



Innov8

**Business Solutions
for the Next WAVE**



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Your E-mail and the Law

Seamus E. Byrne

Lawyer, LL.B, CISSP, EnCE, CCE, MCP, Security+

For Maxus and Innov8

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This presentation does not constitute legal advice and is intended for educational purposes only.

MAXUS

Today

- **The Document Revolution**
 - Document
 - Electronically Stored Information (ESI)
 - Rules of Evidence
- **E-mail Management**
 - Why?
 - Retention
 - Destruction
 - Security
 - Accessibility, Archival and Backup
 - Legacy Migration
 - Case Study – News Limited
 - Best Practice

The Document Revolution

- **Information**
 - Almost all of civilisation has relied on physical information storage
- **Document**
 - Late 19th century
 - Modern form of business document
 - Typewriters, carbon paper and filing cabinets
 - **Certain assumptions**
 - Original records
 - Altered records (i.e. non-authentic)

The Document Revolution

Electronically Stored Information (ESI)

- Dynamic
- Ever-increasing in volume
- Stored in many distributed locations
- Routine processes can delete or overwrite ESI without human intervention
- **Over 90% of today's business correspondence and documentation is electronically-stored**

The Document Revolution

Legal Interpretation

- The term '**document**' is interpreted **very** broadly:
 - Any record of information;
 - Anything on which there is writing;
 - Any book, map, plan, graph, drawing, photograph, label;
 - Any disk, hard drive, audio tape, film, **electronic file**, computer tape; and
 - **Part** of a document.
- The medium itself is also a document!
 - Backup tape, etc.: *Sony Music v University of Tasmania* [2003] FCA 532
 - 'Computer server' - *TLC Consulting Services v White* [2003] QCA 131.
- *Acts Interpretation Act 1901* (Cth) s 25; *Evidence Act 1995* (Cth) s 3
- *Interpretation of Legislation Act 1984* (Vic) s 38; *Evidence Act 1958* (Vic) s 3

Rules of Evidence

- **Relevance = Admissibility**
 - Regardless of form, evidence must go to a ‘fact in issue’
- **Weight = Chain of Custody**
 - Managing electronic evidence in a documented manner without (or with minimal) alteration
 - As a system, any potential e-mail management technology solution must be supported by audit logs, etc.
- **Best Practice**
 - *Guidelines for the Management of IT Evidence* (HB171-2003), Standards Australia

E-mail Management

Why?

- **Business Efficiency**
 - Centralised e-mail access, archival and recovery
 - May be managed in-house or outsourced
- **Corporate Governance**
 - Good document management as a measure of good corporate governance and risk mitigation
- **Litigation Prone?**
 - Forthcoming Federal Court Practice Note
 - Generally, mandates production of e-mail in their original, electronic form with metadata (e.g. not a printout)
- **Over 80+ laws impose retention and destruction obligations on corporate Australia**

E-mail Management Retention Obligations

- **Contract**
- **Legislation (i.e. law)**

E-mail Management

Retention – Corporate Records

- *“a company must keep written financial records that:
(a) correctly record and explain its transactions,
financial position and performance; and
(b) would enable true and fair financial statements to
be prepared and audited **for seven (7) years after
the completion of the transactions covered by the
records”***
- *Corporations Act 2001 (Cth) s 286; Financial Transactions Reports Act 1988 (Cth) s 23.*
- *Also see: Corporations Act 2001 (Cth) s 1307 in relation to falsification.*

E-mail Management

Retention – Tax Records

- *“Businesses that choose to process and keep records in electronic form must keep the records in a form that the ATO can access and understand ... **for five (5) years after the documents were prepared or obtained... (whichever is the later)**”*
- *Income Tax Assessment Act 1936 (Cth) s 262A; Tax Ruling TR 2005/9*

E-mail Management

Retention – Electronic Transactions

- *Electronic Transactions Act 1999 (Cth)*
 - To reduce burden previously imposed by **dealing with Government agencies** electronically (i.e. not private parties)
 - In relation to records retention, if a Commonwealth law specifies retention, this may be satisfied:
 - If there is a reliable means of ensuring **integrity**; and
 - **Readily accessible and useable** for subsequent reference; etc.
 - Legislation generally mirrored at State-level.

