THE GOVERNANCE OF THINGS -
Increasing acceptance of Technology Assisted Review

In December 2016, the Supreme Court of Victoria endorsed the use of Technology Assisted Review (TAR) in the eDiscovery process in the case of McConnell Dowell Constructors v Santam[1]. This was the first time TAR had been approved for use in litigation in an Australian Court.

The Victorian Supreme Court decision follows landmark decisions in the US, Ireland and the UK. In New Zealand, Judge David Harvey in Kim Dotcom Vs. USA[2], advised the parties to consider options like TAR to deal with the large volumes of electronic information in the discovery process. These decisions encourage lawyers and legal technology professionals in eDiscovery to consider the use of TAR in litigation. The use of technologies like TAR assists parties in litigation to meet the requirements 'of a just, efficient and cost-effective resolution of the dispute' by reducing the time and cost involved in large scale document production during the discovery process.

The cost of information and document/ data production

The exponential growth in the volume electronic information that is being retained, coupled with the data that is either duplicated or redundant, adds considerable costs to information held by organisations. It has now become too expensive to 'eye ball' or review every potentially relevant document to litigation proceedings. New practices and technology have been developed to respond to these challenges to enable lawyers to identify relevant documents required to be disclosed more quickly and cost effectively.

Traditionally lawyers have turned to keyword search terms as an easy method to cull documents to a smaller set, but many are unaware of the limitations of keyword search terms. With keyword searches, a document either contains the word or it doesn't. The search terms may reduce the volume of documents to review, but it could mean that crucial information is missed if the keyword does not result in a 'hit' in a document. Alternatively, the search terms may produce irrelevant documents that may have different meanings to that intended.

Alternative options like TAR have emerged to process large volumes of information very quickly. It is widely acknowledged that TAR is considerably faster, cheaper and more accurate than human review method involving lawyers and paralegals.

Technology Assisted Review (TAR) is also commonly known as predictive coding, Computer Assisted Review (CAR), Assisted Review, Predictive Coding or even Prioritisation Technology.

What is Technology Assisted Review?

Put simply, TAR involves lawyers training the software in areas of relevance, with the computer using algorithms to learn these calls and applying the calls to a wider set of documents. It is an iterative process that continues with the lawyer reviewing further documents until they are satisfied with the results.

TAR combines the expert knowledge of lawyers with the aid of technology. Lawyers are at the forefront of the predictive coding process, as the technology learns from their expertise to help facilitate a more consistent and accurate review of information.

The evolution of Technology Assisted Review

Leading TAR technologies have evolved to enable continuous active learning throughout the review process. This is a considerable advantage to earlier iterations of TAR, that placed the focus on lawyers and paralegals reviewing vast volumes of documents. As you start reviewing, the TAR algorithm starts learning. As you train the system it gets smarter as to what documents might be relevant to your matter. Further, in a linear review, you would normally review all documents, but with TAR the documents are ranked with the relevant ones at the front of the queue.

When to use Technology Assisted Review?

The greater the volumes of document/data volumes as well time frames and resources will be factors in your considerations as to whether TAR should be used.

Importantly where labour resources are a consideration, TAR may provide more value. For example, TAR is attractive for smaller to medium size firms that may not have the same resources at their disposal as some larger firms. They can leverage the expertise of their legal team (which may only be one or two lawyers), with the aid of the latest technology to get to the information that matters most, doing so quickly, accurately and more cost effectively.

As the volumes of documents/data increase, options such as TAR should be considered. Any matter with more than 100,000 initial documents should be a viable option, although many would argue that this figure can be considerably less and still pay dividends.

When not to use?

Many TAR algorithms still struggle to effectively evaluate spreadsheets or documents without searchable text. There is also a similar problem with file types such as videos, graphics, construction or engineering drawings and audio files.

Additionally, not all TAR programs are created equal, so it is important to understand how your tool works, together with any potential limitations of its use. There are many different approaches to how TAR works.

TAR will not be right for every matter. Keyword searching, concept searching, near duplicate and email threading may be more suitable than predictive coding in some instances. There is even still a place for a linear review!

On many occasions, TAR can be used in conjunction with other culling and filtering options to try and isolate the most important information.

Do we hold Technology Assisted Review to a higher account?

We often hold TAR to a higher account than more traditional practices, such as a manual document/data identification process with full lawyer review.

There is a common misconception that human review is perfect, or is the only risk free way of conducting a discovery review. Solely human review is not always as effective as one may think.

Large scale manual reviews involving multiple lawyers often produce inconsistent results as the review team may have varying degrees of knowledge about the subject matter. Many of the calls made by the initial reviewers frequently have to be corrected by more senior lawyers later in the process – creating additional, yet avoidable work and cost.

With a more traditional linear discovery review, we do not have to seek judicial permission over whether it is a law clerk, junior lawyer or senior lawyer conducting the review. We do not interrogate the relevancy calls made by the review team and the potential inconsistencies of the reviewers.

Lawyers still have the same obligations to carry out discovery, pursuant to relevant court Rules and Procedures including Practice Notes.

Just as you might engage with the other side to negotiate key individuals, date ranges and search terms, it might be prudent to outline that you intend using TAR to get to the most important information to meet your discovery obligations.

As with any approach, it is important to make sure your TAR process can be substantiated if it ever needs to. The test should be if what was produced was adequate and meets the requirements of the discovery order. If it is not then critique just as you would any other gap in discovery.

What does this mean for practitioners?

Todays' increasing data volumes and the subsequent cost of managing this data require us to work smarter and make better use of technology. TAR is one of the options that can now be deployed in the discovery process in litigation as it is proven to be considerably faster, cheaper and more accurate than any human review method.

The decision in Victoria following the overseas decisions will increase the acceptance of Technology Assisted Review in Australia and New Zealand. While TAR will not be right for every matter it should be at least one of the options now considered in litigation matters.

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1. http://www.austlii.edu.au/au/cases/vic/VSC/2016/734.html
2. http://www.lojo.co.nz/articles/uploads/Dotcom__Ors_v_USA_Disclosure_Harvey_J_290512.pdf