UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

COMMERCIAL LITIGATION SEMINAR

24 AUGUST 2011

TOPIC 4

Evidence in the digital age: the files are in the computer

OVERVIEW

This paper is an outline of the matters to be examined in the session scheduled from 12.10 to 12.55 pm. Its contents aim to stimulate thought and to promote discussion. It is not a definitive statement. Necessarily, the content and detail of the paper is constrained by the time available for the session.

Legal practitioners are cautioned to rely on their own research and enquiries to advise clients. This paper does not purport to be the first or last word on the matters examined. Legal practitioners will also be mindful of the evolving nature of the law, together with the importance of the relevant facts to determine outcomes in individual matters.

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Any sufficiently advanced technology is indistinguishable from magic[1]

A. Introduction

1. Words are only pictures of ideas upon paper[2].

2. An alternative expression of this proposition is that words in a document are the skin of a living thought and it is the thought which the Court looks to in weighing its probative value as evidence in litigation.

3. A challenge for the modern litigator is the extraordinary increase in the amount of data and information recorded in documents which requires assessment in the quest for proof of the client's case.

4. In the notorious, and at the time extreme, example of the C7 litigation, the outcome of the processes of discovery and production of documents was an electronic database containing 85,653 'documents', comprising 589,392 pages. Ultimately, 12,849 'documents', comprising 115,586 pages, were admitted into evidence[3]. Discovery had an estimated cost of $200 million, compared with a damages estimate of $195-$212 million[4].

5. However as ALRC Report 115 recognises, whilst discovery is often the single largest cost in any corporate litigation, it remains an important feature of litigation to avoid ambush and to identify relevant evidence.

6. Due to the evolution of technology it is helpful to discard the assumption that a document is paper-based or a variation on a paper format. As examined below the better use of the word document in law is any "thing" which provides a record or evidence of matters, events, agreements, ownership, or identification.

B. Proof

7. Sections 55 and 56 of the *Evidence Act 1995*, are inclusionary provisions which cast the evidentiary net broadly, and are easily recited. However in practice the application of the words of those sections to the facts of a case is often challenging.

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1 Arthur C Clarke
2 *Dodson v Grew* (1767) 97 ER 106 at 108 per Willmott CJ
3 *Seven Network Limited v News Limited* [2007] FCA 1062 at [4]
4 Managing Discovery ALRC Report 115, Summary March 2011, page 8

Section 55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness; or

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

Section 56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

(underlining added)

8. The usefulness of evidentiary material for a client's case is determined by assessing its relevance and also its probative value. An examination of the nature of the available evidence from the following examples provides insight into those concepts. The examples also may assist to illustrate an effective approach to proof.

the smoking gun

9. In the 1893 Sir Arthur Conan Doyle wrote in one Sherlock Holmes' escapades:

> "We rushed into the Captain's cabin ... there he lay with his brain smeared over the chart of the Atlantic ... while the chaplain stood with a smoking pistol in his hand at his elbow."

10. The term smoking pistol changed with time and after crossing the Atlantic to the more emphatic "smoking gun". One memorable use of the image was on 31 July 1974 when Representative Jack Brooks of Texas told the Impeachment Panel assembled in regard to then President Nixon as to charges of income tax evasion:

> "Millions will view this evidence as a so called smoking gun"

red handed

11. In 1674 Sir George McKenzie wrote in *A discourse upon the laws and customs of Scotland in matters criminal*:

> "If he be not taken 'red-hand' the sheriff cannot proceed against him."

12. To be taken with red-hand was to be caught in the act, such as a murderer with his hands red with his victim's blood. Subsequently, the term evolved to be "taken red-handed", see Sir Walter Scott's *Ivanhoe* in 1819.

13. Evidence of such matters could clearly and persuasively affect the assessment of the probability of the existence of facts in issues in consequent legal proceedings.

14. When considering the nature of the available evidence to sustain charges of murder in the smoking pistol scenario, it is apparent that the available evidence from the witnesses will not include observing the chaplain firing the pistol at and hitting the captain, thus causing his fatal wound. However each individual comprising "we" is likely to be able to give evidence of hearing the discharge of a pistol and shortly thereafter observing the chaplain holding the smoking pistol in the vicinity of the captain whose brains were spread over the chart of the Atlantic.

15. In the absence of a rational explanation in the alternative or other matters which might raise doubt in a fact finder's mind, such as the discharge of many pistols at the same time, there appears to be a *prima facie* case, if not a case beyond reasonable doubt as to the guilt of the chaplain, given such evidence is admissible before the Court.

