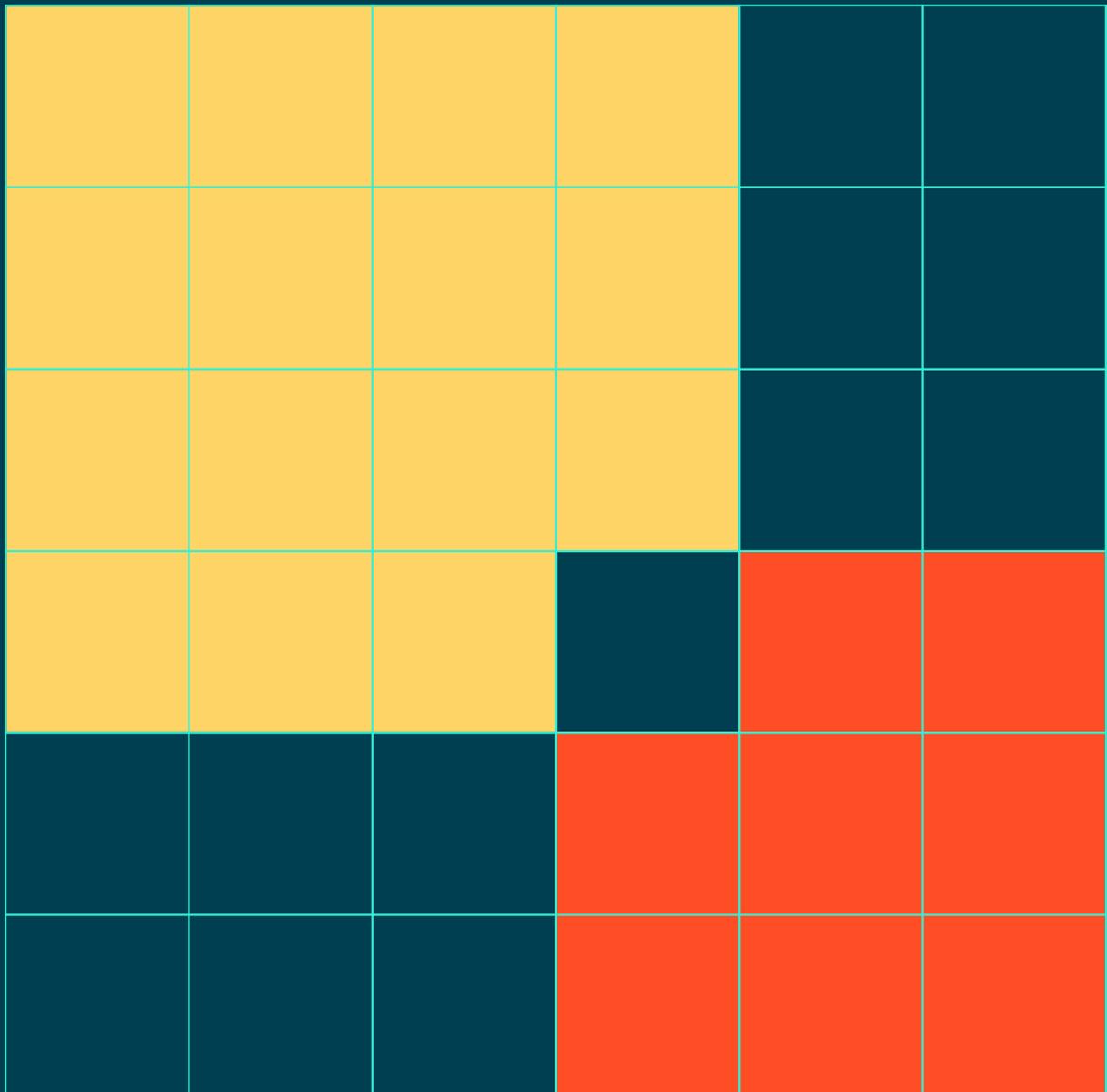


# Drafting effective document exchange protocols



# In this guide we explore the enclosed insights for lawyers to draft effective document exchange protocols.

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The development of, and agreement on, a Document Management Plan or Exchange Protocol (DMP) that governs the use of eDiscovery workflows and processes in disputes is a common theme amongst the various Court jurisdictions in Australia, as well as in private dispute resolution mediums like arbitration.

