

DISCOVERY IN AUSTRALIAN COURTS

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Any documentary evidence relevant to the issues in dispute that is not privileged is subject to discovery, regardless of whether such documentation supports or counters the case being made.

The current practice in large-scale actions is to create an electronic database, in accordance with the relevant Court's Rules and Practice Guidelines (Notes or Directions).

The majority of Australian courts have implemented Practice Guidelines (i.e. Notes or Directions) in relation to electronic litigation. Where the volume of discoverable documents exceeds 200 or 500, the electronic listing and exchange of discoverable documents is either recommended or mandatory.

This note is intended to address the following:

1. Practice Guidelines (Notes and Directions) for the Federal and Supreme Courts of Australia
2. Legal Definition of a "Document"
3. Database
4. Discovery under the Supreme Court of Victoria's Practice Note 2 of 2009 (TEC List)
5. Discovery under the Federal Court of Australia's Practice Note CM 8 (Fast Track List)

Selected Further Reading:

- Adrian Ryan, 'Discovery: The Law's Need to Adapt to Changing Times' (2008) 18 *Journal of Judicial Administration*, 116-135
- Chris Browne and Felicity Monteiro, 'Discovery of Email Chains' (2009) *New Zealand Law Journal*, May 2009, 149-150
- David McGrath, 'E-Discovery War Stories on Home Soil' (2009) 47 *Law Society Journal* 4, 34-35
- Peter Sallmann, 'Document Destruction and Civil Litigation in Victoria' (2004) *Tobacco Control. Reports on Industry Activity from Outside UCSF (University of California, San Francisco)*
- Standards Australia, *Guidelines for the Management of IT Evidence* (HB 171-2003)

1. PRACTICE GUIDELINES (NOTES AND DIRECTIONS)

The Federal Court of Australia and the Supreme Courts of Victoria, New South Wales, South Australia and Queensland have similar practice guidelines.

JURISDICTION	RULES PRACTICE NOTES (PN) OR PRACTICE DIRECTIONS (PD) RELATED MATERIAL
Federal Court of Australia	Federal Court Rules PN CM 6 – Electronic Technology in Litigation (Mandatory, 200+) CM 6 - Pre-Discovery Conference Checklist CM 6- Default Document Management Protocol CM 6 - Example of an Advanced Document Management Protocol CM 6- Pre-Trial Checklist PN CM 8 – Fast Track Directions
Supreme Court of Victoria	Supreme Court Rules PN 2 of 2009 - Technology, Engineering and Construction (TEC) List PN 1 of 2007 – Technology in Civil Litigation Matters (Not Specified) PN 1 of 2007 – Guidelines for the Use of Technology in any Civil Litigation Matter Courtroom Technology Discovery of Electronic Material FAQs
Supreme Court of New South Wales	Supreme Court Rules 1970 PN No. SC Gen 7 – Use of Technology (500+) PN No. SC Eq 3 of 2008 – Equity Division – Commercial List and Technology and Construction List (Mandatory)
Supreme Court of South Australia	Supreme Court Civil Rules 2006 PD 2.1 of 2006 (500+) Guidelines and Check List for the Use of Electronic Technology
Supreme Court of Queensland	Supreme Court Rules PD 8 of 2004 - Electronic Management of Documents (500+) Court Technology
Supreme Court of the Northern Territory	Supreme Court Rules 2008 PD 2 of 2002 – Guidelines for the Use of Information Technology in Litigation in any Civil Matter (500+)
Supreme Court of Western Australia	Supreme Court Rules Consolidated Practice Directions
Supreme Court of Tasmania	Supreme Court of Rules 2000 (SR No 8 of 2000) Practice Directions
Supreme Court of the Australian Capital Territory	Supreme Court Rules Practice Directions

2. LEGAL DEFINITION OF A “DOCUMENT”

The Commonwealth [Evidence Act 1995](#) defines a “document” as any record of information which includes:¹

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.

This includes any **part, copy**, reproduction or duplicate of a document.

Under this definition, files recorded on electronic or optical media constitute “documents”, as well as the medium itself.

Various interpretations of a “document” exist in each Australian jurisdiction.²

Commonwealth

The Commonwealth [Evidence Act 1995](#) definition of “document” is specifically referred to in Order 1, Rule 4 of the [Federal Court Rules](#):

“**[D]ocument** includes any record of information which is a document within the definition contained in the Dictionary in the *Evidence Act 1995* and any other material data or information stored or recorded by mechanical or electronic means.”

See also, the [Acts Interpretation Act 1901 \(Cth\)](#), s 25

Victoria

The uniform [Evidence Act 2008 \(Vic\)](#) definition of a “document” applies (Cf: [Evidence Act 1958 \(Vic\)](#), s 3). See also, the [Interpretation of Legislation Act 1984 \(Vic\)](#), s 38.

Interpretation – Some Relevant Case Law

- Discovery of electronic documents: [NT Power Generation v Power and Water Authority \[1999\] FCA 1669](#)
- Electronic storage of documents: [Sony Music Entertainment \(Australia\) Limited v University of Tasmania \[2003\] FCA 532](#) (Tamberlin J)
- Metadata is “part” of a “document”: [Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited \[2006\] FCA 1802](#) (Tamberlin J)

¹ *Evidence Act 1995* (Cth) Dictionary, Pt 1.

