

E-Discovery and FOI

Practical Information Governance for Government

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National Archives of Australia
Information Awareness Month

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Your Presenter

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- Australian Lawyer and Computer Forensics Expert (CISSP, CCE, EnCE)
- E-Discovery Advisor to S&P/ASX 200 and Fortune 500 companies
- Co-Author, LexisNexis Australia, *Federal Civil Litigation Precedents*
- Co-Author, LexisNexis Butterworths UK, *Electronic Evidence* (Second Ed.)

Today

- **Electronic Documents**
- Electronic Discovery (E-Discovery)
- Freedom of Information (FOI)

Recent Trends

- **Government information governance is in the spotlight!**
- Discovery is the most time and cost intensive stage of litigation
- ALRC Report 115 - Discovery needs a plan!
- Recent FOI reforms designed to increase public access to information
- FOI is readily used as an alternative to discovery



98%

Documents stored in electronic form only

Electronic Documents Historical Perspective



Industrial Revolution

- Typewriter
- Carbon paper
- Filing cabinet

Information Revolution

c. 1960

- Mainframe computer
- Xerox photocopier
- Magnetic storage

Information Revolution

c.1985

- Personal computer
- Computer networks
- Optical storage

Information Revolution

c. 1995-

- Portable computing
- The Internet
- Solid-state storage

Electronic Documents

Key Features

- **Metadata** or “data about the data”
- **Easily copied** to defy the physical concept of an “authentic original”
- **Easily altered**, even without human intervention, to blur “integrity”
- **Easily deleted**, and often, recovery may present an onerous task
- **Easily mismanaged**, particularly when the same electronic document is stored in, or synchronised to, many distributed locations
- The **volume** of electronic documents continues to increase

Electronic Documents

Key Concepts



Data



Document



Format



Information



Metadata

Electronic Documents

Key Concepts



Data



Document



Record

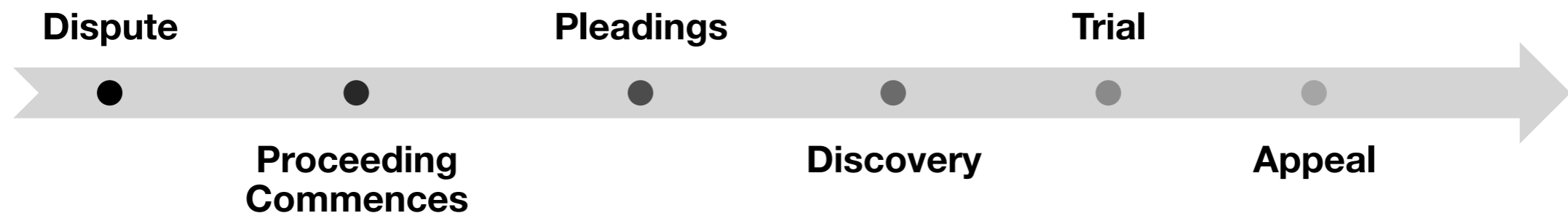
Electronic Documents Legal Interpretation

- **Evidence Act 1995** (Cth) (Dictionary, Pt 1; Pt 2, Cl 8)
 - “*Document means any record of information, and includes... anything from which sounds, images or writings can be reproduced with or without the aid of anything else*”
 - Includes any part, copy, reproduction or duplicate of a document
 - Definition adopted by a number of Australian jurisdictions under Uniform Evidence Law
- **Federal Court Rules** (O 1, r 4)
 - “*Any ...data or information stored or recorded by ...electronic means*”
- **Sony Music Entertainment v University of Tasmania [2003] FCA 532**
 - The electronic storage medium is also a document
- **Jarra Creek Central Packing Shed v Amcor [2006] FCA 1802**
 - Metadata is part of a document!

Today

- Electronic Documents
- **Electronic Discovery (E-Discovery)**
- Freedom of Information (FOI)

Litigation Lifecycle



- Dispute arises between two or more parties based on fact and/or law
- Proceeding commences by the plaintiff preparing, filing and serving a claim
- Upon service, the defendant acknowledges their intention to contest the claim
- Pleadings endeavour to settle undisputed matters by refining the plaintiff's claim and the defendant's defence (often over the course of multiple replies)
- Pleadings should focus the dispute, and consequently, should limit discovery
- **Discovery includes “the disclosure, and subject to privilege, inspection of an opponent’s documents”** (Cairns, 2007)

