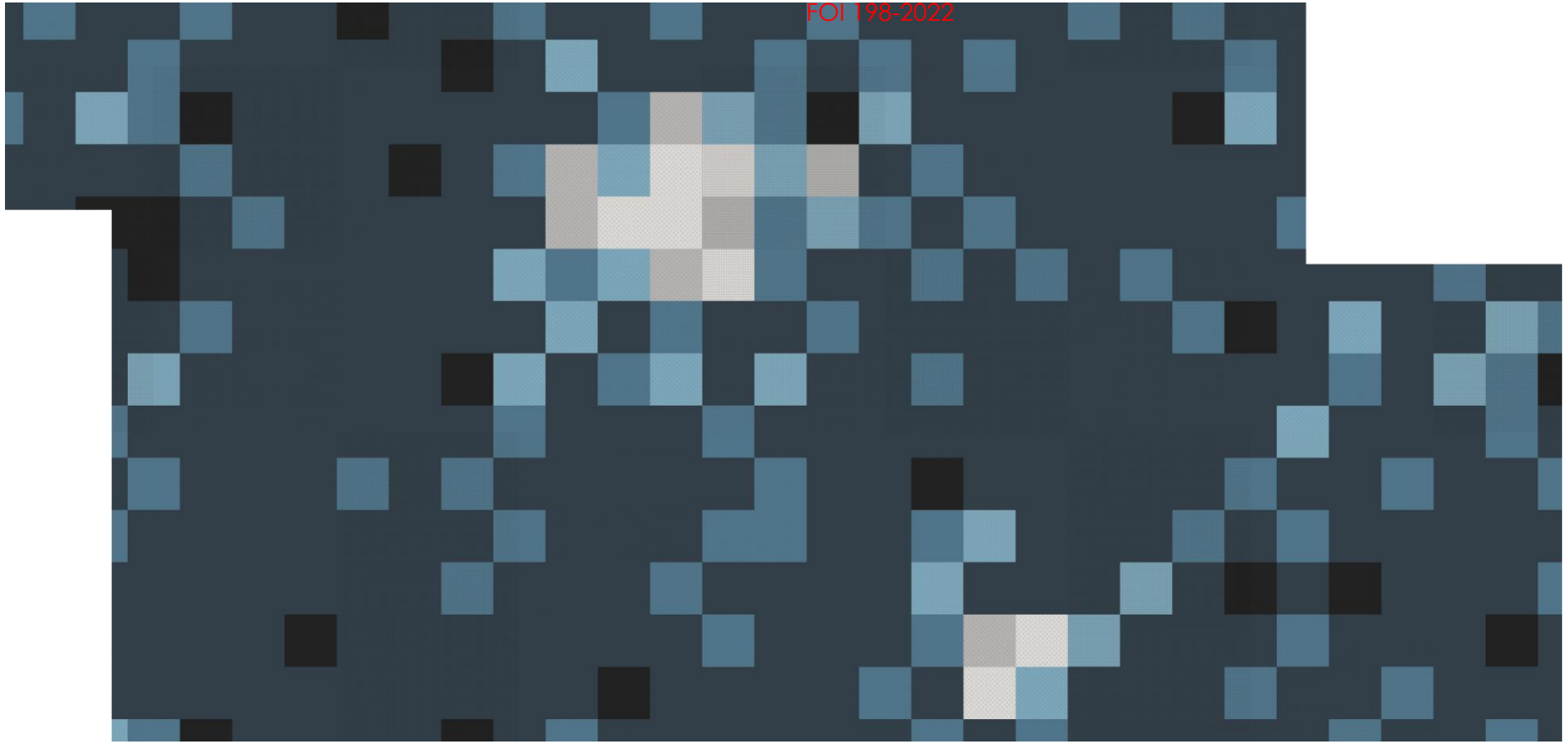

Review of ASIC Evidence Services policies, practices and procedures

Deed of Standing Offer Business Advisory Services SON3305648

4 July 2022

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Information relied on, scope and limitations

The statements and opinions contained in this report are given in good faith. However, in the preparation of this report, we have relied upon the accuracy and completeness of information provided by management and staff of the Australian Securities and Investment Commission ('ASIC') and third parties including Nuix, Australian Competition and Consumer Commission ('ACCC') and the Financial Conduct Authority ('FCA').

