WHAT IS TAR?

"Technology Assisted Review" (TAR) is a process of having computer software electronically classify documents based on input from expert reviewers to expedite the organisation and prioritisation of the document collection. The computer classification may include broad topics relating to discovery responsiveness, privilege, and other designated issues. TAR (also sometimes called Computer Assisted Review, CAR or predictive coding) may dramatically reduce the time and cost of reviewing ESI (Electronically Stored Information), by reducing the amount of human review required on documents classified as potentially non-material.¹

HOW DOES TAR WORK?

There are numerous software packages offering TAR services, often provided through litigation support bureaus or installed in-house at a firm. Whilst functionality and interface differs throughout different software, the underlying science behind them is similar at a high level. TAR processes generally incorporate Statistical Models and/or Sampling techniques to guide the process and to measure overall system effectiveness. Some TAR methods use Machine Learning Algorithms to distinguish Relevant from Non-Relevant Documents, based on training examples coded as relevant or non-relevant by the Subject Matter Experts(s), while other TAR methods derive systematic rules that emulate the expert(s)’ decision-making process. ²

There is no one defined and agreed workflow for the implementation of TAR. Discovery obligations and deadlines, the TAR software in use, and the size of the legal team and document collection can all impact on the workflow to be applied for the review.

This can be considered a benefit of TAR, as it allows legal teams to be dynamic in their approach to review and tailor a workflow to make the review as efficient as possible.

The main steps typically covered in a TAR workflow are detailed below.

SET GOALS

This is the process of deciding what needs to be achieved by using TAR. Common goals include:

- Identifying and culling irrelevant material;
- Identifying relevant material, i.e. documents likely to be discovered or prioritised for human review;
- Quality checking discoveries, such as ensuring that coding decisions are consistent, all relevant material has been considered and no potentially privileged material is being provided; and
- Prioritising the review of potentially relevant material in received discoveries from other parties.

SET PROTOCOL

This is the process of defining and describing the methods used to identify relevant documents. Parties are encouraged to be transparent in the TAR workflow they have implemented. This can prevent subsequent disputes regarding discoveries later in the proceedings.


Protocols typically include:

- Determining criteria for relevance;
- Sample sizes to be reviewed for each round and how these sample documents are to be collated (e.g. statistical sampling, or stratified sampling);
- Determining how to treat documents not suitable for TAR (e.g. documents with little or poor quality text);
- Determining how to treat documents that remain uncategorised upon the completion of TAR; and
- Methods and indicators used in assessing performance (e.g. a desired outcome for precision and recall, acceptable volatility, and control sets).

**EDUCATING THE REVIEWER**

This is the process of training the human reviewer in interpreting the protocol and the criteria used to code documents for relevance.

**CODE DOCUMENTS**

This is the process of human reviewers applying subjective coding decisions to documents to train the TAR system.

One of the major differences between normal document review as against TAR review is that documents are to be reviewed based solely on their textual context. This is termed the “four corners test”: “A document is only a good example if there is text on the document’s face - within the four corners of the document - that makes it responsive.”

The following scenarios violate the four corners test and will not yield good example documents:

- The document is conceptually empty, but is a family member of another document which is substantively Responsive;
- The document comes from a Custodian whose documents are presumptively Responsive;
- The document was created within a date range which is presumptively Responsive; and
- The document comes from a location or repository where documents are typically Responsive.

**CATEGORISING DOCUMENTS**

This is the process of the TAR system categorising documents (e.g. Relevant/Non-Relevant) based on information learned from the human reviewers.

**VALIDATING RESULTS**

This is the process of human reviewers using validation methods to determine how well the TAR model is functioning. These validation methods usually require a review of a statistical sample of the documents to create meaningful metrics of TAR performance. These metrics include:

- **Recall**: the percentage of truly responsive documents being scored as responsive by the TAR model;
- **Precision**: the percentage of truly non-responsive documents being scored as responsive to achieve recall; and
- **Volatility**: the percentage of documents which have changed designation category between rounds.

**EVALUATE RESULTS**

This is the process of the review team deciding if the TAR system has achieved the goals.

**ACHIEVE GOALS**

This is the process of ending the TAR workflow and moving to the next phase in the review lifecycle, e.g. Privilege Review.

**HISTORY OF TAR: KEY PRECEDENTS**

**Da Silva Moore v Publicis Groupe:** ¹ this landmark US decision included the first published opinion recognising TAR, in which TAR was described as an “acceptable way to search for relevant ESI [Electronically Stored Information] in appropriate cases.”

**Rio Tinto PLC v Vale S.A.:** ² in this case, the court opined that TAR can no longer be described as “unproven technology” and that “the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, the courts will permit it.”