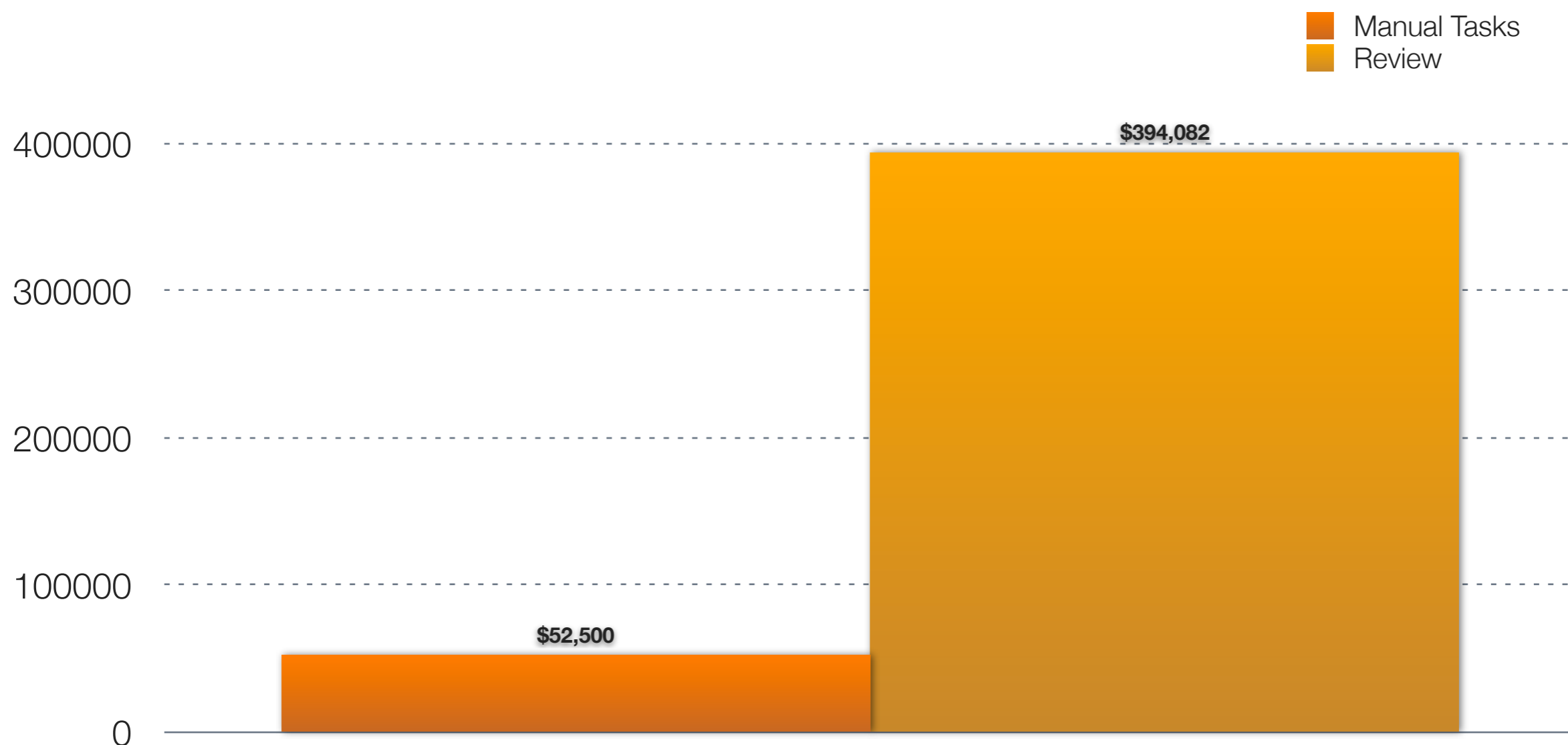
A \$2 DVD can store
4.7GB of data and
350,000 pages of information

The average lawyer would take
25 weeks to review
all documents stored on a \$2 DVD

If the average lawyer worked
24 hours a day!

Case Study

\$2 DVD

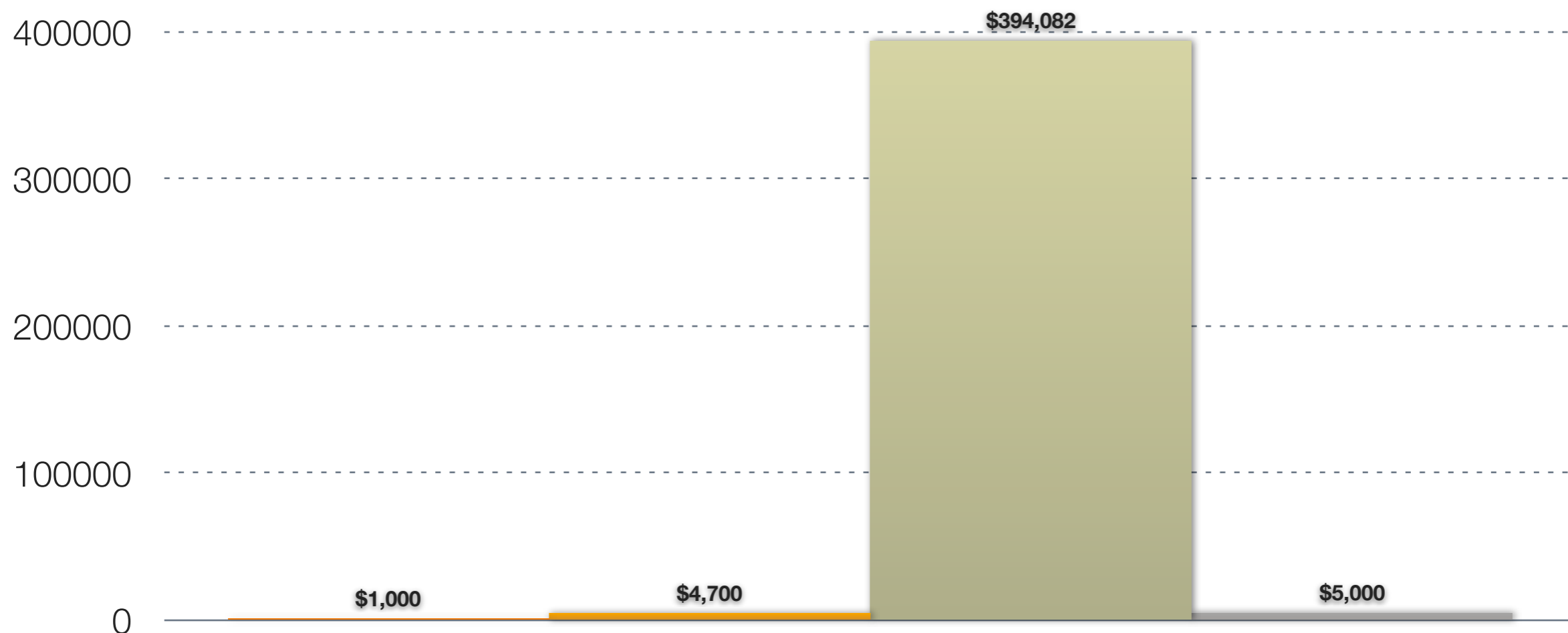


Printing and manual tasks (sort by date, de-duplication, document delimiting) calculated at A\$0.15 per page.
Review calculated on the average cost per hour of document review at A\$230.00 and
on the assumption that the average legally qualified reviewer can manually review 45 documents per hour.