² *Acts Interpretation Act 1901* (Cth) s 25; *Evidence Act 1958* (Vic) s 3; *Interpretation Act 1987* (NSW) s 21; *Interpretation of Legislation Act 1984* (Vic) s 38; *Acts Interpretation Act 1954* (Qld) s 36; *Acts Interpretation Act 1954* (Qld) s 32E.

3. DATABASE

The Discovery Database (and associated images and/or files) will ultimately include all of the discoverable documents. The discoverable documents may be in a number of different formats, either Searchable Images usually TIFF or PDF, or Native File Format which could include Word, Excel, CAD, Outlook, etc.

Depending on the Electronic Discovery Agreement between the parties and/or the relevant Court Rules and Guidelines (Directions/Notes/Protocols), each page and/or file will be given a unique Document ID.

All documents are then reviewed and objectively coded into the database, capturing the following fields:

- individual (To and From)
- organisation (To and From)
- date or between selected dates
- subject title or key word
- abstract remark
- type of document
- issue(s)
- privilege

We have our own Discovery Database tool called *Tacitus*. Tacitus facilitates the identification of documents by relevant issues. Amongst other things, it can be used to identify and separate original documents from their copies, and to separate documents which attract privilege.

Features of Tacitus include:

- Cataloguing and codification of documents, including scanning and storage of document images and files;
- Preparation of discovery lists and electronic delivery of discovered documents;
- Search functions based on category or class of documents (i.e. based on catalogued data fields such as author(s), primary recipient(s), sending date, etc);
- Search functions based on full text of document contents electronically derived using optical character recognition (OCR) technology;
- Combining computer files such as e-mails with scanned documents into one database source; and
- Reporting lists and document distribution.

4. DISCOVERY UNDER THE SUPREME COURT OF VICTORIA'S PRACTICE NOTE 2 of 2009 (TEC List)

Unless limited by case management, parties to a Supreme Court of Victoria civil dispute are required to discover all documents that may “fairly lead [the party] to a train of inquiry which may contain information that may ... either directly or indirectly enable the party requiring discovery to advance his own case or to damage the case of his adversary”³.

A similar test for discovery applies in the Victorian [County Court](#) and [Magistrates' Court](#). The test is narrower in the [Federal Court of Australia](#).

In June 2009, Chief Justice Warren issued the Supreme Court of Victoria's new [Practice Note 2 of 2009](#). Practice Note 2 of 2009 sets out the operational procedure for the Court's Technology, Engineering and Construction ("TEC") List and the protocol for e-Disclosure.

Where a proceeding is conducted under Practice Note 2 of 2009, the Supreme Court's [Practice Note 1 of 2007](#) remains relevant, particularly to assist parties to reach appropriate agreements in relation to the efficient discovery of paper and electronic documents.

The [Supreme Court Rules](#) provide a range of sanctions and enforcement mechanisms to reduce non-compliance with and/or abuse of discovery rules, including a variety of sanctions for the abuse of discovery rules.

The Supreme Court of Victoria has published [Guidelines for the Use of Technology in any Civil Litigation Matter](#) in relation to Practice Note 1 of 2007.

5. DISCOVERY UNDER THE FEDERAL COURT OF AUSTRALIA'S PRACTICE NOTE CM 8 (FAST TRACK LIST)

Parties to a Federal Court of Australia dispute are required to disclose documents on which the party relies, documents that adversely affect the party's own case, and documents that support or adversely affect another party's case.⁴

On 25 September 2009, Chief Justice Black issued the Federal Court of Australia's [Practice Note CM 8 – Fast Track Directions](#) and [Practice Note CM 6 – Electronic Technology in Litigation](#).

The Fast Track Reforms are aimed at finalising a proceeding within 5 to 8 months of commencement, unless the matter settles beforehand. Amongst other things, the reforms restrict the availability of discovery, and where discovery is ordered, limits the scope of a party's discovery obligations.

Where a proceeding is subject to Fast Track Directions under Practice Note CM 8, Practice Note CM 6 is relevant, particularly to assist parties to reach appropriate agreements in relation to the discovery of electronic documents at the pre-discovery stage. It also supplements the Court's existing procedural rules for discovery contained in Order 15 of the [Federal Court Rules](#)

³ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882-1983) LR 11 QBD 55 at 62-63 (Brett LJ).

⁴ *Federal Court Rules 1979* (Cth), O 15, r 2.

Practice Note CM 6 applies, subject to the Court's discretion, to discovery in all legal proceedings where there is likely to be over 200 discoverable electronic documents.

Practice Note CM 6 includes a [Default Document Management Protocol](#) ("DDMP") intended for use where the volume of discoverable documents is between 200 and 5000. For discovery expected to exceed 5,000 documents, a sample [Advanced Documents Management Protocol](#) ("ADMP") is included for guidance. Parties may select either DMP, amend or agree to devise their own, at the Court's discretion.

Other relevant material published by the Federal Court in relation to Practice Note CM 6 includes a [CM 6 - Pre-Discovery Conference Checklist](#) and a [CM 6- Pre-Trial Checklist](#).