KordaMentha does not warrant the accuracy or reliability of any of the information supplied to it.

Issues considered

The issues considered during this review have been specifically limited to the matters set out in the Request for Quotation Under Deed of Standing Offer Business Advisory Services SON3305648 and our subsequent contract under the deed.

Reliance on this report

We have no responsibility to update this report for events or circumstances occurring after the date of this report, apart from any subsequent arrangement.

This report has been prepared, and may be relied on, solely for the purpose/s specified in the contract and use by ASIC. This report may only be published or distributed:

- For the purpose/s specified in the Scope and Methodology section of this report
- In accordance with any law or by order of a court of competent jurisdiction.

The express written consent of KordaMentha must be obtained prior to relying upon, publishing or distributing this report, or part of it, for some other purpose. KordaMentha does not accept responsibility to anyone if they use this report for some other purpose.

Scope and methodology

The scope of our review, and the methodology undertaken, is provided at Annexure 1.

Contents

Annexures

Executive Summary

Overview

We have undertaken a current state assessment of Evidence Services. s 37(2)(b), s 47C, s 47E (d) [redacted].

Our assessment is based on a series of workshops held with Evidence Services, the Regulatory Teams, ASIC IT and third parties, and has been guided by the EDRM eDiscovery Maturity Assessment Framework.

s 37(2)(b), s 47C, s 47E (d) [redacted] s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C [redacted]. s 37(2)(b), s 47C, s 47E (d) [redacted].

More broadly, the single largest document review challenge is to efficiently and effectively identify relevant documents amongst a large volume of irrelevant documents. This is becoming more problematic as data volumes continue to grow at an exponential rate, and the diversity of sources of Electronically Stored Information ('ESI') proliferates. s 37(2)(b), s 47C, s 47E (d) [redacted]

[redacted]

The Electronic Document Review Challenge

Efficiently and effectively identifying relevant documents amongst a large volume of irrelevant documents is a significant challenge. Current trends are seeing the volume and diversity of documents increase exponentially. s 37(2)(b), s 47C, s 47E (d) [redacted]

[redacted].

Executive Summary

s 37(2)(b), s 47C, s 47E (d) [redacted]

[redacted]

[redacted]. s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C [redacted]

s 37(2)(b), s 47C, s 47E (d) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Overview

Management and Review of Electronically Stored Information

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ASIC's main challenge is the processing and review of large data volumes

Efficiently and effectively identifying relevant documents amongst a large volume of irrelevant documents is a significant challenge. Current trends are seeing the volume and diversity of documents increase exponentially. s 37(2)(b), s 47C, s 47E (d) [redacted] Further detail is provided at Annexure 2.

1. Increasing volume and diversity of ESI

The single largest Electronic Document Review challenge is to efficiently and effectively identify relevant documents amongst a large volume of irrelevant documents. This challenge is becoming more problematic as data volumes continue to grow at an exponential rate, and the diversity of sources of Electronically Stored Information proliferates.

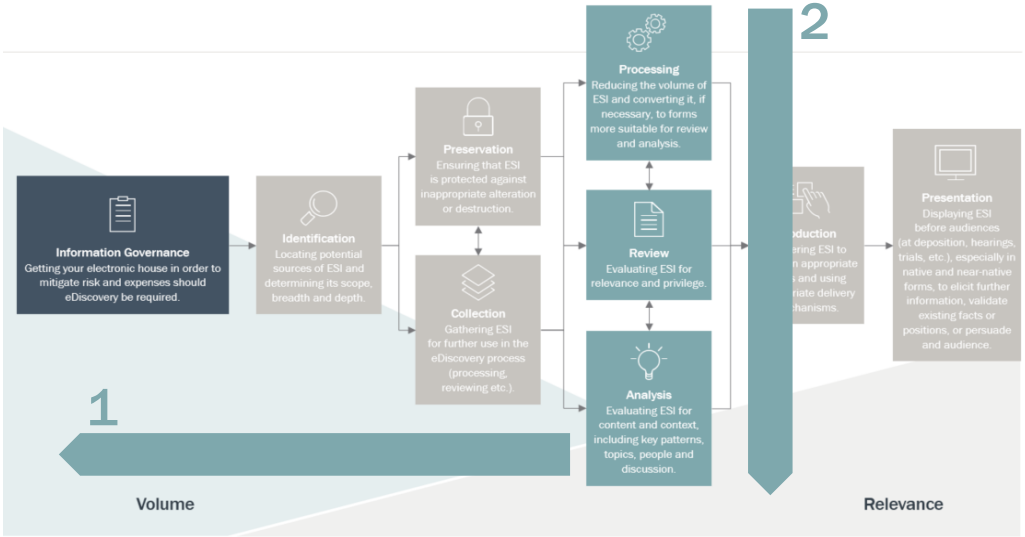
In the long term this challenge will be partially addressed by an increasing focus by corporates on Information Governance and a resulting reduction in the retention of redundant, obsolete and trivial documents.