16. So too in the case of a red handed murderer – particularly if a sample of blood from the suspected murderer's hand and knife is proven by DNA analysis to match that of the victim killed by stabbing.

C. What is a document?

Change

17. In 1614 the court in *Henry Pigot's Case* considered the proposition that if three distinct bonds are "***wrote upon one piece of parchment***" and one of them only is read to the obligor and he being a man not lettered seals and delivers this deed it is good for that which was read and *ab initio* void for the others.

18. *Pigot's Case* was also authority for the proposition that the erasure of a deed by which it becomes void may be given in evidence upon the plea of *non est factum*. The alteration of a deed by the obligee in point material or not material avoids the deed; but the alteration by a stranger without the privity of the obligee does not avoid the deed unless the alteration is in a material point.

19. Travel forward in time by over 300 years to *Warburton v National Westminster Finance Australia Ltd* (1988) 15 NSWLR 238 where the Court determined:

> "Where a party filling up blanks in the deed makes an honest mistake and inserts incorrect material into the deed, the Court is entitled to rectify the mistake and make the deed conform to the contractual intention of the parties."

20. Travel forward another 20 years and now consider paperless transactions arising from the *Electronic Transactions Act 2000* by which the Legislature stated the following objects:

> **Section 3 Object**
>
> The object of this Act is to provide a regulatory framework that:
>
> (a) recognises the importance of the information economy to the future economic and social prosperity of Australia, and
>
> (b) facilitates the use of electronic transactions, and
>
> (c) promotes business and community confidence in the use of electronic transactions, and
>
> (d) enables business and the community to use electronic communications in their dealings with government.

21. In less than 400 years the law has evolved from a strict approach to documentary evidence requiring formal parchment free from amendment or alteration to paper free documents. As opposed to the quill, information is now recorded by the action of electromagnetic energy on sand which has been refined to silica from which reactive digital chips with the ability to record electronic impulses in binary code have been manufactured.

22. As to the fate of the rule in *Pigot's Case*; it was abolished by the *Conveyancing Amendment (Rule in Pigot's Case) Act 2001* which commenced on assent on 1 November 2001[5].

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[5] ***Conveyancing Act 1919*** **Section 184 Abolition of Rule in Pigot's Case**
(1) The rule of law known as the Rule in Pigot's Case is abolished.
(2) Accordingly, a material alteration to a deed does not, by itself, invalidate the deed or render it voidable, or otherwise affect any obligation under the deed.
(3) ...
(4) ...
(5) ...

Definition of a document

23. As noted above, when considering electronic evidence and documents, it is unhelpful to think of the traditional concept of a piece of paper with writing upon it. An email, including its associated metadata, is an example of a common means of communicating information which is paper free. It is also a document as defined by statute.

24. Thus the legal use of this word is to be distinguished from the lay dictionary definition of the word. As an example, the *Macquarie Dictionary* provides the definition of document to include a written or printed paper furnishing information or evidence, a legal or official paper. The *Shorter Oxford English Dictionary* picks up the concept of written instruction, official paper and includes *something written, inscribed, engraved, etc, which provides evidence or information or serves as a record; esp. an official paper.*

25. There is no substitute for referring to the different areas within the *Evidence Act* and other legislation properly to identify whether or not an item of evidence is a ***document***.

26. The definition of the word document for the purpose of the law of evidence in New South Wales is an amalgam of different provisions of the *Evidence Act 1995*, and incorporation by reference of the *Electronic Transactions Act 2000*. A convenient place to start is s47 of the *Evidence Act 1995*, which for convenience is set out:

> **Section 47 Definitions**
>
> (1) A reference in this Part to a ***document in question*** is a reference to a document as to the contents of which it is sought to adduce evidence.
>
> (2) A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.
>
> (underlining added)

27. Clearly, this picks up the concept of Willmott CJ in paragraph 1. above. The statute looks to the **contents** of the document as the relevant evidence. It is the content or substance not the form that is relevant.

28. As to a copy, the latitude for difference provided by the legislature is other than "all relevant respects". It is the "contents" and not the form (unless form is relevant) of the document which must be identical.

29. The next important provision is the Dictionary of the *Evidence Act 1995,* which states the following in Schedule 2 to the act:

> **DICTIONARY**
>
> **PART 1 DEFINITIONS**
>
> ***document*** means any record of information, and includes:
>
> (a) anything on which there is writing; or
>
> (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
>
> (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
>
> (d) a map, plan, drawing or photograph.
>
> …
>
> ***electronic communication*** has the same meaning as it has in the *Electronic Transactions Act 1999*.