Various jurisdictions provide differing levels of guidance on the form and content of the DMP with some even providing example DMP documents so that lawyers have a starting point. However, in all jurisdictions (whether by virtue of a practice direction, rules or common law) the parties are encouraged to adopt a DMP that best suits their matter and best advances the principals of efficiency and proportionality throughout the entire eDiscovery process.

A DMP, specific to your matter requirements, should be adopted in all dispute resolution mediums in circumstances where you intend to adopt eDiscovery processes. The use of a DMP should occur irrespective of whether its use is mandated, recommended, or not mentioned at all in the relevant jurisdiction.

Getting the DMP right, as early as possible in the matter, will ensure the discovery process is as efficient and effective as possible, minimising delay and decreasing the cost to clients surrounding this process, particularly due to ballooning data and document volumes.

# Key considerations for drafting, or coming to, a DMP agreement.

## Data volume and type

The DMP effectively governs the way in which parties to a proceeding will obtain, search, manage and exchange electronic documents. It is near impossible to effectively negotiate a DMP appropriate for your matter without having a solid understanding of not only the potential data volumes and types in your client's control but also what you might expect to receive from opposing or other parties. A failure to give due consideration to this factor could result in DMP requirements that are cumbersome to comply with and ultimately costly.

You may be unable to change the DMP at all or incur time delays and costs in doing so. Ensure you start discussions with your client about data and document volumes early in the matter lifecycle. Your eDiscovery partner should be able to guide you as to the information you will need and the sorts of questions you should ask.

## Jurisdictional nuances

Whilst most jurisdictions are consistent in the fact that they want parties to adopt eDiscovery the guidance provided around the formation of a DMP is far less consistent and in some cases relatively non-existent. Some jurisdictions provide quite detailed guidance, others none.

Reference our summary of the Court's current position in respect of DMP's and [eDiscovery practice directions by jurisdiction](#).

It is important that any jurisdictionally specific requirements are considered and, where appropriate, adopted. Most jurisdictions approach the formation of a DMP with relative fluidity encouraging the parties to come together to agree on a document that best suits the needs of their matter. Provided you can justify your position as being in the interests of efficiency and proportionality you will have a good chance of having the terms of your DMP approved.

## **Collaboration**

Whilst there may be some strategic advantages to be gained in using eDiscovery where another party is not, we are of the view that there is a greater benefit to be gained from all parties effectively using eDiscovery under the guidance of a well drafted DMP. Any benefit gained from being more efficient than another party can be quickly eroded if the documents they send you aren't ordered and structured.

The key to having a well drafted DMP is collaboration with all parties. In fact, most jurisdictions strongly encourage the parties to get together to discuss their eDiscovery requirements and attempt to resolve any differences without intervention of the Court. At the very least the Court would expect a DMP to be substantively agreed and their involvement in rectifying any points of contention is limited.

Open communication between the parties and their relevant eDiscovery teams is crucial to finding quick agreement on the form of the DMP. At the very least there should be genuine attempts to work with the other parties to form an agreement. A failure to take such steps is not viewed favourably by the courts.

## **Industry best practice**

The most recent practice direction relating to the use of eDiscovery was released in 2020, the oldest in 2001, with the bulk sitting in the mid-2010s. One year is a long time when it comes to technology let alone twenty years. The eDiscovery space moves quickly, and it is important that you are looking to adopt industry best practice.

As set out above, the Courts encourage parties to depart from their broad guidance in circumstances where it will be of benefit to all from an efficiency and proportionality standpoint. You should always ensure that the DMP you are adopting is in accordance with present day best practice, rather than being reliant on an old precedent or old practice direction.

Our standard protocol is a substantive document, and it needs to be, to ensure that the eDiscovery process is efficient and effective and manages all the variables. Set out below are some of the key areas we think you need to consider and why.