2. Development of more sophisticated analytic tools

In the short term, recent advances in analytics (particularly Technology Assisted Review) and continuing development in new Artificial Intelligent-powered analytics is providing new tools to more efficiently find the needle in the proverbial haystack. The adoption of these new analytical tools is not without challenges though.

s 37(2)(b), s 47C, s 47E (d) [redacted].

s 37(2)(b), s 47C, s 47E (d) [redacted]



Overview of ASIC Evidence Services

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Clients

s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C

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s 37(2)(b), s 47C, s 47E (d)

Electronic Document Review Maturity

Electronic Document Review Maturity

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Clients

s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C

s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C

s 37(2)(b), s 47C, s 47E (d)

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Electronic Document Review Maturity

Proposed approach

s 37(2)(b), s 47C, s 47E (d)

[redacted]

s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C

[redacted]

s 37(2)(b), s 47C, s 47E (d)

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

s 37(2)(b), s 47C, s 47E (d)

[redacted]

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Sourcing Models

Specific recommendations

Annexure 1: Scope and Methodology

Scope, purpose and focus of our review

Scope and purpose of our review

s 37(2)(b), s 47C, s 47E (d)

- s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C and
- s 37(2)(b), s 47C, s 47E (d)

- s 37(2)(b), s 47C, s 47E (d)

s 37(2)(b), s 47C, s 47E (d)

Scope and Methodology

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Our engagement has been structured in four phases

s 37(2)(b), s 47C, s 47E (d)

s 37(2)(b), s 47C, s 47E (d)

s 37(2)(b), s 47C, s 47E (d)

s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C

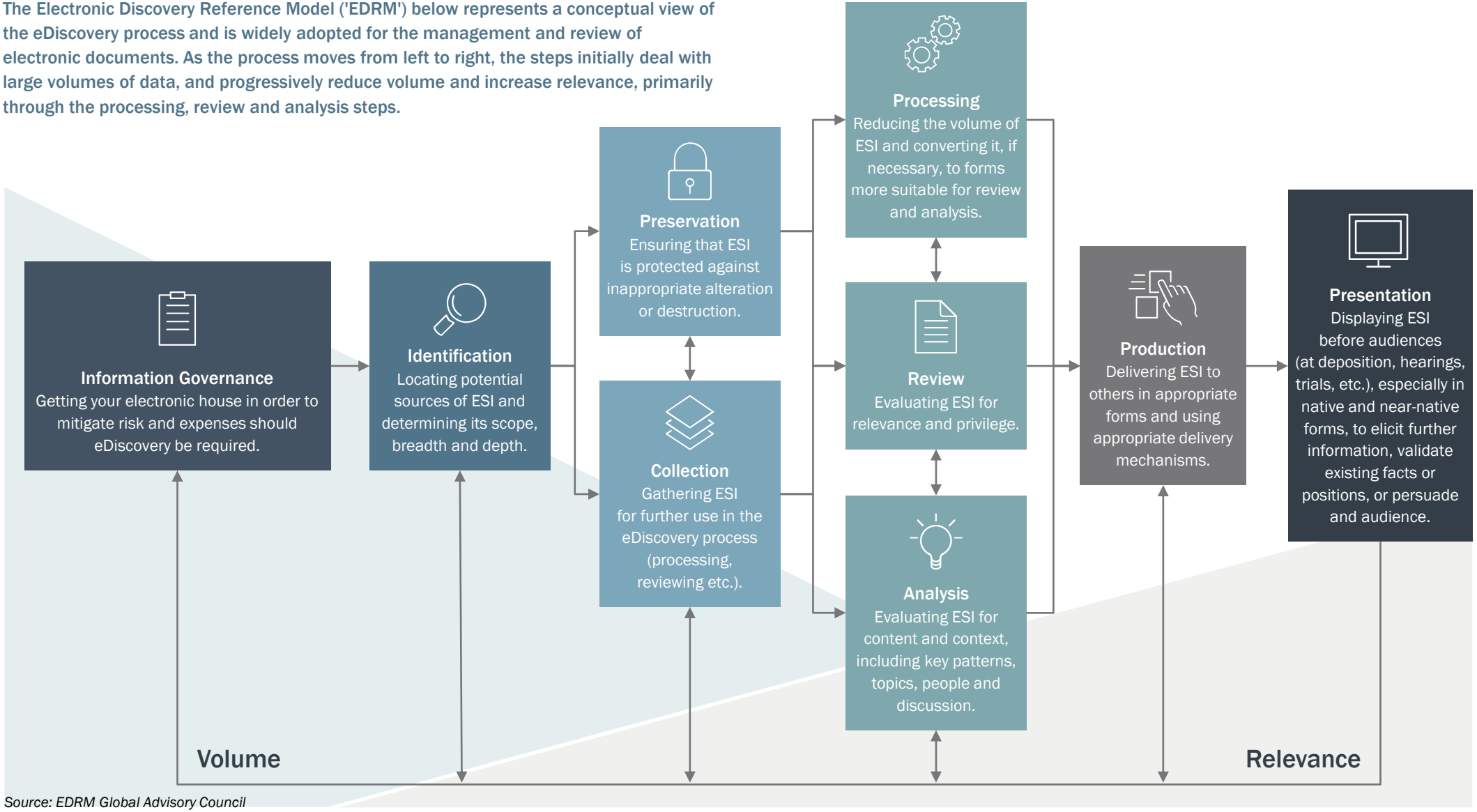
s 37(2)(b), s 47C, s 47E (d)