30. That definition is at a level of abstraction and technology which on one view is extraordinarily broad.

31. One of the key concepts to electronic evidence is that it is information in the form of data, text or images stored by and consequently produced wholly or partly by a device or process, see *Evidence Act* s147.

> **Section 147: Documents produced by processes, machines and other devices in the course of business**
>
> (1) This section applies to a document:
>
> (a) that is produced wholly or partly by a device or process; and
>
> (b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.
>
> (2) If:
>
> (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and
>
> (b) the device or process is or was at that time used for the purposes of the business;
>
> it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.
>
> (3) Subsection (2) does not apply to the contents of a document that was produced:
>
> (a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
>
> (b) in connection with an investigation relating or leading to a criminal proceeding.

32. An interesting consideration is the reach of Part 2 of the Dictionary to the *Evidence Act* in Clause 6:

> **6 Representations in documents**
>
> For the purposes of this Act, a representation contained in a document is taken to have been made by a person if:
>
> (a) the document was written, made or otherwise produced by the person;
>
> (b) the representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document.

33. However, a different and less rigid approach to what is a copy of a document to that set out in s47 ([26] above) is found in Clause 8 of Schedule 2 to the Dictionary of the *Evidence Act 1995*:

> **8 References to documents**:
>
> A reference in this Act to a document includes a reference to:
>
> (a) any part of the document, or
>
> (b) any copy, reproduction or duplicate of the document or of any part of the document, or
>
> (c) any part of such a copy, reproduction or duplicate.

34. As to transactions, s5 of the *Electronic Transactions Act 2000* provides a definition of data and data storage device which appears to be a subset of the definition of document provided by the *Evidence Act*.

> (1) In this Act:
>
> ***data*** includes the whole or part of a computer program within the meaning of the Copyright Act 1968 of the Commonwealth.
>
> ***data storage device*** means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.
>
> ***electronic communication*** means:
>
> (a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both, or
>
> (b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.
>
> ***information*** means information in the form of data, text, images or sound.
>
> ***information system*** means a system for generating, sending, receiving, storing or otherwise processing electronic communications
>
> ***…***
>
> ***transaction includes***:
>
> (a) any transaction in the nature of a contract, agreement or other arrangement, and
>
> (b) any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement, and
>
> (c) any transaction of a non-commercial nature..

35. In regard to what comprises a "document" there is an ongoing debate as to whether the whole of a hard drive is a document for the purpose of the *Evidence Act* as opposed to the more conventional approach of analogy to a paper document. Given the broad approach taken by the Federal Court in this debate, issues of confidentiality or privilege will necessarily arise.

36. Finally, the ongoing change in practice is demonstrated by the recent introduction of UCPR r33.6(7)(b), underlined below:

> **33.6 Compliance with subpoena**
>
> (1) An addressee need not comply with the requirements of a subpoena to attend to give evidence unless conduct money has been handed or tendered to the addressee a reasonable time before the date on which attendance is required.
>
> (2) An addressee need not comply with the requirements of a subpoena unless it is served on or before the date specified in the subpoena as the last date for service of the subpoena.
>
> (3) Despite rule 33.5 (1), an addressee must comply with the requirements of a subpoena even if it has not been served personally on that addressee if the addressee has, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.
>
> (4) The addressee must comply with a subpoena to produce:
>
> (a) by attending at the date, time and place specified for production and producing the subpoena or a copy of it and the document or thing to the court or to the person authorised to take evidence in the proceeding as permitted by the court, or
>
> (b) by delivering or sending the subpoena or a copy of it and the document or thing to the registrar at the address specified for the purpose in the subpoena, so that they are received not less than 2 clear days before the date specified in the subpoena for attendance and production.
>
> (5) In the case of a subpoena that is both a subpoena to attend to give evidence and a subpoena to produce, production of the subpoena or a copy of it and of the document or thing in any of the ways permitted by subrule (4) does not discharge the addressee from the obligation to attend to give evidence.
>
> (6) Unless a subpoena specifically requires the production of the original, the addressee may produce a copy of any document required to be produced by the subpoena.
>
> (7) The copy of a document may be:
>
> (a) a photocopy, or
>
> (b) <u>in any electronic form that the issuing party has indicated will be acceptable</u>.
>
> (c) (Repealed)

D. Business records

37. The hearsay rule in s59 of the *Evidence Act* is an exclusionary rule which applies to a "representation made by a person" which is not admissible to prove the existence of the fact asserted by the representation.

