

Controlling the flow

THE C7 CASE HAS ADDED TO THE PRESSURE FROM THE COURTS ON IN-HOUSE COUNSEL TO APPROPRIATELY MANAGE THE HUGE AMOUNT OF POTENTIALLY DISCOVERABLE MATERIAL WELL BEFORE THEIR EXTERNAL LAWYERS GET INVOLVED, WRITES SEAMUS E BYRNE

In December 2006, the United States substantially overhauled its Federal Rules of Civil Procedure (FRCP) pertaining to electronic discovery. Almost one year on, it is anticipated that the Federal Court of Australia will soon replace the ageing Practice Note (PN) 17, dealing with the use of technology in civil litigation, introduced almost eight years ago by Chief Justice Black.

During this time, the majority of lawyers, in all specialisations, have experienced the rise of electronically stored information (ESI) as a potential source of electronic evidence. Australian courts have also taken steps to accommodate the discovery and management of such information. Unfortunately, while current practice guidelines are undoubtedly concerted efforts for their time, they still may be considered unnecessarily ambiguous and overly technical. This criticism extends to the recent Supreme Court of Victoria's PN 1 of 2007.

WHAT CAN WE EXPECT FROM THE FEDERAL COURT?

The anticipated Federal Court PN has been drafted with an eye to the great burden currently faced by the courts in conducting commercial litigation. Members of the judiciary, including the Chief Justice, have observed the process of discovery (the process of sourcing and exchanging documents relevant to a case) as a substantial contributor to "litigation excesses" (time and cost) in recent media commentary.

In the C7 judgment (*Seven Network Ltd v News Ltd* [2007] FCA 1062), Justice Sackville also

acknowledged that "in the electronic age, when deleted emails or other documents stored in digital form can generally be retrieved, albeit sometimes with great difficulty, the process of production and inspection of documents becomes an industry in itself".

This proposition is supported by international trends, and the recent 2007 Socha-Gelbmann Electronic Discovery Survey illustrated that e-discovery in the United States is a US\$2 billion-plus (\$2.4 billion-plus) per year industry. Further, based on anticipated growth patterns, the market is expected to exceed US\$4 billion (\$4.9 billion) in 2009. While Australia does not have the population or litigation workload of the United States, a proportionate level of growth is expected.

SAVING TREES TO SAVE TIME?

The Federal Court is expected to set out a clear principle that any relevant electronic document is to be produced, managed and reviewed in its original, electronic form or a searchable image representation of the native document, as opposed to the traditional conversion to hard copy form. With very limited exceptions (ie very limited photocopying), this will require a significant mindset shift for many lawyers who are accustomed to this traditional practice.

The exchange of all documents is to be done in an "electronically searchable" format. This signals the end of lawyers manually searching a substantial volume of documents in the form of relatively useless unsearchable images. Unfortunately, the current

practice of using unsearchable images fails to demonstrate the efficiencies that technology may provide in litigation. Consequently, the Court is likely to recommend the use of mature optical character recognition (OCR) technology when converting paper documents to electronic form.

The time and cost expended in "coding" each document, usually for reference in the litigation support database, is another issue to be addressed. The Court will likely recommend that, wherever possible, the coding for each document is to be automatically extracted based on their metadata (descriptive information about each document) as opposed to manually describing each document.

FROM PAPER CLIPS TO SILICON CHIPS

In many cases, the discovery process is perceived as overly adversarial. This situation is often amplified when lawyers are faced with technology and the discovery of ESI in multiple locations and forms, including emails, databases and tape backups.

The US innovated by mandating a "meet and confer" conference which forces consideration and resolution of potential or foreseeable discovery issues early in proceedings. To a lesser extent, the Supreme Court of Victoria provides that the Court may order parties, or their lawyers to utilise technology as part of the proceedings or to retain a technology consultant.

It is anticipated that the Federal Court will endorse the mandatory concept of a "pre-discovery conference", which would involve all parties meeting to discuss the scheduling, scope, preservation and



production of discoverable documents (including dealing with privilege). The conduct of the meeting will likely be set out by the Court in the form of a template checklist document containing issues that parties should agree upon.