Case Study

\$2 DVD

Collection Processing Review
Review Platform

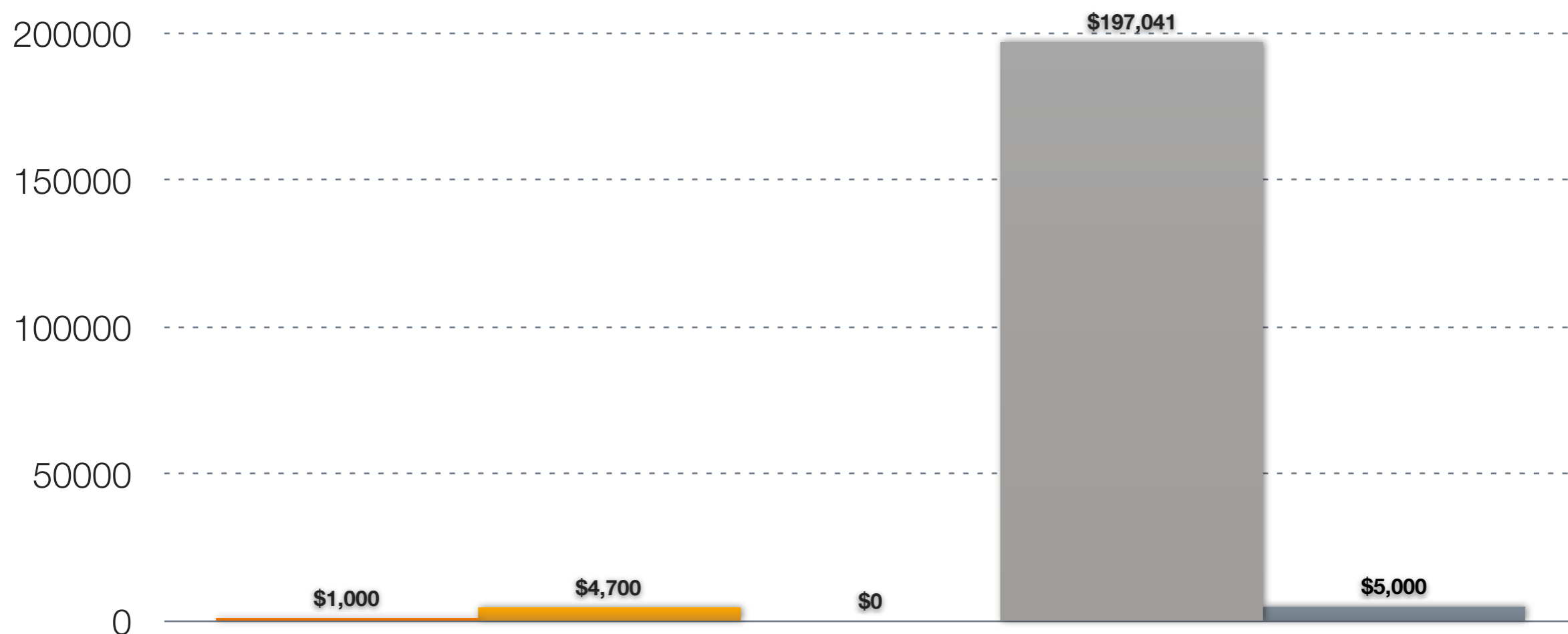


Collection calculated at forensic imaging of 1x DVD at \$1000.00.
Processing calculated on cost of \$1000.00 per GB.

Case Study

\$2 DVD

Collection Processing Analysis
Review Review Platform



First-pass analysis estimated to reduce document set by 50%.

How can your agency save **\$5.20**
per potentially discoverable document
within your possession, custody or power?

E-Discovery Definition

- **Traditional E-Discovery**

- Managing discoverable paper documents by conversion to electronic form

- **Modern E-Discovery**

- Managing discoverable electronic documents in electronic form

- **Today = Transitional Phase**

E-Discovery Court Practice Guidelines

Federal Courts	Guide	Year	Mandated?
Federal Court of Australia - Fast Track List	<u>PN CM 6</u> <u>PN CM 8</u>	2009 2009	Yes, 200+

Supreme Courts	Guide	Year	Mandated?
New South Wales - Equity Division (Select Lists)	<u>PN SC Gen 7</u> <u>PN SC Eq 3</u>	2008 2008	No, 500+ Yes, All ESI
Victoria - TEC List	PN 1 PN 2	2007 2009	No, 500+
South Australia	PD 2.1	2006	No, 500+
Queensland	PD 8	2004	No, 500+
Northern Territory	PN 2	2002	No, 500+