38. The exceptions to the hearsay rule found in ss60 – 69 similarly apply to persons (although s60 arguably has a broader reach).

39. Section 69 of the *Evidence Act* is the most commonly used provision in commercial litigation, to avoid the exclusionary operation of the hearsay rule and to ensure that relevant evidence which albeit is hearsay is admitted into evidence.

40. Section 69 states:

> **Section 69 Exception: business records**
>
> (1) This section applies to a document that:
>
> (a) either:
>
> (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
>
> (ii) at any time was or formed part of such a record; and
>
> (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
>
> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
>
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
>
> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
>
> (3) Subsection (2) does not apply if the representation:
>
> (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
>
> (b) was made in connection with an investigation relating or leading to a criminal proceeding.
>
> (4) If:
>
> (a) the occurrence of an event of a particular kind is in question; and
>
> (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind;
>
> the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.
>
> (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

41. On one argument the exception provided in regard to business records applies to documents created by machines rather than persons yet the exception requires the records to belong to or to be kept by a person, body or organisation.

42. Thus the pre-requisites of s69 which necessarily have already been established as to previous hearsay representations are in any event not caught by or alternatively an exception to the hearsay rule and the document is admissible.

43. A further exception to the hearsay rule is provided in s71, which states:

> **Section 71 Exception: electronic communications**
>
> The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:
>
> (a) the identity of the person from whom or on whose behalf the communication was sent; or
>
> (b) the date on which or the time at which the communication was sent; or
>
> (c) the destination of the communication or the identity of the person to whom the communication was addressed.
>
> Note 1: Division 3 of Part 4.3 contains presumptions about electronic communications.
>
> Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.
>
> Note 3: Electronic communication is defined in the Dictionary*
>
> (underlining added)
>
> * See Definition in Part 1 of the DICTIONARY: ***electronic communication*** has the same meaning as it has in the *Electronic Transactions Act 2000* ([34] above)
>
> **Section 161 Electronic communications**
>
> (1) If a document purports to contain a record of an electronic communication other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:
>
> (a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made; and
>
> (b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made; and
>
> (c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made; and
>
> (d) was received at the destination to which it appears from the document to have been sent; and
>
> (e) if it appears from the document that the sending of the communication concluded at a particular time--was received at that destination at that time.
>
> (2) A provision of subsection (1) does not apply if:
>
> (a) the proceeding relates to a contract; and
>
> (b) all the parties to the proceeding are parties to the contract; and
>
> (c) the provision is inconsistent with a term of the contract.
>
> **Section 162 Lettergrams and telegrams**
>
> (1) If a document purports to contain a record of a message transmitted by means of a lettergram or telegram, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram.
>
> (2) This section does not apply if:
>
> (a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) subsection (1) is inconsistent with a term of the contract.

44. It is important to notice that the above provisions facilitate proof of provenance, date or time and destination of the electronic communication, however not content.

45. Does s161 *Evidence Act* permit a document to prove itself? See *National Australia Bank Limited v Rusu* (1999) 47 NSWLR 309 where the Court held that a third party response to a subpoena is not sufficient to establish provenance of a document on the balance of probabilities. However, the better interpretation of the application of ss71 and 161 may be that they overcome the challenges in *Rusu*, absent the application of ss135, 136 of the *Evidence Act 1995*.

46. In such circumstances, the provisions in ss48 – 50, 146 – 147 and also 150 are likely to assist – see further below.

47. Interestingly s69(4) precludes the operation of the hearsay rule to allow reception of negative evidence to establish the negative that there is no record kept in accordance with the system of the occurrence of an event of the particular kind in question.

E. ESI

48. The challenges to obtaining evidence in digital or electronic form and the barrier of technology was well illustrated in this memorable exchange from the movie *Zoolander*. The scene, you will recall, was one were Derek and Hansel were seeking evidence of the evil Mugatu's misdeeds. Confronted with a now dated orange Apple Mac, the following exchange took place with their journalist friend:

- ***Did you find the files?***
- ***I don't even know what they ...***
- ***What do they look like?***
- ***They're in the computer.***
- ***They're in the computer?***
- ***Yeah, they're definitely in there ...***
- ***I don't know how he labelled them ...***
- ***I got it.***

- ***You gotta figure it out ...***
- ***We're running out of time.***
- ***Find them and meet me at the show.***
- ***Roger.***
- ***In the computer.***
- ***It's so simple.***

49. The complexity attendant to obtaining and adducing probative electronic evidence, as opposed to photocopying a document in paper form, is self-evident. A further challenge is the massive storage capacity of digital devices, with resultant increases in irrelevant material which must be discarded from relevant material.