### **Data preservation**

It is important that both parties take steps to preserve the integrity of the data and documents they obtain from their client. Preserving hardcopy documents is generally much easier than for electronic documents. The integrity can be easily, and inadvertently, impacted which may see the value of the potential document undermined as well as impact the efficacy of the eDiscovery process more broadly. Including a clause that ensures the parties take reasonable and accurate steps to collect the data and preserve the relevant metadata is vital.

### **De-duplication**

De-duplication is a quick, easy, and cost-effective way to remove documents from the reviewable dataset. However, there are multiple methods and workflows surrounding how de-duplication can occur, subject to the types of data you may be reviewing. It is important that you account for these methods in your protocol to ensure that de-duplication is effective but does not undermine the value of the documents being reviewed or produced.

### **Document numbering**

It is important that the appropriate numbering structure is adopted. That numbering structure is typically as follows: "AAA.BBB.FFF.PPPP\_XXXX". Whilst this may appear long and cumbersome it will ensure that your documentation can be appropriately and accurately numbered.

This numbering system does more than just create a unique record for each individual documents, but it will also allow you to reference material consistently and accurately, refer to specific pages of documents as well as largely automate the process of collating and hyperlinking witness statements.

Any departure from this structure may run the risk of undermining the efficiencies that can be gained from use of the comprehensive numbering system. The sooner this system is adopted the better as there are long term benefits to its implementation and potential delays and downsides if adopted part way through a matter.

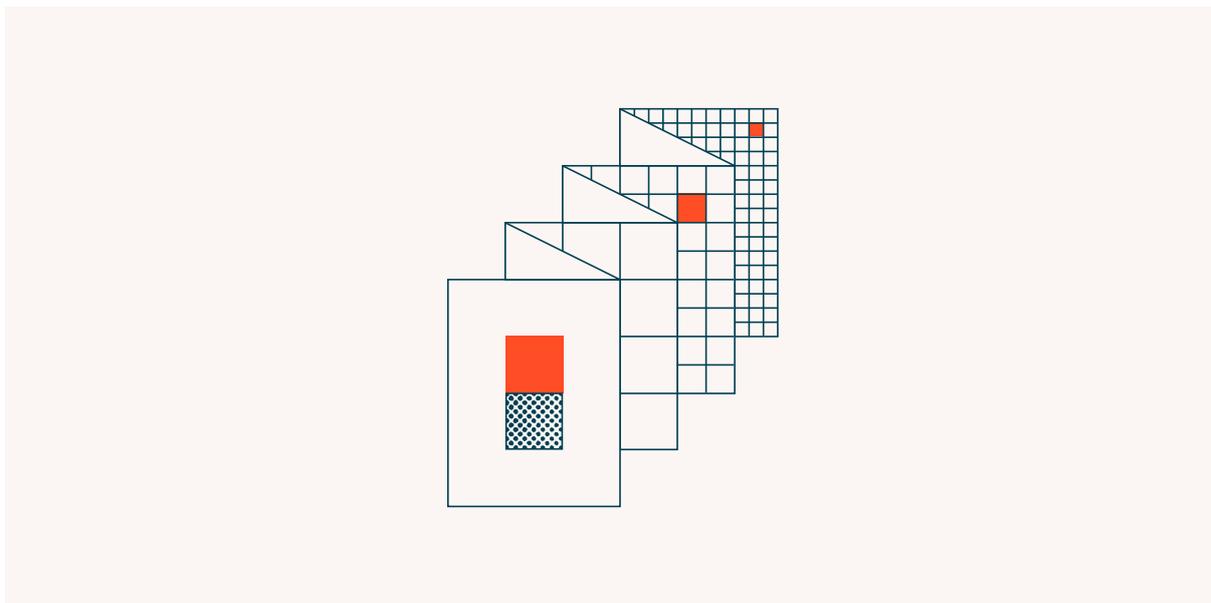
### **Format for exchange**

It is important to be as clear as possible about the format for exchange of documents. Any room for discretion can result in inefficiency and a lack of accuracy in the exchange process. At the very least this should include the exchange of documents with:

- A relevant list of documents for exchange, part and wholly privileged
- In Microsoft Access Database Format (.mdb)
- A table of export fields for exchange e.g. Export, Pages, Parties and Extras
- In text searchable PDF format

Whilst it may be appealing to exchange documents in native format, we recommend against it for a variety of reasons.