Federal Court PN CM 6

Key Features

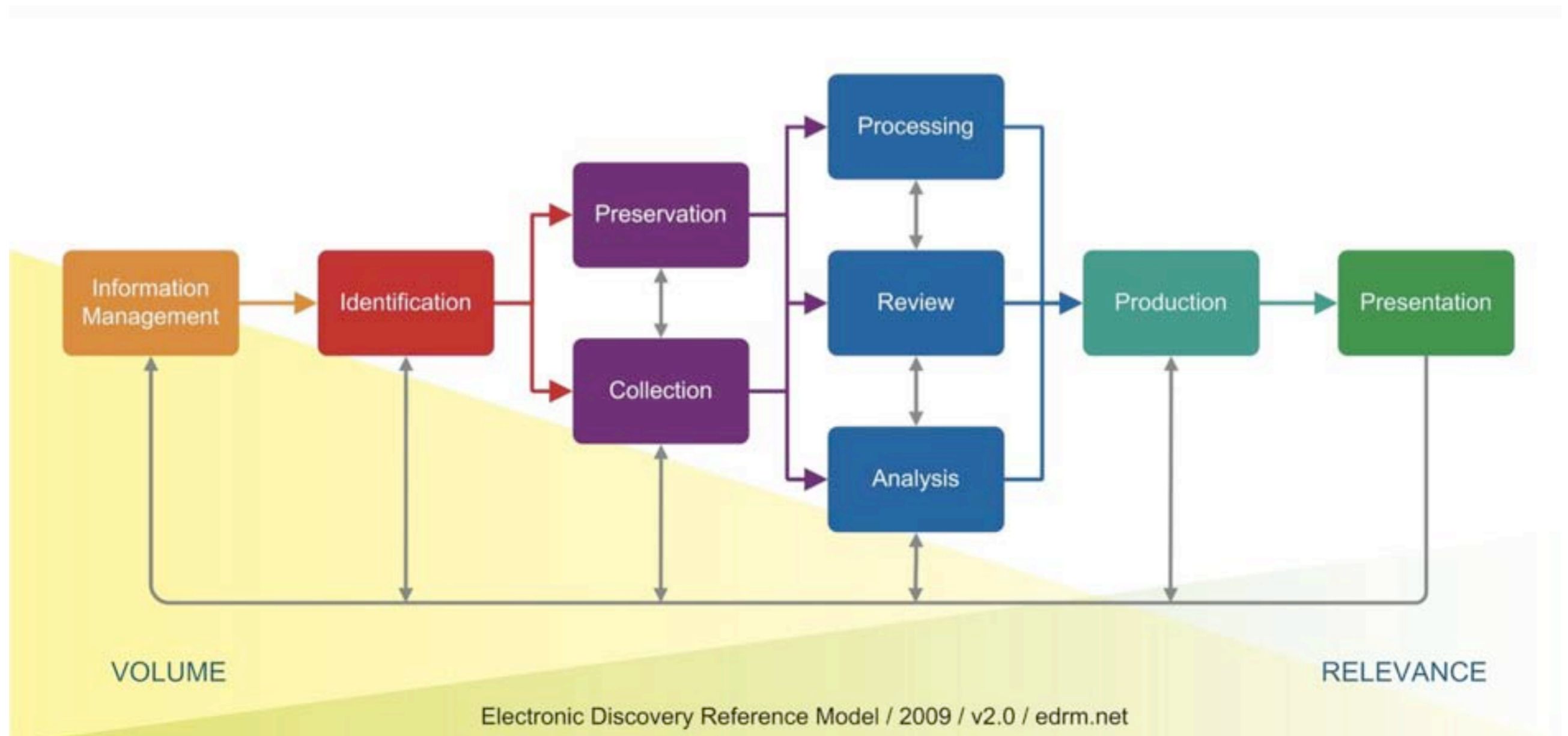
- **Subject to Court's discretion, the Practice Note applies at discovery and trial where there is likely to be over 200 electronic documents**
- **DOES** focus the attention of parties to discovery at the earliest opportunity
- **DOES** provide a framework for parties to agree upon and manage discovery
- **DOES NOT** impose new discovery obligations, but re-emphasises:
 - Need for parties to preserve discoverable electronic documents
 - Performance of a reasonable search per existing Court Rules and **PN CM 5**

Federal Court PN CM 6

Pre-Discovery Conference

Scope of Discovery	<ul style="list-style-type: none"> ● Map pleadings to discoverable documents
Reasonable Search	<ul style="list-style-type: none"> ● Plan a reasonable search for discoverable documents ● Identify reasonably inaccessible documents
Preservation	<ul style="list-style-type: none"> ● Preservation strategy for potentially discoverable documents before, during and after discovery
Time and Cost	<ul style="list-style-type: none"> ● Understand the time and cost implications of discovery ● Understand the resource requirements for discovery ● Production schedule for discoverable documents
Privilege	<ul style="list-style-type: none"> ● Agreement on privilege management
Document Exchange	<ul style="list-style-type: none"> ● Default, Advanced or Agreed Document Management Protocol (<i>DMP</i>)
Areas of Dispute	<ul style="list-style-type: none"> ● Are there any unresolved issues?

E-Discovery EDRM Workflow



E-Discovery Information Management

- Consider your agency's **litigation risk profile and culture**
- If your **electronic house** is not in order, then the ability to efficiently manage litigation is significantly reduced
- Ensure that the majority of potentially discoverable documents are reasonably accessible – and know what it would take to access the rest!
- **How do you promote and enforce your Document Retention Policy?**

Information Management Retention

- **Retention obligations typically rise from contract and legislation**
- 80+ pieces of legislation impose retention (and destruction) obligations
- Archives Act 1983 (Cth)
 - Administrative Functions Disposal Authorities (**ADFAs**)
 - General Disposal Authorities (**GDAs**)
 - Records Authorities (**RAs**)
 - Agency Policy/Normal Administrative Practice (**NAPs**)

Information Management Destruction

- **Commonwealth records**

- s 24, *Archives Act 1983* (Cth)

- **Current Australian common law test**

- ***McCabe v BATAS*** [2002] VSC 73; [2002] VSCA 197

- The Court may draw adverse inferences or impose severe sanctions
- Sanctions can apply where the conduct of document destruction is prejudicial to another party and amounts to an attempt to pervert the course of justice (or contempt of court)

- **Victorian legislative response**

- *Crimes (Document Destruction) Act 2006* (Vic)
- *Evidence (Document Unavailability) Act 2006* (Vic)*