50. To put the issue in practical terms a 16 GB[6] iPhone contains sufficient storage for 3.6 million conventional A4 pages. Allowing 300 pages for a lever arch file, if such pages were printed and assembled in lever arch files, the number of lever arch files would 12,000. Simple mathematics applied to that number, ie 1 folder per hour, 12 hours per day, 5 days per week, suggests that approximately 4 years working without a holiday would be required to manually read the content of those 12,000 lever arch files.

51. This figure presents a confronting reality as to the challenges in dealing with electronic evidence.

52. The conundrum of the sheer volume of data today has recently been recognised in the ALRC Report 115 March 2011 on Managing Discovery - Discovery of Document in Federal Courts. As stated on page 8, data now runs into terabytes - 1 terabyte is 1 million megabytes or 1,000 gigabytes[7] – which "*tests the historical rationale of discovery is being to facilitate fact-finding, save time, and reduce expense. The commercial realities of discovery in the context of possibly 'too much information' may represent a significant barrier to Justice for many litigants as well is amounting to a huge public cost*".

53. There are numerous and different sources of digitally stored information comprising documents under the *Evidence Act*.

54. Sources of electronic evidence include:

    (a) desk top computers;

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[6] 16,000,000,000 bytes of storage

[7] 1 Bit = Binary Digit; 8 Bits = 1 Byte; 1000 Bytes = 1 Kilobyte;·1000 Kilobytes = 1 Megabyte;·1000 Megabytes = 1 Gigabyte; 1000 Gigabytes = 1 Terabyte

(b) personal computers;

(c) mobile telephones;

(d) SIM cards in mobile telephones;

(e) storage disks;

(f) USB drives;

(g) email servers;

(h) external storage devices – the cloud.

55. The growth in the amount of data and the difficulty in locating a "smoking gun" necessitates specialist services for:

(a) electronic discovery;

(b) identification of probative material within the discovery;

(c) proof of documents by expert testimony as to provenance and integrity.

56. An example of a specialist in this area is a department created by Deloitte Touche Tomastsu and its Forensic Data Discovery and Recovery Services (**Deloitte Forensic**).

57. A most useful guide to this topic generally is Allison Stanfield's 2009 book, *Computer Forensics, Electronic Discovery and Electronic Evidence*. I commend that book to anyone who wishes to explore this topic further.

58. In many ways specialists such as Deloitte Forensic may be understood as analogous to pathology services used by medical practitioners for analysis of blood and other tests for diagnosis of patient's complaints.

59. The ever increasing use of technology in commercial transactions is fostered by the legislature, as an example:

> ***ELECTRONIC TRANSACTIONS ACT 2000 (NSW)***
>
> **Section 3 Object**
>
> The object of this Act is to provide a regulatory framework that:
>
> (a) recognises the importance of the information economy to the future economic and social prosperity of Australia, and
>
> (b) facilitates the use of electronic transactions, and
>
> (c) promotes business and community confidence in the use of electronic transactions, and
>
> (d) enables business and the community to use electronic communications in their dealings with government.

Section 4 Simplified outline

The following is a simplified outline of this Act:

(a) For the purposes of a law of this jurisdiction, a transaction is not invalid because it took place by means of one or more electronic communications.

(b) The following requirements imposed under a law of this jurisdiction can generally be met in electronic form:

(i) a requirement to give information in writing,

(ii) a requirement to provide a signature,

(iii) a requirement to produce a document,

(iv) a requirement to record information,

(v) a requirement to retain a document.

(c) For the purposes of a law of this jurisdiction, provision is made for determining the time and place of the dispatch and receipt of an electronic communication.

(d) The purported originator of an electronic communication is bound by it for the purposes of a law of this jurisdiction only if the communication was sent by the purported originator or with the authority of the purported originator.

60. Similar legislation has been enacted by the Commonwealth and other states.

F. Harvesting e.evidence

61. The scale and technically difficult challenges of electronic evidence militates against litigators having the knowledge, sophistication and available technology properly to perform the necessary analysis.

62. Specialists can assist in the identification, preservation and analysis of electronic evidence.

63. Most importantly such specialists ought be engaged at a very early stage of case management to assist in identifying where both your own client and the opponent is likely to have stored electronic information.

64. Documents in electronic form which have been accidentally or deliberately destroyed can often be retrieved from electronic storage devices.