¹ See Da Silva Moore v. Publicis Groupe 287 F.R.D. 182, 183 (S.D.N.Y. 2012), in which the court also stated that it “highly recommends that counsel in future cases be willing to at least discuss, if not agree to, such transparency in the TAR process.”
David Brown v BCA Trading Ltd: 8 in this case, the High Court of England and Wales approved the use of TAR over the objection of the requesting party.

Pyrrho Investments Ltd v MWB Property Ltd & Ors: 9 in this decision, the court highlighted that TAR is not machines replacing humans, rather, it represents the two collaborating to achieve a better result.

“The decision to allow computer-assisted review in this case was relatively easy - the parties agreed to its use (although disagreed about how best to implement such review). The court recognises that computer-assisted review is not a magic, Staples-easy-Button, solution appropriate for all cases. 10

The technology exists and should be used where appropriate, but it is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the court needs to examine.”

In determining appropriate cases for the application of TAR, the court considered:

• The total number of “reviewable” documents;
• The value of the claims made in the litigation;
• The time available to the parties to revert to more traditional disclosure methods if ultimately required; and
• The attitude of the parties of the application of the software.

Ultimately, the court found that it was appropriate for the parties to use TAR in meeting their disclosure obligations.

RECENT AUSTRALIAN JUDICIAL ADOPTIONS

Money Max Int Pty Limited v QBE Insurance Group Limited: 11 in November 2016, the Federal Court of Australia (District Registry: Victoria) made orders approving the use of TAR and outlined considerations to be taken into account when using TAR. 12

McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No 1): 13 in December 2016, the Supreme Court of Victoria made orders approving the use of TAR, and stated that “traditional manual discovery of the Plaintiff’s documents is not likely to be either cost effective or proportionate”. The court also added that “The TAR process is far more sophisticated than a word search facility.”

Practice Note SC GEN 5 Guidelines for the Use of Technology: 14 in this Practice Note, which commenced on 30 January 2017, promotes “the effective use of technology in the conduct of civil litigation to reduce time and costs.” At [8.7], the Practice Note states “that technology assisted review will ordinarily be an accepted method of conducting a reasonable search in accordance with the Rules of Court”, adding that the court may order for technology assisted review whether or not it is consented to by the parties.

Outside of TAR, the general principles of the Practice Note indicate that the use of technology in all aspects of civil litigation is not for exceptional cases, rather, the norm. Principles relevant to TAR include:

• Dealings in hard copy are to be the exception rather than the rule in all aspects of civil litigation in the court. Converting Electronic Documents into hard copy requires justification;
• The inability or reluctance of a lawyer to use common technologies should not occasion additional costs for other parties. The use of common technologies is a core skill for lawyers and a basic component of all legal practice;
• An unreasonable failure to cooperate in the use of technology which occasions additional costs will constitute a breach of the overarching obligations of the parties; and
• Parties should be prepared to address the court on the use of technology at an early stage of a proceeding.

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9 Ibid 4.
11 Ibid 127.
12 [2016] EWHC (Ch) 1464 (Eng.).
14 Ibid [38].
16 Ibid [6].
BENEFITS OF TAR

Cost Savings
Data sizes in litigation are growing exponentially each year. In a traditional review, more documents mean more reviewer hours, and consequently, a greater expense for the end client. TAR can significantly reduce the number of documents required for review, therefore lowering the cost when compared to a labour intensive review.

Quicker Review Times
As the bulk of the documents are reviewed the TAR model, as opposed to a human reviewer looking at each one by one, the review is significantly faster. TAR projects can often scale favourably. A document set of 3 million might require little extra human input than a document set of 2 million.

Accuracy
Unlike a human reviewer who might suffer review fatigue after months of review, the TAR system codes consistently throughout the entire process.

RISKS ASSOCIATED WITH TAR

Uncertainty with Timeframes
- It is difficult to estimate at the start of TAR how many training rounds will be required;
- The machine may require few rounds. It may require many and still not yield results or reduce document count; and
- Conservative estimate is often 10 rounds.

NOT APPLICABLE FOR ALL DOCUMENT SETS
Old hard copy documents or certain datasets sets like spread sheets or drawings are not ideal candidates for TAR. This is because the text is too poor or too conceptually void to reliably train the system.

REQUIRES SENIOR LAWYERS TO REVIEW
Unlike a linear review which can rely on junior lawyers performing the heavy lifting in reviewing documents, TAR requires that documents be reviewed by a subject matter expert, typically a senior lawyer working on the case. It can pose practical difficulties for senior lawyers to allocate the time required to perform a document review.