E-Discovery Information Management



First Steps

- Key Stakeholder Support
- Concise and Relevant Document Retention Policy (**DRP**)
- E-Discovery Audit

Use of Technology

- Appropriate Infrastructure
- Clear Documentation

On-Going Compliance

- Employee Training
- Regular Review

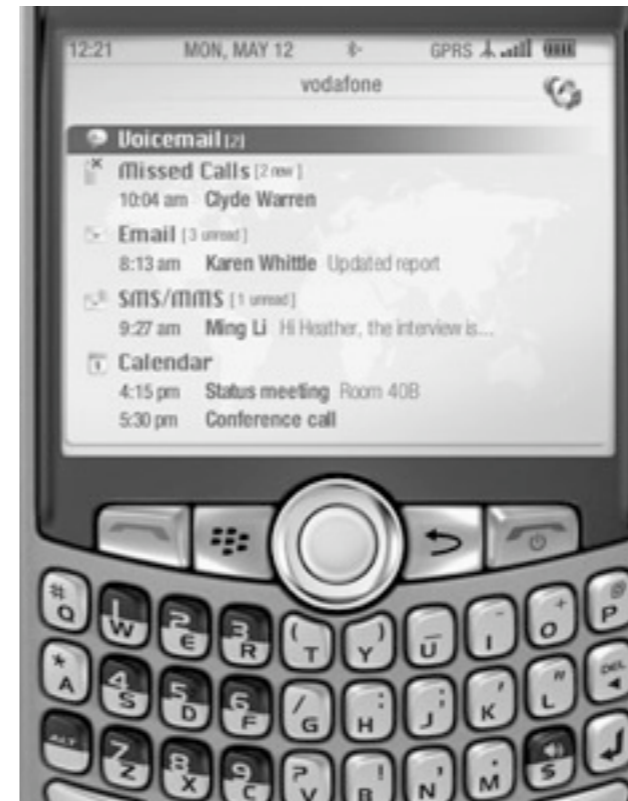
Emerging Trends

- Internal Checklists
- E-Discovery Champions
- Information Packets
- Preferred Suppliers Panel

E-Discovery Identification

- **Identify the documents** (or document categories) which constitute the ordered or agreed **scope** of potentially discoverable documents in your possession, custody or power
- **Identify the custodian(s)** of the documents
- **Identify the format(s)** of the documents
- **Identify the electronic source(s)** of the documents
- **Identify the physical location(s)** of the documents
- **Identify your strategy**

E-Discovery Identification - Sources



Personal Computers

- Desktop and Notebook
- Removable Devices
(Floppy, CD/DVD, USB)

Computer Servers

- File/EDRMS
- Internet (Web, E-mail)
- Application
- Database
- Storage (NAS, SAN, Tape)

Communication

- Mobile Phone
- Smartphone and PDA
- GPS Navigation System
- Multifunction Printer

Multimedia

- Media Player (iPod)
- Digital Still/Video Camera
- Digital Voice Recorder
- Digital Video Recorder

E-Discovery Identification - Web Sources



facebook

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English (US) Español Português (Brasil) Français (France) Deutsch Italiano

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Blogger

Create a blog. It's free.

- Your blog.** Share your thoughts, photos, and more with your friends and the world.
- Easy to use.** It's easy to post text, photos, and videos from the web or your mobile phone.
- Flexible.** Unlimited flexibility to personalize your blog with themes, gadgets, and more.



Google wave

Navigation: Inbox, My Docs, My Drive, My Recent Docs, My Recent Docs, My Recent Docs

Participants: Greg, Natalie, Alan, Christine, Toby, Stephanie

Messages:

- Let's go to the Grand Canyon - Remember the last year? On the water. The canyon. On shore. (waiting) At the...
- Chess time? - Let's play this Thursday!
- No way! - Did you see this youtube video?
- There is a party in your browser - and everyone is invited!
- What's going on tonight? - The boring!
- Want to get some coffee? - I can't wait to get out of the office!



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NIKKEI 10,257.62 ▲ 18.97 (0.1%)

18290
18280
18270
18260
18250
18240
18230

9AM 11AM 1PM

EQUITY INDEXES

	VALUE	CHANGE
Topix	901.15	-2.96
Hang Seng	22,071.71	72.63
Singapore Straits Times	2,707.53	-4.62
S&P/ASX	4,947.30	-12.60

JAPAN MOST ACTIVE BY VOLUME

	PRICE	% CHANGE
KIDUHO FINANCIAL	170	-3.95
JAPAN AIRLINES	102	-10.33
MITSUBISHI UFJ F	465	-4.12
NOMURA HOLDINGS	636	0.00

News headlines:

- Drop; Sony Climbs on Upgrade
- That's No 'Slam-Dunk' for Moody's
- Add to Rate Increase Chances
- 'Flexibility' by U.S. Treasury
- 'Usual Baby Step,' Lee Says
- 2015 to Meet Domestic Demand
- Pentagon Review, May Be Discarded
- to Gain Psychological Advantage

Social Networking

- Facebook
- LinkedIn
- Second Life

Content Sharing

- Google Blogger
- Google Docs
- Salesforce CRM
- Wikipedia
- YouTube

Communication

- Voicemail
- IM (BBM, MSN, QQ)
- VoIP (Skype)
- Twitter

Commerce

- Share Trading
- Banking
- Auctions
- Shopping

Identification Federal Court Guidance

- **Order 15, rule 2(5):** Considerations for **making a reasonable search**:
 - (a) the nature and complexity of the proceedings; and
 - (b) the number of documents involved; and
 - (c) the ease and cost of retrieving a document; and
 - (d) the significance of any document likely to be found; and
 - (e) any other relevant matter.
- **Order 15, rule 2(6):** *“If the party does not search for a category or class of document, the party **must include** in the list of documents a statement of the category or class of document not searched for and the reason why.”*

Galati v Potato Marketing Corp.