s 37(2)(b), s 47C, s 47E (d)

Annexure 2: Management and Review of Electronically Stored Information

Management and Review of Electronically Stored Information

The Electronic Discovery Reference Model ('EDRM') below represents a conceptual view of the eDiscovery process and is widely adopted for the management and review of electronic documents. As the process moves from left to right, the steps initially deal with large volumes of data, and progressively reduce volume and increase relevance, primarily through the processing, review and analysis steps.



Source: EDRM Global Advisory Council

Key Challenges: Volume

The single largest electronic document review challenge is to efficiently and effectively identify relevant documents amongst a large volume of irrelevant documents. This challenge is becoming more problematic as data volumes continue to grow at an exponential rate, and the diversity of sources of Electronically Stored Information proliferates.

Data volumes continuing to skyrocket

- More data has been created in the past two years than in the entire previous history of the human race (growing at 40–60% pa).
- By the year 2020, about 1.7 megabytes of new information will be created every second for every human being on the planet.
- At present, less than 0.5% of all data is ever analysed and used.

Diversification in types of Electronically Stored Information

- The notion of ESI in moving beyond email to other digital communication channels such as text messages, IM, social media content and internet of things. These alternatives to email will require electronic document management to encompass data stored on a diverse range of devices.
- As such, forensic data collection and analysis is increasingly becoming a proactive step in the management of ESI to ensure that laptops, servers and cloud-based and mobile data is preserved in a defensible manner.

Proliferation of social media data

- Social media data is one of the most challenging data types due to continuous changing, editing, auto-deleting and access issues.
- Despite these challenges, the insights that can be sought from social media will drive the increasing reliance on it for litigation and investigative purposes.

Key Challenges: Relevance

In the short term, recent advances in analytics (particularly Technology Assisted Review) and continuing development in new artificial intelligent-powered analytics is providing new tools to more efficiently find the needle in the proverbial haystack.

Focus on analytics and visualisation

- Data analytics and visualisation software helps reviewers to organise and analyse big data quickly and efficiently gain insights. Analytics also drive down cost and will increasingly become a standard feature in document review.