65. A further forensic consideration is the use of metadata and device logging facilities to identify inconsistent date and time representations in electronic documents.

66. Expertise is required both to perform such tasks and also to qualify the person as an expert for the purpose of proof, including issues such as chain of custody.

67. As with much practice in commercial litigation it is imperative to identify the destination before commencing the journey. A key consideration is to recognise the issues in dispute between the parties.

68. A sound starting point for the preparation of a case is a complete document library of both hard copy and digitally stored information. It is from this basis that "smoking guns" may be identified as lying within the opponent's documents.

69. Electronic discovery requires both identification with precision and nominating effectively sources of documents from which discovery is to be given.

70. The likely volume of documents produced will require searching techniques and computer analysis beyond the ability of most practitioners. The sheer volume of material produced in terms of the old fashioned page size means that reviewing hard copies of documents is simply impractical.

71. Finally, the ability to provide expert evidence to satisfy the decision maker as to the integrity of the evidence and of the processes by which the documents were obtained from electronic storage is a significant consideration for the persuasion of the decision maker as to the just nature of your client's case.

G. Facilitation of proof

72. The challenges to a litigator in regard to proving documents electronic form are threefold:

    (a) the means by which a party will adduce the evidence, the contents of which are said to be relevant;

    (b) whether the document is admissible in the sense that it is not subject to the exclusionary rules of the *Evidence Act 1995*;

    (c) the probative value of the evidence.

73. Sections 71 and 161 of the *Evidence Act* examined above facilitate proof of matters. The legislature also has facilitated the proof of contents of documents by s48 of the *Evidence Act 1995* which states:

> **Section 48 Proof of contents of documents**
>
> (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:

(a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question,

(b) tendering a document that:

(i) is or purports to be a copy of the document in question, and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents,

(c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)-tendering a document that is or purports to be a transcript of the words,

(d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it-tendering a document that was or purports to have been produced by use of the device,

(e) tendering a document that:

(i) forms part of the records of or kept by a business (whether or not the business is still in existence), and

(ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary,

(f) if the document in question is a public document-tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed:

(i) by a person authorised by or on behalf of the government to print the document or by the Government Printer of the Commonwealth or by the government or official printer of another State or a Territory, or

(ii) by the authority of the Government or administration of the State, the Commonwealth, another State, a Territory or a foreign country, or

(iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.

(2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.

(3) If the party adduces evidence of the contents of a document under subsection (1) (a), the evidence may only be used:

(a) in respect of the party's case against the other party who made the admission concerned, or

(b) in respect of the other party's case against the party who adduced the evidence in that way.

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:

(a) tendering a document that is a copy of, or an extract from or summary of, the document in question, or

(b) adducing from a witness evidence of the contents of the document in question.

74. Another helpful provision for the management of evidence in document-heavy litigation is:

Section 50 Proof of voluminous or complex documents

(1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible

conveniently to examine the evidence because of the volume or complexity of the documents in question.

(2) The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:

(a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and

(b) given each other party a reasonable opportunity to examine or copy the documents in question.

(3) The opinion rule does not apply to evidence adduced in accordance with a direction under this section.

75. The following provisions also assist with proof of documents:

Section 146: Evidence produced by processes, machines and other devices

(1) This section applies to a document or thing:

(a) that is produced wholly or partly by a device or process; and

(b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.

(2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

Example: It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

Section 147: Documents produced by processes, machines and other devices in the course of business

(1) This section applies to a document:

(a) that is produced wholly or partly by a device or process; and

(b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.

(2) If:

(a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and

(b) the device or process is or was at that time used for the purposes of the business;

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.

(3) Subsection (2) does not apply to the contents of a document that was produced:

(a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

(b) in connection with an investigation relating or leading to a criminal proceeding.

76. However, if evidence is led which challenges the provenance or veracity of a document such as an email, eg if any presumption arising from legislation is rebutted, then proof of the contents of the document challenged by an opponent proof can be complex and costly.

77. This is a clear example of the need for careful planning and consideration to pre-hearing interlocutory steps to facilitate proof. Such processes include:

(a) discovery (including preliminary discovery);

(b) interrogatories;

(c) subpoenas;

(d) notices to admit.

H. Getting material into evidence

78. Here is a forensic problem to consider. Facilitation of proof by operation of s48 of the *Evidence Act* is subject to s49 which states:

> **Section 49 Documents in foreign countries**
>
> No paragraph of subsection 48(1) (other than paragraph 48(1)(a)) applies to a document that is in a foreign country unless:
>
> (a) the party who adduces evidence of the contents of the document in question has, not less than 28 days (or such other period as may be prescribed by the regulations or by rules of court) before the day on which the evidence is adduced, served on each other party a copy of the document proposed to be tendered; or
>
> (b) the court directs that it is to apply.

