Disputes

10.1 Where circumstances surrounding the preservation, accessibility, classification or exchange of **Documents** are disputed, the Court may refer the matter to mediation.

10.2 If the dispute requires adjudication the **Court** may consider:

- (a) The resources available to the parties;
- (b) The extent to which proactive **Document Management** practices have been used by the parties including:
 - i. The use and implementation of technology;
 - ii. Documented policies, procedures, standards and guidelines;
 - iii. The provision of education, advice and information by the parties to those undertaking **Document Management** activities; and
 - iv. Any other relevant matter.
- (c) Whether the disputed **Documents** are available from more easily accessed sources.

11. Costs

11.1 Each party will bear the cost of compliance with this Practice Note, and **Related Materials**.²

11.2 Practitioners must exercise diligence to ensure that any **Document Management** activities performed by or on behalf of their clients are conducted with quality, time and cost efficiency as priority considerations.

¹ The list of documents is to be provided in Form 22 per O 15 FCA Rules

12. Education and Awareness of Technology, and Court nominated eRegistrars

12.1 The **Court** will facilitate education and awareness in relation to this Practice Note and its **Related Materials**.

12.2 The **Court** requires legal practitioners to be appraised of the basic capabilities of modern technology in so far as it relates to this Practice Note or, where they are not so appraised, to ensure they have access to advisors who have the necessary skills and experience.

12.3 In addition to the nomination of **eRegistrars**, the Court may also maintain a register of other suitably qualified persons and organisations that provide consulting, mediation, **Document Management** and training services to facilitate the implementation of this Practice Note and its **Related Materials**.

13. Related Materials

13.1 The following **Related Materials** are released alongside this Practice Note:

- (a) **Pre-Discovery Conference Checklist (PDCC)**;
- (b) **Default Document Management Protocol (DDMP)**;
- (c) **Sample Advanced Document Management Protocol (ADMP)**; and
- (d) **Pre-Trial Conference Checklist (PTCC)**;

13.2 The **Related Materials** are available from the Court's web site at www.FedCourt.gov.au.

13.3 The **Related Materials** will be reviewed regularly by the Court and, if necessary, updated to accommodate feedback from interested parties and advances in technology.