Increasing adoption of Technology Assisted Review

- Despite the obvious benefits of Technology Assisted Review and court acceptance of it, TAR today still is not widely used (just 64% of respondents reported using it in Norton Rose Fulbright's 2017 Litigation Trends Annual Survey). Furthermore, in the 10th Annual Law Department Operations Survey, published by the Blickstein Group, 66% of law departments say they do not use Artificial Intelligence at all and only about 50% expect to be using it anytime in the next three years.
- However, adoption rates are expected to increase significantly over the next few years as the obvious benefits of TAR overcome reluctance from legal departments (who historically have not been early adopters of new technology).

Artificial intelligence will be the next technological wave

- AI will power a range of new applications in the legal field, including areas like contextual and sentiment analysis during the review stage, predicting legal outcomes, proactive analysis of data that leads to litigation prevention, contract and legal document analysis, and more.

A primer on Technology Assisted Review

The appropriate execution of TAR in relation to discovery has the potential to reduce the time and cost of the review of documents by up to 90%. It is not just about having the right tools however, it's how you use the tools.

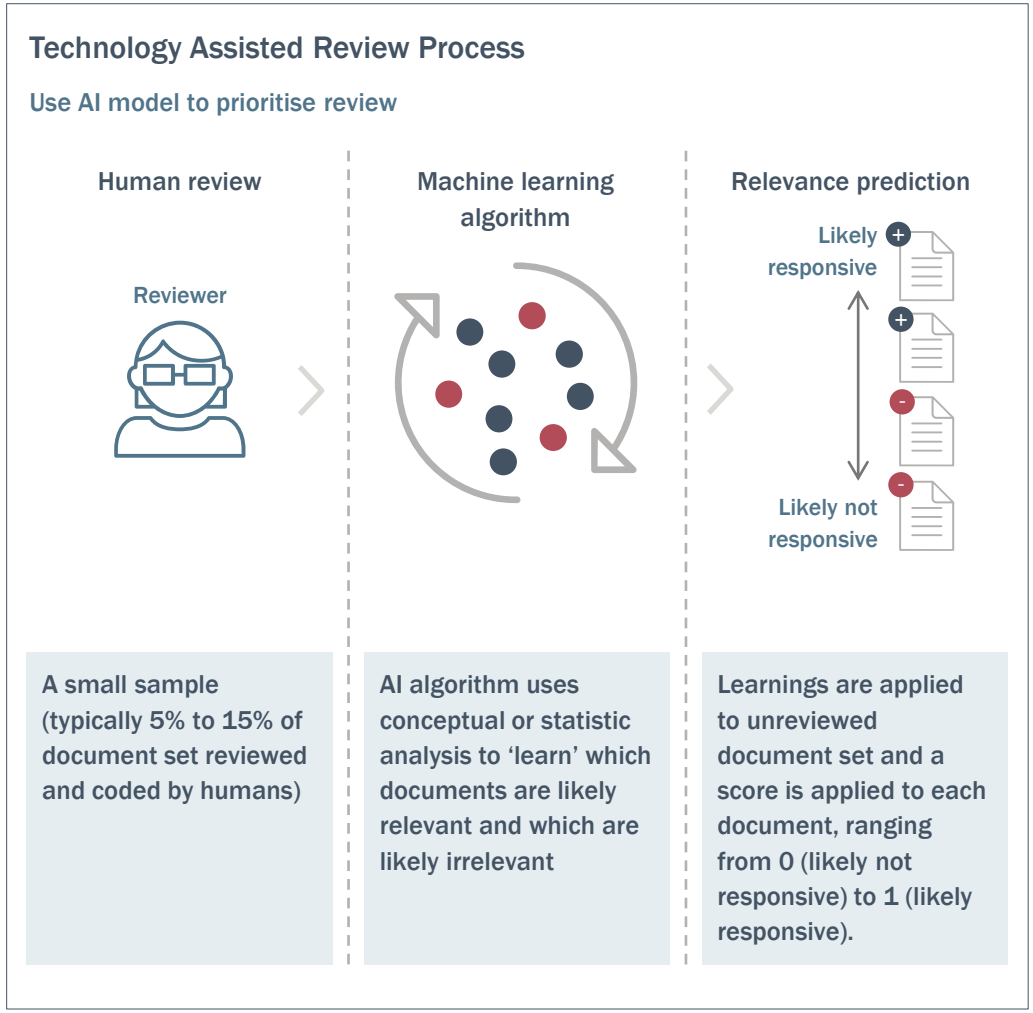
A primer on Technology Assisted Review

Technology Assisted Review is the use of computer software to assist with the automated review of documents, usually in matters likely to involve legal proceedings. Due to the high volume of documents that are increasingly encountered during these matters, it is impractical for review teams to review every document. TAR leverages long established machine learning algorithms, to learn from coding decisions made by the review team and predict how unreviewed documents would be coded. The algorithms usually use either conceptual or statistical analysis of the content of documents in building its prediction. Successful TAR projects can require a review team to only review a small percentage of the overall documents. TAR is cheaper and quicker.