[2007] FCA 919

- The CEO of the Potato Marketing Corporation advised that the party had not undertaken a search due to the burden arguably imposed by searching approximately 100,000 documents
- The CEO advised that he believed a search for those documents would be “*very onerous, time consuming and expensive*”
- **Due to the apparent admission that no reasonable search had been performed, and that the categories of documents likely to be discovered were of significance, the Court ordered the Potato Marketing Corporation to give further discovery**

Slick v Westpac (No 2)

[2006] FCA 1712

- **Discovery should be done right the first time!**
- During the relevant time, Quadrant only discovered a very small number of e-mails and no electronic calendar entries
- Quadrant had upgraded their technology infrastructure, including e-mail server, during the relevant time
- Unfortunately, Quadrant's CFO, as representative, was unable to explain their searches and clarify the impact of the migration on their electronic documents, specifically whether any documents could have been potentially deleted or no longer reasonably accessible as part of the process
- The Court ordered Quadrant to give further discovery

Leighton v Public Transport Authority

[2007] WASC 65

- **Reaffirmed the *NT Power* principle that the burden of discovery must be proportionate to the potential value of the electronic documents sought**
- Time, cost and inconvenience are to be considered in the context of the litigation and financial resources available to the party
- The burden and obligation of discovery is greater for a large organisation due to the volume of electronic documents they manage
- Whilst discovery for a large corporation or government department may be onerous, proportionality should ensure that it is not oppressive

Optus v Telstra (No 4)

[2011] FCA 485

- As part of ongoing access agreement dispute, Optus applied for Telstra to give discovery of documents to support Optus' election of a remedy
- ***Information dating back 17 years stored away in archives which must be searched for on unrestored backup tapes ...cannot constitute “readily available information”***

Westraint v BHP Iron Ore (No 4)

[2009] WASC 17

- **Highlights the critical relationship between the business process of information management, and the legal process of discovery**
- Westraint requested **order for further discovery** of particular documents
- BHPIO successfully persuaded the Court against such an order
 - Filed multiple affidavits outlining extensive searches made for discoverable documents
 - Made extensive documented enquiries to current and former personnel, within multiple departments and jurisdictions
 - BHPIO's Records Manager and external legal counsel collaborated to undertake additional searches

Police Federation of Australia v Nixon

[2010] FCA 315

- **The use of declarations as part of offensive e-discovery strategy**
- The Victoria Police applied for a declaration that: *“The [Victoria Police] is not required to conduct further searches for electronic documents stored on G Drives.”*
- In support of the declaration, the Victoria Police argued that the G Drive was:
 - Widely used;
 - Searching is very problematic; and
 - Unlikely to identify any relevant documents.

E-Discovery Preservation and Collection

- **Determine the most efficient method of preserving and collecting potentially discoverable documents**
- **Legal Hold** technology prevents destruction of electronic documents by
 - **Applying information security controls** to a set of selected documents once litigation is anticipated or has commenced
 - **Sending frequent reminders to key custodians** as to which documents must be preserved and their individual role in assisting the organisation to comply with their discovery obligations
- In complex and contentious matters, **computer forensic expertise** may be required to collect potentially discoverable documents

BT v State of New South Wales v Anor [1998] FCA 363

- **Organisations must diligently manage their electronic documents – or else!**
- Failure to adequately disclose your information management practices in a timely manner may lead to more onerous discovery obligations

Seven Network Limited v News Limited

[2007] FCA 1062

- News Limited (Hutley SC): ***“What policy should a commercial organisation in the early 21st century, with the ubiquity of e-mails, adopt?”***
- Sackville J: *“Keep them, or don’t engage in a systematic process of removal of them so that in a case like this the end result is that ... as far as the trier of fact is concerned, I simply don’t know what the contemporaneous communications were within News [Limited]”*

E-Discovery Processing

- Processing potentially discoverable documents into a **readable and usable** form for analysis and review
 - Electronic Documents
 - Paper Documents
- Understand limitations of your processing tools

E-Discovery Processing - Electronic

- Automated extraction of document and e-mail metadata
- Extract compressed data (e.g. documents in ZIP archives, backup tapes)
- Extract password-protected or encrypted data
- Use optical character recognition (**OCR**) technology to facilitate searchable text for non-searchable documents
- Conversion of audio files to transcript (e.g. voicemail)
- Management of complex and proprietary document types (e.g. creating queries to generate reports from the data stored in databases)
- Management of non-English text (Unicode, traditional code pages)

E-Discovery Processing - Paper

- Scan paper documents to an electronic image format (e.g. TIFF, PDF)
- Manual extraction of document metadata (e.g. Title, Author, Date)
- OCR technology to facilitate searchable text

E-Discovery Analysis

- Analysis of processed potentially discoverable documents **prior to review**
- Analysis and review should be treated as an **iterative cycle**
- Consider **sampling** to validate analysis tasks
- Consider agreeing to a **search protocol** with opposing party
- **If the appropriate technology is in place, the majority of analysis tasks can be performed at the Identification stage!**

E-Discovery Analysis

- **Key Custodians or Repositories**

- Date Ranges
- File Types

- **Search Queries**

- Keywords
- Concept Searching
- Clustering

- **De-Duplication**

- Exact De-duplication (MD5 Hashing)
- Near De-duplication
- E-mail Threading

bus

“bus” OR “buses”?

toll

“toll” NOT “toll-free”?

“toll” AND [keyword] NEAR/25 [keyword]?

E-Discovery Analysis

Results

Please note that this report only reflects the results of your original search, and is not affected by any filters.