This meeting will likely be facilitated by a member of the Court e-discovery panel. A panel member is envisioned as, in essence, a court appointed expert who will solely focus on objective issues of e-discovery and more generally, on using technology to increase efficiency of the conduct of the case for all parties. At this meeting, all parties will also be required to agree upon a "document management protocol", which sets out in layman's terms for all parties how documents are to be managed. This includes, for example, how each document for each party is to be numbered and how partially-privileged documents will be masked (or redacted).

This concept is innovative to the extent that it facilitates court efficiency by largely outsourcing a mentally intensive, non-core activity of the Court, to essentially a "court-accredited" expert to resolve objective issues. To this point, the meeting still would

not prevent further argument as to case-specific, substantive issues of discovery.

Overall, the Court may be perceived as being ambitious in re-asserting greater access to justice, but this may be facilitated through a clear and concise PN, which allows smaller law firms and sole practitioners to perform e-discovery with top-tier firms on a "more even" playing field. On a wider basis, limiting the scope of discovery appears to create greater case management efficiency in both the Federal Court (Fast Track List, Victorian Registry) and Supreme Court of New South Wales (PN SC Eq 3 of 2007).

ARE YOU LITIGATION READY?

Aside from issues relating to trade practices, the C7 "mega-litigation" further stressed the need for Australian organisations to take proactive steps to ensure the appropriate management of their documents, including ESI. We have also seen the rise of "litigation readiness" as a buzzword to define the strategy, associated infrastructure and process of taking such steps as a measure of good corporate governance

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COUNSEL SEARCH FOR AN EARLY DISCOVERY

Litigation readiness is the buzz phrase of the moment among corporate legal departments, as several high-profile court cases and a rash of new rules has put the spotlight on their employers' information management practices – and the financial and legal risks involved in not getting them right.

In the US, the *Zubulake* cases and several subsequent cases (see "Fistful of files", *Lawyers Weekly* issue 335, 27 April 2007) have led to new rules dealing with cost shifting in electronic discovery and a subsequent hike in demand for IT systems that facilitate compliance. As a result, the US electronic discovery industry's earnings grew by 51 per cent from 2005 to 2006, reaching US\$2 billion (\$2.4 billion) last year, according to the latest annual survey by Socha-Gelbmann. The consultancy predicts this will double to US\$4 billion (\$4.9 billion) by 2009.

Demand in Australia is also very strong, pushed along by a string of high-profile cases, including the Oil-for-Food Inquiry, *McCabe v BATAS* and most recently the C7 case.

Peter Turner, CEO of the Australian Corporate Lawyers Association says these cases are just three major examples that have contributed to general counsel taking a closer look at their data management policies and practices.

"In McCabe, C7 and AWB ... documents formed the crux of the issue. In the McCabe case there were a number of documents that had been destroyed; in C7 it was probably more the number of documents; and in the AWB case it was the late production of documents that held up the enquiry for months," he notes.

"Out of those cases two or three significant issues have emerged for all corporate counsel, particularly for the big-end of town. Firstly there is the question of cost, and one of the prime problems when managing discovery is the question of keeping costs under control.

"Secondly you have the issue of defensibility. If you don't produce documents you need to have a good argument as to why documents were not produced and thirdly you need to be able to ensure and even enforce the preservation of documents internally."

Perhaps most worrying, these cases have shown that in-house counsel can be held directly responsible for their company not complying with relevant regulations and court requirements. "There is not only a cost and a document management issue involved here, but a liability issue, or at least responsibility of the corporate counsel to ensure that [requirements are complied with]," he says.

"In two of the three cases the in-house counsel was regarded as an unreliable witness by the judge at the end of the proceeding, and that's something that has never occurred before."

Software companies are now lining up to offer e-discovery services to companies, including those that haven't traditionally competed in this space such as Oracle, with AWB recently purchasing an e-discovery system from US provider AXS One, for instance.

Australian company e.law provided the information technology support for the court in the C7 case, but it is also advising in-house legal departments on how to prepare their workplace better for litigation.