Numerous studies have shown that TAR is more accurate and consistent than traditional linear review. TAR has also been accepted by many global court jurisdictions and is commonly used in Australia for matters involving large document volumes.

The first step in the TAR workflow is deciding what is the outcome required. Some of the outcomes may be:

- reduction and culling of not-relevant documents;
- prioritisation documents so that content of interest can be moved to the front of the review queue; and
- quality control of the human reviewers (comparing human reviewed coding with predicted results and identifying anomalies that may require a QA human review to confirm or over-turn the original coding decisions.



Technology Assisted Review

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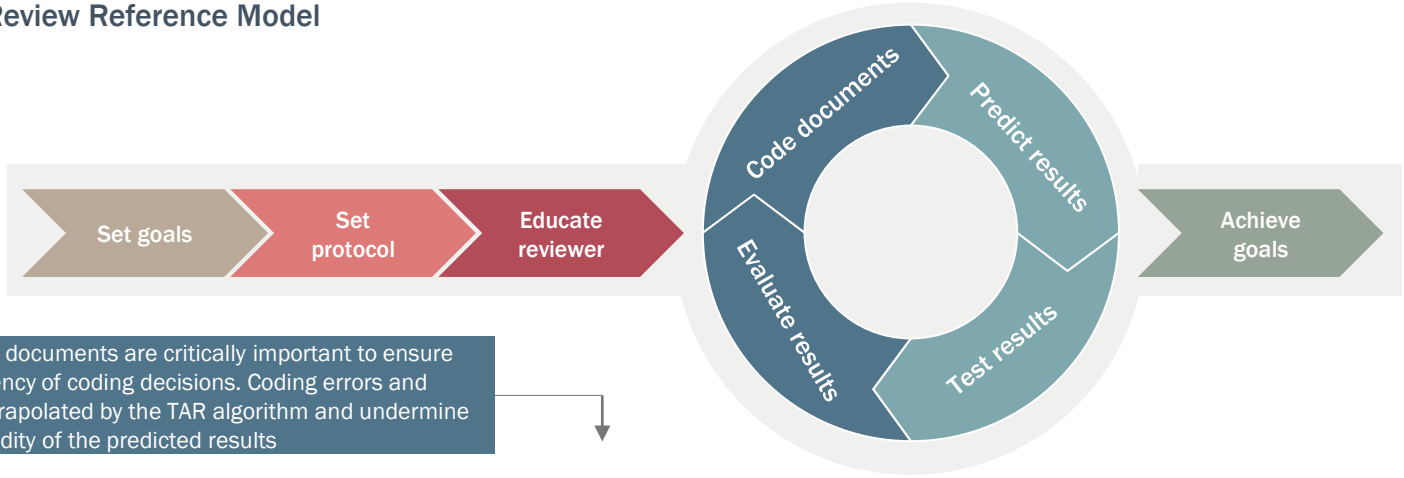
Technology Assisted Review Reference Model

The appropriate execution of TAR in relation to Electronic Document Review has the potential to reduce the time and cost of the review of documents by up to 90%. However, the effectiveness of TAR is directly linked to the accuracy and consistency of the coding decisions upon which the algorithm relies (Garbage In Garbage Out principle). As such, a mature approach to document review is an essential component.