Emails	Loose Files	Documents	Attachments
78	0	78	18

Keywords

Keyword	Documents
fals* AND earn*	78

Results:

falsify AND earning	27
falsifying AND earnings	27
falsifications AND earnings	17
falsifying AND earning	4
falsification AND earnings	4
falsified AND earnings	4
falsifications AND earning	2

Variations searched for:

fals* : falsification, falsifications, falsified, falsify, falsifying, falsity
 earn* : earning, earnings, earnings.xls

Not searched for:

fals* : falsani, false, falsealarm, falsehood, falsely, falseness, falsestart, falsesto, falsie, falsom, falstaff, falstore
 earn* : earn, earned, earner, earners, earnest, earnestly, earnestness, earnhardt, earnhardt.doc, earnold, earns, earnshaw, earnst, earnheart, earni, earnie, earnin

Export Report...

Select Variations

Select variations for: fals* Show: All

Variation	Matching Emails	Matching Unique Files
<input type="checkbox"/> falsestart	274	4
<input type="checkbox"/> falsesto	74	5
<input type="checkbox"/> falsie	0	5
<input type="checkbox"/> falsification	1	6
<input type="checkbox"/> falsifications	17	4
<input checked="" type="checkbox"/> falsified	66	4
<input checked="" type="checkbox"/> falsify	27	0
<input checked="" type="checkbox"/> falsifying	28	8
<input type="checkbox"/> falsity	148	5
<input type="checkbox"/> falsom	43	2
<input type="checkbox"/> falstaff	70	2
<input type="checkbox"/> falstore	25	4

Displaying 7 - 18 of 18

OK

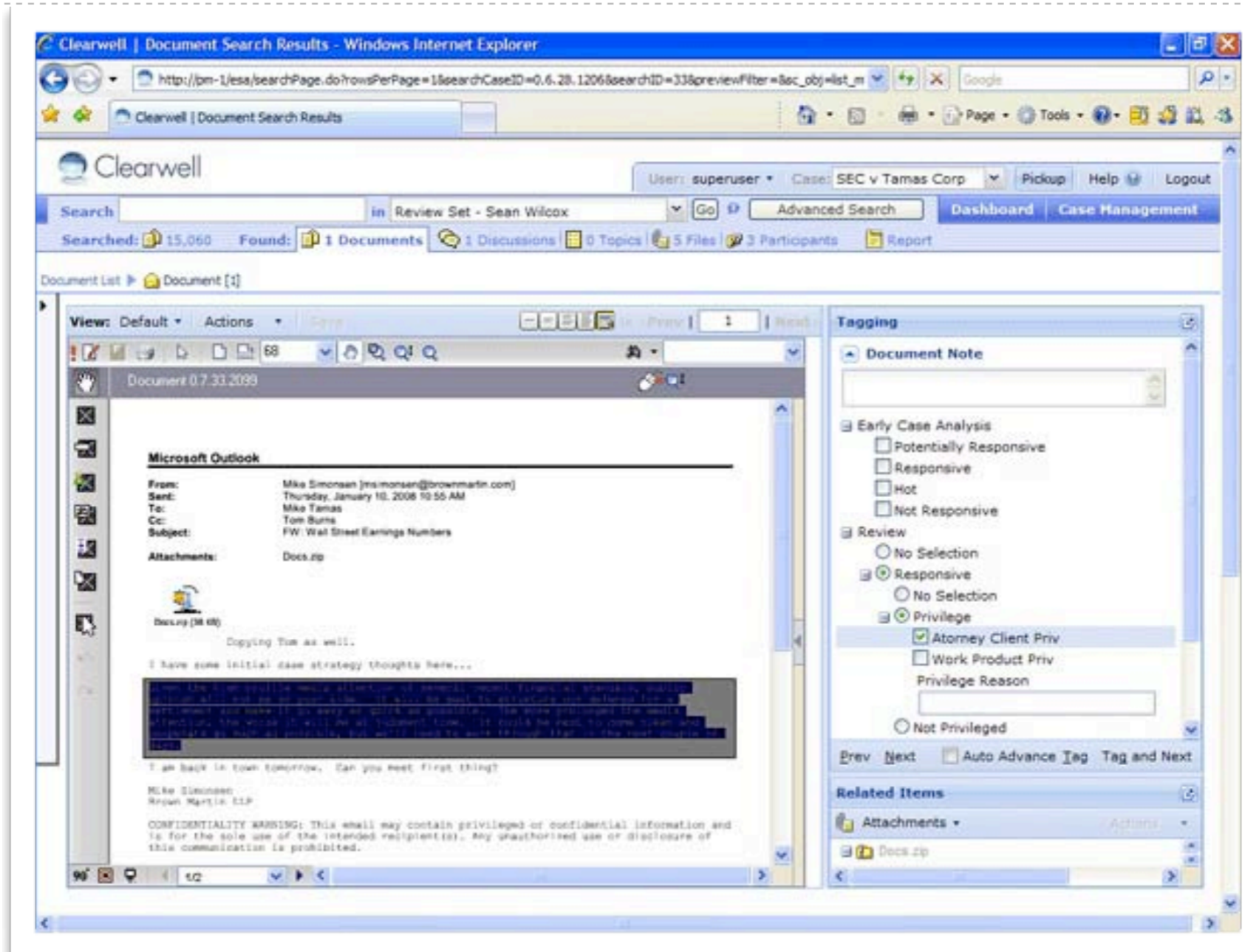
Copy Shown Variations

Cancel

E-Discovery Review

- **Lawyers review the filtered set of documents**
- **Privilege Management**
 - Traditional
 - Bulk Discovery without Privilege Waiver
 - Hybrid
- **Redaction**
 - Part-privileged, part-confidential and irrelevant documents or attachments
- Documents may be hosted in-house using a document review platform or via an external service provider