Executive director Allison Stanfield says there has been a big increase in interest from corporate legal departments in how they can effectively manage their data so it is easy to access, and compliant with court rules. But it requires both legal and technical knowledge of information systems to understand how this can best be done.

IT managers will be responsible for the backing up of company data and general counsel will have a good idea of the legal requirements that govern this collection to ensure it is compliant with court rules and regulations, she says, but putting together the two is not a simple task.

"I have seen a marked increase in interest in this in the past six to 12 months. We have received so many calls out of the blue from general counsel wanting to know what they should do about their data," she says.

As well as C7, Stanfield points to the new practice note for the equity division of the NSW Supreme Court which requires all discovery is conducted electronically. These and the fact that the vast majority of information is created and stored in electronic form anyway has inevitably led to "corporations wanting to make sure the information is catalogued and stored in a way that is litigation-ready from the get-go".

Management of data has to be on a risk basis, she says, but it can include counsel making sure their document retention and destruction policy is up-to-date with relevant requirements, as well as reflecting their company's actual practices.

"It's also making sure [the policy] is being implemented at the most basic level on a daily basis. So that goes down to making sure that the admin person is filing that email appropriately, right up to making sure that the executive directors are doing the same."

— Shaun Drummond

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(getting the “electronic house” in order). Implemented correctly, such measures provide effective return on investment, especially for organisations that may be considered somewhat “litigation prone”.

The pressure is being exerted on in-house counsel to understand the “information lifecycle” of their organisation, from three perspectives – records management, technical and legal. This is essential, as a mere policy pertaining to document retention and destruction does little to support a potential argument of “good faith” deletion or destruction of potentially relevant documents due to the lack of audit and enforceability.

The *Privacy (Data Security Breach Notification) Amendment Bill 2007* has recently been introduced to federal parliament as a Private Members Bill by Senator Stott-Despoja. If passed, the Bill will legally oblige all organisations, within the ambit of the federal *Privacy Act 1988*, to notify affected individuals where there has been a data security breach (for example, an employee notebook computer or tape backup lost in-transit to offsite storage containing personal information). This further encourages in-house counsel to understand how information is managed within their organisation or face both legal and public relations consequences.

A further issue arises as to who can assist in-house counsel facilitate a litigation readiness strategy. Legal advice may be sourced from an external law firm, generally a top-tier firm. However, as technology provides the majority of the solution to overall information management – a hybrid legal-technical approach may need to be adopted, as a commercial practicality. This

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proposition is also supported by Socha-Gelbmann, which identified the emergence of leading enterprise technology players, such as Oracle, into the market. Alternatively, providing litigation readiness services may provide an alternative revenue stream for law firms as the scope for litigation revenue is reduced by the Courts.

CAN DELETING AN EMAIL DESTROY YOUR CAREER?

It is often raised that in-house counsel face the increased challenge of balancing the interests of their client – that is, the organisation which pays them – with legal and professional conduct obligations that may give rise to potential commercial detriment. In C7, chief general counsel for News Ltd acknowledged that his conduct in deleting emails was done to avoid the possibility that “somebody might read [his] emails and draw adverse conclusions about [him] or News ... from them”.

Justice Sackville stated that counsel deleted his records of emails “in part, because he appreciated that communications of this kind might be useful in litigation”. His Honour continued, counsel’s “actions show that he was perfectly prepared to destroy

documents he considered to be detrimental to his interests or those of News”. Justice Sackville has referred the conduct to the Law Society of New South Wales for their consideration.

It must also be noted that New South Wales practitioners have an obligation (Regulation 177 of the *Legal Profession Regulation 2005*) to not destroy documents which may be required in litigation. Contravention of the regulation is considered professional misconduct.

Consequently, due caution must be afforded to information management, particularly with ESI, by in-house counsel and on both an individual and organisational level. It is acknowledged that many grey areas still exist in relation to retention periods. Notwithstanding, as a diligent practitioner, any actions should be justifiable and defensible to the period of retention – regardless of whether you are dealing with the retention or destruction of electronic documents, financial records or even voicemail. Technology provides numerous efficiencies and advantages that lawyers must now be aware of in order to successfully fulfil their obligations. ■