Technology Assisted Review Reference Model



Set Goals	Set Protocol	Educate Reviewer	Code Documents	Predict Results	Test Results	Evaluate Results	Achieve Goals
The process of deciding the outcome of the Technology Assisted Review process for a specific case.	The process of building the human coding rules that take into account the use of TAR. TAR must be taught about the document collection by having the human reviewers submit documents to be used as examples of a particular category, e.g. Relevant documents. Creating a coding protocol that can properly incorporate the fact pattern of the case and the training requirements of the TAR system takes place at this stage.	The process of transferring the review protocol information to the human reviewers prior to the start of the TAR Review.	The process of human reviewers applying subjective coding decisions to documents in an effort to adequately train the TAR system to 'understand' the boundaries of a category, e.g. Relevancy.	The process of the TAR system applying the information 'learned' from the human reviewers and classifying a selected document corpus with pre-determined labels.	The process of human reviewers using a validation process, typically statistical sampling, in an effort to create a meaningful metric of TAR performance. The metrics can take many forms, they may include estimates in defect counts in the classified population, or use information retrieval metrics like Precision, Recall and F1.	The process of the review team deciding if the TAR system has achieved the goals anticipated by the review team.	The process of ending the TAR workflow and moving to the next phase in the review lifecycle.

Annexure 3 : EDRM eDiscovery Maturity Self-Assessment Test (eMSAT-1)

Annexure 4: Regulator workshops

Regulator workshops

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Overview

s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C

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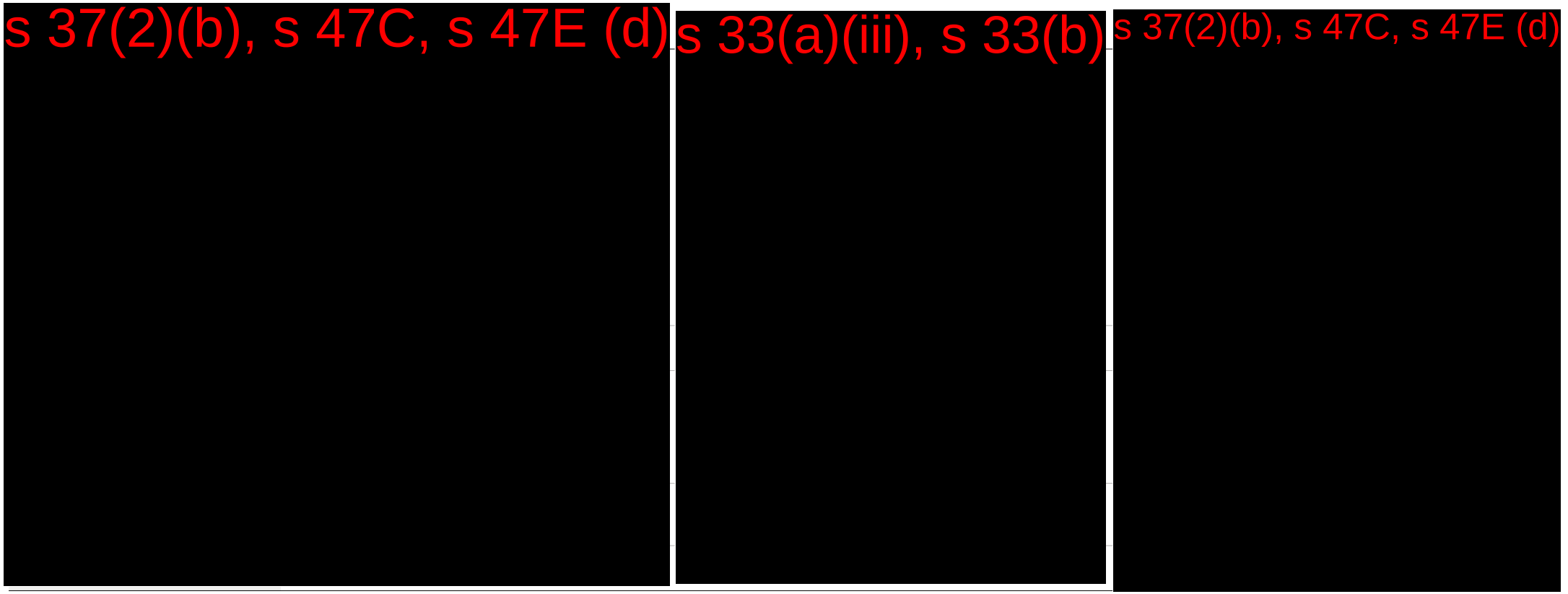

s 33(a)(iii), s 33(b), s 37(2)(b), s 47E (d), s 47C

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s 33(a)(iii), s 33(b)

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s 33(a)(iii), s 33(b)

Annexure 5: Specific recommendations