E-Discovery Review - Platforms



E-Discovery Production

- Perform final validation and quality assurance
- Prepare **List of Documents** and verification **Affidavit**
- Produce discoverable documents as ordered or agreed with DMP
 - Convert electronic documents to an electronic image format (e.g. PDF)
 - Assign Document ID to each (page of a) document
 - Create load file for opposing party to import into document review platform

Jarra Creek Central Packing Shed v Amcor [2006] FCA 1802

- **Proactively agree upon a DMP, with all other parties, at the earliest opportunity**
- Ensure that you fully understand the DMP, and its implications
- Be prepared to offer to pay the costs to other parties if you require anything above or beyond the agreed DMP to ensure that your lawyers can efficiently review discoverable documents
- Unfortunately for Jarra Creek, their application to use a new DMP was dismissed in the interests of avoiding ‘unnecessary discovery’

*“The reality in our Court is that only about
1 in 30 of our cases will ...go to trial.”*

- Chief Justice Martin, Supreme Court of Western Australia, September 2009

E-Discovery Presentation

- **If the proceeding continues to trial**, consider use of the Court's technology resources, including electronic court book facilities, to efficiently manage and display documents within the Court
- The Federal Court has a **Pre-Trial Checklist** as part of **PN CM 6**

Today

- Electronic Documents
- Electronic Discovery (E-Discovery)
- **Freedom of Information (FOI)**

Commonwealth FOI Reforms

Searches - s 24A

- 1. An agency or Minister may refuse a request for access to a document if:**
 - (a) all reasonable steps have been taken to find the document; and**
 - (b) the agency or Minister is satisfied that the document:**
 - (i) is in the agency's or Minister's possession but cannot be found; or**
 - (ii) does not exist.**

2. An agency may refuse a request for access to a document if:
 - (a) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document; and
 - (b) the agency has not received the document; and
 - (c) the agency has taken all reasonable steps to receive the document in accordance with those contractual measures.

Chu v Telstra

[2005] FCA 1730

- Have **ALL** reasonable steps been taken?
- *“Taking the steps necessary ...may in some circumstances require the agency or Minister to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered or disorganised.”*
- **Affirmed that adequacy of searches is a matter for the Tribunal**

Langer and Telstra

[2002] AATA 341

- **Set out a number of considerations for satisfying “all reasonable steps”**
 - Subject matter of the documents sought
 - File management systems
 - Any destruction schedules followed
 - Steps that have already been taken to locate documents within the terms of the request

In Re Viewcross Services and Telstra

[2003] AATA 1025

- **All considerations set out in *Langer*, plus**
 - Consultation of relevant persons in the Agency about possible existence of further documents
 - Willingness of the Applicant to provide further information
 - Willingness of the Agency to conduct further searches
 - Purpose for which the request for documents was made
 - Agency's commitment to FOI

Mester & Anor and Centrelink

[2004] AATA 354

- **Tribunal NOT satisfied and ordered**
- Enquiries be made of an appropriate person within Centrelink, who is familiar with the disability support pension area, to find out what additional Centrelink computer screens it would be appropriate to search in looking for records of letters between Mr Mester and Centrelink between 1998 and 2001, and those screens be searched to see if any further letters can be located;
- Enquiries be made of an appropriate person within Centrelink, who is familiar with procedures in the disability support person area between 1998 to 2001 to find out what letters he or she would expect to have been sent to Mr Mester...; and
- Evidence be sought as to whether the activity statements from the Ballarat Office covering the period 1996 to 1997 and stored in batches have been destroyed in accordance with the *Archives Act 1983* and if so, evidence as to the dates of destruction be obtained.

Maksimovic and CDPP

[2009] AATA 700

- CDPP commissioned fresh searches
- Discussions with relevant officers involved in the prosecution of Mr Maksimovic
- Supervised searches of both paper and electronic files
- Supporting evidence in relation to CDPP's records management system and search procedure
- **Tribunal satisfied**

Ugur and AHRC

[2010] AATA 144

- **Considerations**
 - Significant **number** of documents released
 - Diverse and different **types** of documents located
 - Range of **sources** from which the documents have been obtained
 - Both **electronic** and **physical records** were searched
 - **Two searches** were undertaken and by **different people**
 - Search was conducted across all **sections** of the HRC
- **Tribunal satisfied**

Novak and AFP

[2010] AATA 219

- ***“If adequate searches had been conducted, it may not have been necessary to order further searches during these proceedings.”***
- The Applicant should raise any concerns about “missing documents” at their earliest opportunity
- The issues and scope of searches should be first considered at Internal Review, not on appeal at the Tribunal

Re Matthews and ASIC

[2010] AATA 649

- ***“...My concern is that the way in which documents have been located has given [ASIC’s] searches the air of being somewhat piecemeal.”***
- *“I do not consider the fact that an officer of ASIC, when asked for documents, asks who the person requesting them is – **“Some student / academic / disaffected lawyer or accountant or what?”** – amounts to any suggestion that the documents were not properly looked for or identified.”*
- **Considerations**
 - Record-keeping policy
 - Identify the categories of documents that should be retained
 - Identify apparent gaps in the logical flow of documents one would expect to see
- **Tribunal satisfied**

Closing Remark

- **Any benefit (or detriment) to be derived from fulfilling your information compliance obligations is largely dependent upon your information governance**
- Technology should assist and provide efficiency – not hinder!
- Consult specialist expertise - Archives - to mitigate risk

Further Resources

- National Archives of Australia Website (<http://www.naa.gov.au>)
- In Pursuit of Relevance Blog (<http://www.elitigation.com.au>)

Thank You

If you have any questions or feedback regarding this presentation please contact

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