

APPENDIX E PART 1

Part V

CHECK LIST OF ISSUES FOR GOOD FAITH COLLABORATION

Where electronic discovery and inspection is contemplated, parties should discuss and consider, with a view to agreeing to as much as possible, the aspects relating to electronic discovery and inspection, including the following:

1. Scope of reasonable search

(a) *Who are the custodians of documents that have to be discovered?*

Typically, the custodians will eventually be called as witnesses in the trial. The key witnesses are also likely to be the custodians of key documents.

(b) *The physical locations where the documents and any reasonable searches will be conducted.*

Identify the computing equipment, communication and storage devices, etc for each custodian. Examples include personal and notebook computers, tablets, mobile phones, removable storage devices like flash drives and external hard disks, external storage media like optical discs, cloud-based storage, etc. Parties should be aware that there may be centralised online or networked storage locations which may be accessible by the custodians.

Consider the amount of printed documents that will be disclosed during discovery. Discuss whether printed documents should be digitised, and if so, whether the digitised electronic copies should be subjected to text-conversion using Optical Character Recognition (OCR) software to facilitate searching. Documents with typewritten text will undergo OCR conversion with a higher degree of accuracy than documents containing handwritten text and drawings.

(c) *The precise date range of requested documents, including the period during which the requested documents were created, modified, and/or sent received, if necessary.*

(d) *The specific categories of documents sought to be disclosed.*

For example, electronic mail, instant messages, Short Message Text messages, web-based electronic mail, etc.

(e) *The use of agreed search terms and/or phrases.*

Discuss the keywords to be used with reference to the issues in dispute and pleadings. Try to avoid common words which will result in many hits. It is useful to consider the following categories of search terms and/or phrases:

- (i) names, nick names and e-mail addresses of key witnesses or custodians;
- (ii) search terms and/or phrases derived from the names of projects or products;
- (iii) search terms and/or phrases derived from significant events, eg date or location of a key meeting or discussion,

Be familiar with the search engine that will be used and explore the use of search operators (eg proximity searches).

2. Use of software tools to facilitate searches and to save costs

(a) The use of search engines and the preparation of the search engine.

If each party is using a different search engine, to agree on steps to minimise discrepancies in search results. For example, preparation of a fresh index of the search engine.

Documents which are image files (these include image-based PDF files) and which have not undergone text conversion using OCR software will not be searchable. Similarly, electronic documents which are password protected or encrypted may not be indexed by the search engine and hence may not be searchable.

Parties should also be aware of the foreign language capabilities of the search engine that will be used and be familiar with the amount of electronic documents which are in different languages.

(b) The use of de-duplicating software, and/or the methods used to identify duplicate documents.

(c) The format(s) of documents which parties accept for the purposes of the discovery.

Document review software platforms are able to produce a set of discoverable documents in PDF or TIFF documents or, increasingly, in native format. Production in native format is preferred. If production is in PDF or TIFF formats, the original electronic documents in native format should remain available for inspection, if necessary.

(d) Review of search results

Where search terms are used, the search results are deemed to be relevant and discoverable subject to review for the purpose of identifying privileged documents. Parties **should not** expend additional time, effort and resources to review search results for relevance.

3. Privilege review and redaction of privileged material

(a) The methods to be used to identify privileged documents and other non- discoverable documents.

Search terms may be considered to identify potentially privileged documents for the privilege review. For example, the email addresses of solicitors, the law firm's file reference number, "without prejudice", "legal privilege", "legal advice privilege", "litigation privilege", etc.

(b) The methods used to redact documents, where required.

Where legible parts of documents are to be redacted, the redacted document can be provided in PDF or TIFF format. Where internal metadata is to be redacted, the redacted documents can be provided as a new version (without the metadata) in native format or in PDF or TIFF format.

4. Preliminary searches, data sampling or discovery in stages

(a) Conducting preliminary searches on the agreed repositories using the agreed search terms and limits.

Preliminary searches are conducted after parties have agreed on the repositories and also the limits (eg time periods). The agreed search terms are used to run a search in order to identify whether there are some search terms that will lead to little or no hits and whether there are those search terms that will lead to too many hits. This does not entail either party viewing the contents of documents in the search results (at least not the full contents, perhaps highlights of documents if the search engine supports this function). This is intended to assist parties in discarding search terms with little or no hits and to refine the search parameters and/or operators for search terms that turn up too many hits.

(b) *The use of data sampling methods to test the suggested search terms.*

Data sampling requires that parties agree to a sample of documents, which is ideally representative of the documents which will eventually be given during discovery. A sample may be, for example, selected electronic mail and softcopy folders of a key custodian. A reasonable search is conducted and the documents in the search results reviewed. This is intended to assist parties arrive at a useful set of search terms for the actual reasonable search. Safeguards to preserve privilege will have to be agreed by parties. As this method is resource intensive, parties should agree to limit the number of times data sampling is used to test the efficacy of search terms.

(c) *The use of a staged approach in the discovery of electronic documents, if appropriate.*

In staged discovery, parties agree to discover documents from the repositories of key custodians or witnesses initially. After reviewing the documents, they may then agree to proceed to discovery of other custodians or witnesses, or they may agree that the initial stage is sufficient for general discovery and proceed with specific or further discovery. Staged discovery is useful if there are a few key custodians who have the majority of the relevant and material documents in the repositories under their possession, power or control.

5. Inspection and provision of copies

(a) *The place of inspection of the documents.*

For inspection of electronic document which require proprietary or obsolete computing equipment (including software programs), the place for inspection may be the client organisation's premises where the electronic documents are accessible.

(b) *The manner of inspection of the documents.*

Inspection may be carried out by an operator who will retrieve each document that is to be inspected, and display it on the display panel. He will then manipulate the document on the screen at the request of the party entitled to inspection. Parties may also need to consider a protocol that will allow the solicitors for the party giving discovery to prevent disclosure of privileged information (including metadata), where relevant.

(c) *The supply of copies of documents, if any, and the format and manner in which the copies will be supplied.*

Apart from optical discs, parties may discuss supply of copies on removable hard disks, flash drives, online storage folders, etc.

6. Production of non-reasonably accessible documents and metadata

(a) *Whether production of deleted documents which are recoverable only with forensic techniques is necessary and proportionate.*

- (b) *Whether production of data archived using backup software and stored off-line on backup tapes or other storage media is proportionate and economical.*
- (c) *Whether metadata is stored externally, and if so, whether production of externally stored metadata is necessary.*

7. Appointment of computer experts for inspection and/or forensic examination

- (a) *The appointment of a joint computer expert for the acquisition of the Original Acquired Image where there is to be forensic inspection of electronic medium or recording devices.*
- (b) *Whether the joint computer expert will also be appointed to carry out the reasonable search on the electronic medium or recording device, or parties will appoint their own computer expert to carry out the reasonable search.*
- (c) *The costs of and incidental to the conduct of the search, including the costs of appointment of any joint experts.*