ONE GIANT LEAP FOR E-DISCOVERY: PREDICTIVE CODING APPROVED BY AUSTRALIAN COURT

06 December 2016 | Sydney, Australia
Legal Briefings – By **Luke Hastings**, **Andrew Eastwood** and **David Grainger**

The Supreme Court of Victoria has, for the first time in Australia, approved the use of predictive coding for the purpose of discovery in a large litigation matter.

This decision follows the endorsement of predictive coding both in extra-judicial commentary by several Australian judges and a string of cases in other jurisdictions including the US and the UK. It represents a significant leap forward in the adoption of this emerging technology within Australia.

Herbert Smith Freehills has extensive experience deploying predictive coding throughout our global network, having acted on the first commercial court proceeding to use predictive coding in the UK.

WHAT IS PREDICTIVE CODING?

Predictive coding (also known as "technology assisted review" or "TAR") is a sophisticated form of software that enables a computer to be trained by a lawyer to review a set of documents and identify those that are relevant. It can offer significant time and cost advantages compared to manual document review.

WHAT HAPPENED IN THIS CASE?

In *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No. 1)*,[1] Vickery J considered the appropriate process for managing discovery in a large dispute concerning the design and construction of a natural gas pipeline in Queensland.

McConnell Dowell had identified approximately 4 million potentially relevant documents (which it estimated could be reduced through "de-duplication" to approximately 1.4 million documents). At the suggestion of a court-appointed special referee, the parties agreed to use predictive coding to increase the efficiency of the document review.

Vickery J endorsed the agreement of the parties, and the opinion of the special referee, to use predictive coding in the discovery process. He made the following key points:

- Having regard to the enormous volume of documents (which his Honour estimated would take more than 583 weeks for a solicitor to review), traditional manual discovery was not likely to be cost-effective or proportionate, and would therefore not facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

- His Honour endorsed overseas authorities approving the use of predictive coding, including the decision of the High Court of Justice of England and Wales in *Pyrrho Investments Limited & Anr v MWB Property Limited and Others,*[2] the decision of the High Court of Ireland in *Irish Bank Resolution Corporation Limited & Ors v Sean Quinn & Ors,*[3] and the US decision of *Rio Tinto Plc v Vale SA.*[4]

- His Honour noted that, in *Irish Bank*, the High Court of Ireland concluded that "*the evidence establishes, that in discovery of large data sets, technology assisted review using predictive coding is at least as accurate as, and probably more accurate than, the manual or linear method in identifying relevant documents.*"

- His Honour also confirmed that the efficiency benefits of predictive coding are not confined to construction and engineering cases. In this regard, his Honour referenced the new Supreme Court of Victoria Practice Note, "Technology in Civil Litigation Practice Note SC Gen 5", which is expected to be issued on 1 January 2017, will apply to all proceedings in the court, and will expressly endorse the use of predictive coding in cases involving large volumes of documents.

OUTLOOK

We expect more Australian courts to follow the approach taken by Vickery J in *McConnell Dowell*, and that predictive coding will become commonplace in Australian cases involving large volumes of documents. This is supported by the fact that a number of Australian judges, both in NSW and Victoria, have recently made positive extra-judicial comments about the technology.[5]

ASIC has also publicly expressed its enthusiasm for predictive coding and is adopting this technology itself.[6] We therefore expect to see increasing use of predictive coding in regulatory matters, both at investigation and enforcement stages.

Herbert Smith Freehills has extensive experience deploying predictive coding throughout our global network, particularly in the UK where this technology has been recognised and endorsed by courts and regulators for some time. We now expect to increasingly leverage this experience to assist clients to utilise this emerging technology in litigious and regulatory matters within Australia.

ENDNOTES

1. [2016] VSC 734

2. [2016] EWHC 256 (Ch). See our note here

3. [2015] IEHC 175. See our note here

4. 1:14-cv-3042 (S.D.N.Y. Mar. 2, 2015)

5. See, for example, The Hon Chief Justice Marilyn Warren AC, 'Australia - A vital commercial hub in the Asia Pacific region: Victoria - a commercial hub' (Speech delivered at the Federal Court and Supreme Court Commercial Seminar, Monash Law Chambers, Melbourne, Wednesday 25 February 2015); The Hon Justice François Kunc, 'Current Issues – Discovery and Predictive Coding' (2016) 90 *Australian Law Journal* 283, 285; and The Hon Justice Peter Vickery, 'Recent Developments in Discovery in Commercial Litigation' (Speech delivered at the VICBAR CPD Seminar, 5 February 2015)

6. See, for example, ASIC Report 476, 'ASIC enforcement outcomes: July to December 2015', March 2016

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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