The content of a document which is stored in "*the cloud*" requires timely and planned pre-hearing steps to ensure its admission into evidence.

79. Depending upon the importance of the contents of the document in question a party seeking to rely upon the evidence may well be advised to make an application pursuant to s70 of the *Civil Procedure Act* for an order dispensing with the rules of evidence for proving any matter that is not *bona fide* in dispute. Such an application relieves a party seeking to rely upon the contents of what is essentially a non-contentious document.

80. Another alternative is to seek a determination on a separate issue pursuant to UCPR r28.2:

> ***UNIFORM CIVIL PROCEDURE RULES 2005***
>
> **28.2 Order for decision**
>
> The court may make orders for the decision of any question separately from any other question, whether before, at or after any trial or further trial in the proceedings.

81. Other helpful provisions which commend the early attention of commercial litigators include:

> ***UNIFORM CIVIL PROCEDURE RULES 2005***
>
> **Rule 31.10 Plans, photographs and models**
>
> (1) At least 7 days before the commencement of a hearing, a party who intends to tender any plan, photograph or model at the hearing must give the other parties an opportunity to inspect it and to agree to its admission without proof.
>
> (2) A party who fails to comply with subrule (1) may not tender the plan, photograph or model in evidence except by leave of the court.
>
> (3) This rule does not apply to any proceedings entered, or intended to be entered, in:
>
> (a) the Commercial List or the Technology and Construction List in the Supreme Court, or
>
> (b) the Commercial List or the Construction List in the District Court.
>
> **Rule 31.13 Unstamped documents: arrangements under section 304 of the *Duties Act 1997***
>
> (1) The "usual undertaking by person liable" if given to the court by a party in relation to an instrument referred to in section 304 (2) of the Duties Act 1997 is an undertaking that the party will, within a time specified by the court, transmit the instrument to the Chief Commissioner of State Revenue.
>
> (2) The "usual undertaking by person not liable" if given to the court by a party in relation to an instrument referred to in section 304 (2) of the Duties Act 1997 is an undertaking that the party will, within a time specified by the court, forward to the Chief Commissioner of State Revenue the name and address of the person liable to pay duty on the instrument under that Act together with the instrument.

82. In substantial and contested litigation the assistance of experts with the ability to preserve the integrity of electronic evidence is well recognised.

83. Furthermore, the requirements of the Supreme Court and the development of the E-Court clearly indicates the direction of likely change and requirements in regard to electronic evidence, see, for example **Practice Note SC Gen 7 Supreme Court – Use of technology**:

> **Encouraging the use of technology in civil litigation**
>
> 9. All parties are required at all stages of their litigation to consider the prospect of using technology for the purposes of information exchange and at trial itself. In preparing a case for trial the parties are specifically encouraged to:
>
> - exchange electronic versions of documents such as pleadings and statements;
> - consider the use of electronic data at trial in accordance with the Court's requirements.
> - Serve documents electronically
>
> **Electronic exchange of discovery lists and documents**
>
> 10. Where parties have discoverable ESI, efficiency dictates that any discovery and production of such information be given electronically to avoid the need to convert it to a paper format. In such cases the Court, as a general rule, will require the parties to:
>
> - create electronic lists of their discoverable ESI material

- give inspection by production of databases containing copies of discoverable ESI created in accordance with an agreed protocol. Host and attachment documents must not be separated in this process and
- change original file names to document identification numbers.

11. Where the parties have more than 500 documents that are not ESI, as a general rule the Court will expect the parties to consider the use of technology to discover and inspect such documents along with any ESI. Decisions about the appropriate use of technology will be better informed if the parties have identified early in the proceedings the scope of discovery and the categories of documents likely to be discovered.

