

Federal Court of Australia

Practice Note No 17: Pre-Discovery Conference Checklist

1. Introduction

- 1.1 This is the Checklist mentioned in paragraphs 7.3 and 11.1 of Practice Note No 17. It is current as at 29 January 2009.
- 1.2 The Court will expect the parties to have considered the issues identified in this Checklist and to be in a position to inform the Court on how the issues are to be addressed prior to or at the first Directions hearing or case management conference.
- 1.3 When considering the scope and conduct of discovery, the parties should have regard to the issues in dispute and the likely number, nature and significance of the documents that might be discoverable in relation to them.
- 1.3 The parties may decide, and in some cases the Court may direct, that the outcome of their consideration of the issues in the Checklist be recorded in accordance with the Schedules to this Checklist. The record should include details of the matters that have been agreed by parties and of the matters upon which they are unable to reach agreement.
- 1.4 The parties may combine the contents of one or more Schedules into one Schedule where this facilitates legibility.

2. Scope of discovery

- 2.1 The parties should agree on the scope of discovery having regard to:
 - (a) Order 15 rules 2 and 3 of the Federal Court Rules and Practice Note No 14.
 - (b) the importance of limiting the scope of discovery as far as practicable in order to minimise the time and costs associated with the identification, collection, processing, analysis, review and exchange of Documents.
 - (c) the Court's view that it is inefficient and inappropriate to require the production of more documents than are necessary for the fair conduct of the case.
- 2.2 The parties may record the details of their agreement as to the scope of discovery in Schedule 1.

3. Strategies for conducting a reasonable search

- 3.1 The parties should consider the factors set out in Order 15 subrule 2(5) of the Federal Court Rules and agree upon:
 - (a) the strategies they will use for conducting a reasonable search to locate Discoverable Documents; and
 - (b) any sources and/or categories of Discoverable Documents that are to be excluded from such a search.
- 3.2 The parties may record the details of their agreement in Schedule 2.

4. Management of Electronic Documents

- 4.1 The parties should consider the potential for Discoverable Documents to be managed as Electronic Documents and agree upon a strategy for the identification, collection, processing, analysis, review and exchange of Electronic Documents.
- 4.2 The strategy mentioned in paragraph 4.1 should, if necessary, deal with the management of Electronic Documents contained within databases, proprietary computer systems and other uncommon formats or repositories.
- 4.3 The parties may record the agreed strategy in Schedule 3.

5. Preservation of Electronic Documents

- 5.1 The parties should agree upon a strategy to ensure that Electronic Documents which are potentially Discoverable Documents are preserved in their original format.
- 5.2 The parties may record the agreed strategy in Schedule 4.

6. Timetable and Estimated Costs for Discovery

- 6.1 The parties should agree on a timetable for Discovery, which may be recorded in Schedule 5.
- 6.2 Each party should exchange with the other parties their best preliminary estimate of the cost associated with Discovery. The parties may record these estimates in Schedule 6.

7. Privilege

- 7.1 The parties should agree upon the strategies they will use to manage documents which are:
 - (a) subject to a claim of privilege of confidentiality
 - (b) ordered by the Court to be privileged
 - (c) ordered by the Court to be confidential.
- 7.2 The parties may record the agreed strategies in Schedule 7.

8. Document Management Protocol

- 8.1 The parties should agree on whether they will use the Default Document Management Protocol (DDMP) mentioned in paragraph 8.1 of Practice Note No 17 or a different Document Management Protocol (which may be an Advanced Document Management Protocol).
- 8.2 If the parties agree to use a different Document Management Protocol, a copy of that Protocol may be set out in Schedule 8.

9. Pre-Discovery Conference Attendees

- 9.1 If the Court orders the parties to attend a case management conference for the purpose of resolving any issues in relation to the scope of discovery, the protocols to be used for

the electronic exchange of documents and other issues relating to efficient document management in a proceeding, then:

- (a) it is expected that each party may have up to 3 representatives at the conference, including a 'Discovery Liaison' representative who will act as the single point of contact for the party in relation to the matters resolved at the conference.
- (b) it is expected that that the representatives of each party who attend the conference will have sufficient knowledge and access to information to address each item in this Checklist.
- (c) the parties or the Court may engage an expert or advisor to:
 - attend the Pre-Discovery Conference to facilitate or mediate resolution of any issues that have arisen in relation to the matters identified in this Checklist; and/or
 - complete the Checklist and prepare a Document Management Protocol in light of the agreements reached, or directions given by the Court, at the conference.

9.2 The name and contact details of each person who may attend the Pre-Discovery Conference, along with an indication of the party whom the person represents, may be recorded in Schedule 9.

10. Areas of disagreement

10.1 The parties may record the issues on which they have been unable to reach agreement in Schedule 10.

Schedules to Pre-Discovery Conference Checklist

Schedule 1 – Scope of Discovery

Agreed scope of discovery.

Schedule 2 – Agreed Reasonable Search Strategies

Agreed strategies in relation to reasonable searches.

Schedule 3 – Agreed Strategies for management of Electronically Stored Information (ESI)

Agreed strategies in relation to the management of ESI.

Schedule 4 – Agreed Preservation Strategies

Agreed strategies to ensure the preservation of Electronic Documents in their original format.

Schedule 5 – Timetable for Discovery

Agreed timetable for discovery.

Schedule 6 – Preliminary estimates of the cost of Discovery

Agreed best preliminary cost estimates.

Schedule 7 – Management of Electronic Documents subject to claims of privilege etc

Agreed strategy for the management of Electronic Documents that are subject to claims or orders of privilege or confidentiality.

Schedule 8 – Document Management Protocol

Agreed Document Management Protocol.

Schedule 9 – Pre-Discovery Conference Attendees

Name and contact details of each person attending any Pre-Discovery Conference and the party whom they represent.

Schedule 10 – Issues in Dispute

Particulars of each issue on which the parties have been unable to agree.