- You may provide more data about the document than required
- An inability to label documents with IDs can create confusion at hearings and trials, as well as general matter preparation
- Data security and integrity risks around native disclosure, particularly emails
- Native documents cannot always be redacted securely
- The relevant program is required to open the relevant native file type
- Natives are difficult to produce in hardcopy.



## Document fields

Again, with respect to the document fields, it is important to be clear and prescriptive about what is to be included. The emphasis should always be on efficiency. This means that parties should look to agree on populating certain disclosure and discovery fields in automated fashion. For example, electronic documents would involve using the extracted metadata fields rather than having someone manually create information about each document. If both parties are using an eDiscovery system, then they should be able to navigate one another's exchange efficiently and effectively.

A standard set of fields should be exchanged across the four primary exchange tables: *Export*, *Pages*, *Parties* and *Extras*. There should also be clear direction given as to how each of these is to be populated and how that might differ between hardcopy and electronic documents.

## **Use of advanced review features**

There are many advanced technologies available within the sphere of eDiscovery that assist in making the process more efficient and effective. One such example of an “advanced” technology is that of Technology Assisted Review, and its associated tools. This is a practice accepted by jurisdictions around Australia and the world and parties should be free to adopt it where appropriate. Such permission should be embedded within the agreed DMP provided that the parties notify the other side of its use and believe that the process will deliver an outcome equal to or more superior than a traditional review method. A failure to have agreement on the use of AI can result in increased costs and delays.

## **Privilege clawback**

Having a provision that governs the clawback of privileged documents because of inadvertent disclosure and discovery is important in any protocol. The drafting should indicate that inadvertent disclosure does not waive privilege over the documents and provide a mechanism with which each party will deal with the apparently privileged material as the potential disclosing party and receiving party.

## **Non-compliance**

The DMP should include a basic provision governing what happens in the event of non-compliance with the terms of the DMP as well as who bears the costs regarding such rectification.

## Helpful resources

As specialists we continually invest in R&D and best practice so we can advise our partners with confidence. These insights culminate in helpful [resources](#) and [references](#) for lawyers and decision-makers.

### Data Identification Questionnaire

Our questionnaire aims to help you quickly and accurately identify data potentially relevant to your matter. The information captured from key stakeholders will facilitate the development of a collection plan and enable its swift and defensible execution.

[Learn what to consider](#)

### Draft Exchange Protocol (Australia)

This reference is used by our teams on most disputes in most jurisdictions within Australia. The template provides a starting point for developing a protocol that governs the exchange of documents for Australian disputes.

[Learn what to consider](#)

### Practice direction by jurisdiction (Australia & UK)

Reference our index of all Australian and UK eDiscovery practice directions.

[Learn what to consider](#)

### Learn more

Negotiating a document exchange protocol with opposing party	<a href="#">↗</a>
Reducing discovery obligations with another party	<a href="#">↗</a>
Developing an appropriate review workflow	<a href="#">↗</a>

Across hundreds of matter types in all sectors and jurisdictions, we focus on solutions and impact. Here is a selection of matters that may be relevant to you.

### Relevant matters

#### **Negotiating a document exchange protocol**

Dispute, Analyse, Review, Produce

[Read](#)

#### **Mitigating collection risk**

Dispute, Regulatory, Investigation, Locate, Collect

[Read](#)