12. Practitioners must advise their opponents at an early stage of the proceedings of potentially discoverable electronically stored information and meet to agree upon matters including:

- the format of the electronic database for the electronic discovery, noting that metadata, mark-up or other "hidden" data will be automatically discovered if native format is used. Because of potential costs, the Court would ordinarily expect it should only be discovered where the relevance outweighs the cost
- the protocol to be used for the electronic discovery including electronically stored information
- the type and extent of the electronically stored information that is to be discovered
- how legacy or deleted data is to be dealt with. The existence of ESI that is not reasonably or readily accessible should be disclosed between the parties, but the Court would ordinarily expect that it would not need to be retrieved unless necessary for the conduct of the proceedings
- whether electronically stored information is to be discovered on an agreed without prejudice basis
- without the need to go through the information in detail to categorise it into privileged and non-privileged information and
- without prejudice to an entitlement to subsequently claim privilege over any information that has been discovered and is claimed to be privileged under s 118 and/or s119 of the Evidence Act 1995 and/or at common law.
- Such ESI could be produced separately on a CD-ROM or DVD and appropriately marked to enable the Court to determine any privilege issue.

13. In many cases where there is a substantial amount of ESI the parties should consider producing the material in its searchable native format, rather than by production of document images.

14. If a party chooses to produce document images rather than originals of ESI, the costs of providing access to hardware, software or other resources to enable inspection of original electronic material should be agreed by the parties.

84. See also Practice Note SC Eq 3 in regard to the Commercial List:

Discovery

27. The Court endorses a flexible rather than prescriptive approach to discovery to facilitate the making of orders to best suit each case.

28. Subject to an order of the Court or unless otherwise agreed between the parties, <u>discovery of electronically stored documents and information is to be made electronically. Discoverable documents and information that are not stored electronically should only be discovered electronically if it is more cost effective to do so</u>.

29. <u>Practitioners must advise their opponents at an early stage of the proceedings of potentially discoverable electronically stored information and meet to agree upon matters including</u>:

29.1 <u>the format of the electronic database for the electronic discovery</u>

29.2 the protocol to be used for the electronic discovery including electronically stored information

29.3 the type and extent of the electronically stored information that is to be discovered and

29.4 whether electronically stored information is to be discovered on an agreed without prejudice basis

29.4.1 without the need to go through the information in detail to categorise it into privileged and non-privileged information and

29.4.2 without prejudice to an entitlement to subsequently claim privilege over any information that has been discovered and is claimed to be privileged under s 118 and/or s119 of the Evidence Act 1995 and/or at common law.

30. At any hearing relating to discovery (including its form and extent), the Court expects practitioners to have:

30.1 ascertained the probable extent of discoverable documents

30.2 conferred with their opponents about any issues concerning the preservation and production of discoverable documents including electronically stored information

30.3 given notice to their opponents of any problems reasonably expected to arise in connection with the discovery of electronically stored information, including difficulty in the recovery of deleted or lost data

30.4 given consideration to and conferred in relation to the particular issues involved in the collection, retention and protection of electronically stored information, including:

30.4.1 whether the burden and cost involved in discovering a particular document or class of documents is justified having regard to the cost of accessing the document or class of documents and the importance or likely importance of the document or class of documents to the proceedings

30.4.2 whether particular software or other supporting resources may be required to access electronically stored information

30.4.3 the manner in which documents are to be electronically formatted so that the integrity of the documents is protected

30.4.4 whether particular documents need to be discovered in hard copy form (such as original documents or documents larger than A3 in size)

30.4.5 how privileged documents should be appropriately protected

30.5 given consideration to preparing and, if agreed, prepared a Joint Memorandum signed by the senior practitioners who attended the discovery meeting (and who are to attend the discovery hearing) identifying:

30.5.1 areas of agreement on proposed discovery

30.5.2 areas of disagreement with a brief statement of the reasons therefore and

30.5.3 respective best estimates of the cost of discovery.

31. **The Court will make orders for discovery having regard to the overriding purpose of the just, quick and cheap resolution of the disputes between the parties**.

32. For the purposes of ensuring that the most cost efficient method of discovery is adopted by the parties, on the application of any party or of its own motion, the Court may limit the amount of costs of discovery that are able to be recovered by any party.

I. Conclusion

85. While much has changed due to the development of technology, a fundamental constant for a litigator is that marshalling probative evidence well in advance of trial is the most effective means to conduct litigation. Equally important is that such an approach allows a litigator properly to advise a client as to prospects of success at a very early stage of a dispute.

86. Early investigation of relevant electronic evidence is a reality in 2011 and the key to identifying the "smoking guns". Furthermore, the Court's processes and Practice Notes envisage an increase in the use of technology in litigation.

87. Understanding the risks and the opportunities of such matters and the availability of specialists to assist in this process can only improve performance through preparation and planning at an early stage of litigation, to achieve the best available outcome for the client prior to or at trial.

88. My thanks to the University of New South Wales and particularly Mr Chris Lemercier for the opportunity to participate in this Commercial Litigation Seminar.

M J Walsh
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