#### **Preparing hyperlinked evidence quickly**

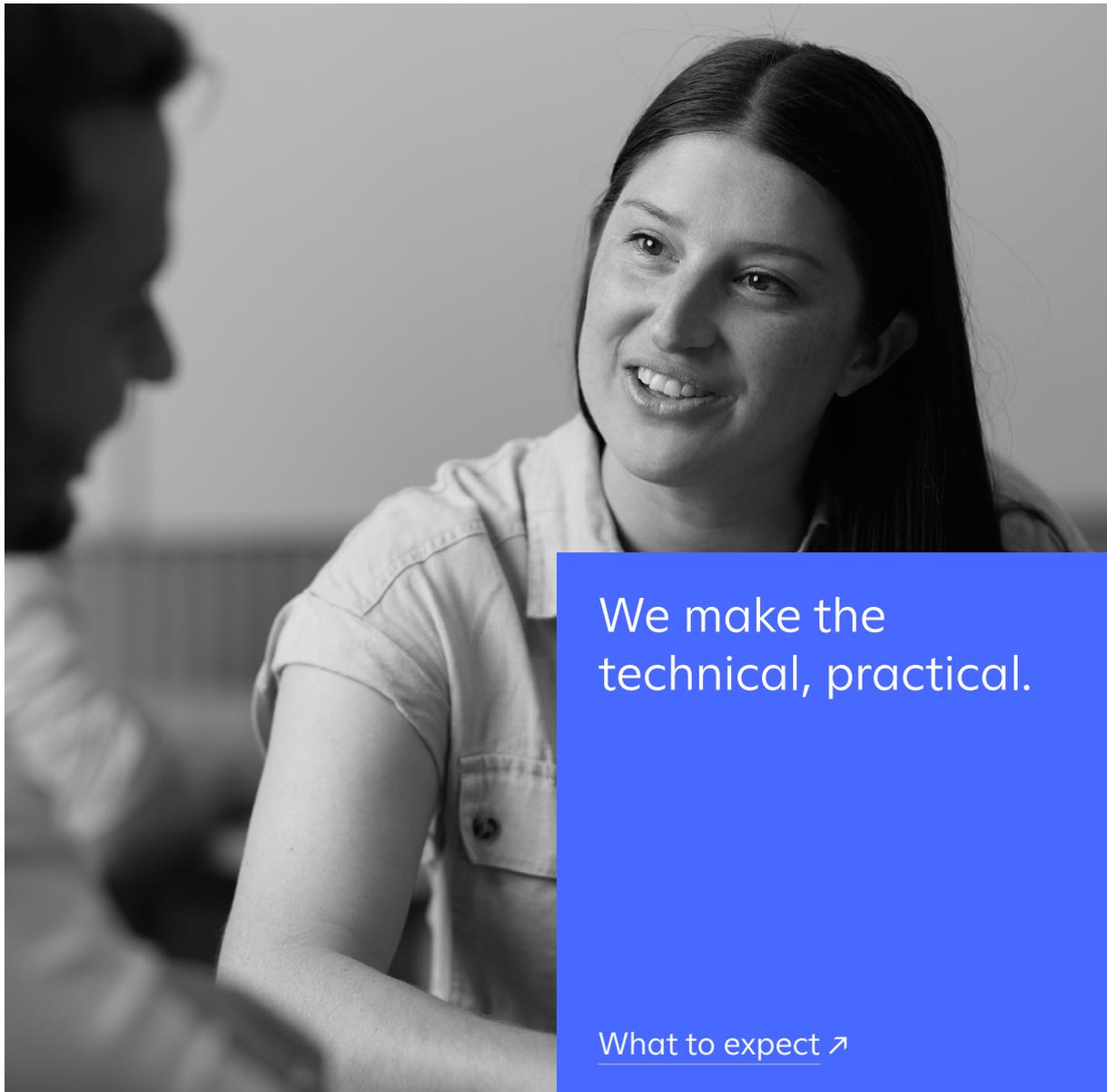
Dispute, Regulatory, Investigation, Collect, Process, Analyse

[Read](#)

[View all solutions ↗](#)

You need a team with a balance of legal, eDiscovery and technology expertise, this is who we are.

Our expert team of lawyers and technologists are available to assist you with navigating all stages of your matter, from the first meeting, through scoping, to completion. We focus on technical solutions so you can focus on the law. Find out how we help.



We make the technical, practical.

What to expect ↗