E-mail Management Personal Information

- *Privacy Act 1988* (Cth)
 - 2001 ‘Private Sector’ amendments and **10 National Privacy Principles** (‘NPP’)
 - Does it apply to your organisation?
 - Over AUD\$3M revenue; or
 - In health care industry
 - Voluntary opt-in provision for small business

E-mail Management

Personal Information

- National Privacy Principles
 - **Collect** only information necessary for one or more of the organisation's functions or activities
 - **Use** only for such purposes
 - **Disclose** to the individual as to their personal information
 - Take steps to **secure** and **de-identify** when personal information is no longer required
- Forthcoming amendments with penalties for non-compliance and insecurity!

E-mail Management Destruction Considerations

- **Current Common Law Test – McCabe**
 - Documents destroyed before litigation commencement may attract adverse inference and criminal contempt sanctions
 - McCabe v British American Tobacco Australia Services Ltd [2002] VSC 73; [2002] VSCA 197
- **Legislative Response in Victoria – Following McCabe**
 - Crimes (Document Destruction) Act 2006 (Vic)
 - Corporate criminal liability for document destruction, even where:
 - Litigation may only be ‘reasonably likely’ or anticipated; or
 - Corporate culture seen to support document destruction and mismanagement
- **Evidence (Document Unavailability) Act 2006 (Vic)**
 - Codified sanctions for document unavailability in civil litigation

E-mail Management

Security and Risk Assessment

- **ISO 27000 Series**
 - Information Security Management Systems
 - ISO 27002 – Code of Practice
- **ISO 15489 – Record Keeping**
 - Accessible
 - Authentic
 - Reliable
 - Useable
- Take reasonable steps to mitigate your risk!

E-mail Management

Accessibility, Archival and Backup

- Ensure information is **reasonably accessible**
- Understand the difference
 - Archive for '**nearline**' access
 - Backup for **business continuity** and **disaster recovery**

E-mail Management

Legacy Migration

- Over time, technology changes, so does your e-mail platform
- Understand and document **any limitations** of your migration methodology

E-mail Management Case Study

- ***Seven Network Limited v News Limited***
[2007] FCA 1062 (27 July 2007)
- Evidence of News Limited In-House Counsel:
 - Outlined ‘print or delete’ retention policy
 - Produced only 50 relevant internal e-mails for the five (5) year period
 - Backups of deleted e-mails were retained for three (3) days only
 - Admitted to destroying relevant handwritten faxes

E-mail Management Case Study

- **News Limited (Hutley, SC):** *“What policy should a commercial organisation in the early 21st century, with the ubiquity of e-mails, adopt?”*
- **Sackville J:** *“Keep them, or don’t engage in a systematic process of removal of them so that in a case like this the end result is that ... as far as the trier of fact is concerned, I simply don’t know what the contemporaneous communications were within News [Limited]”*

E-mail Management Case Study

- Sackville J on News' In-House Counsel:
 - “*Mr Philip's actions show that he was **perfectly prepared to destroy documents he considered to be detrimental to his interests or to those of News***”
 - “***deliberately dishonest conduct***”
- Sackville J has ordered a copy of judgment be given to the Law Society of NSW
 - Reg 177, *Legal Profession Regulation 2005* (NSW)

E-mail Management

Best Practice

- **Starting Point**
 - What your legal obligations are
 - What you have
 - Where it is
- **Don't keep or delete everything!**
 - Justify your actions

E-mail Management

Best Practice

- **Proper Information Management**
 - Four Steps
 - Policy
 - Training
 - Implementation (Content Management System)
 - Regular Review
 - **Goal:** Legal and regulatory compliance
 - **Additional Result:** Better business with increased efficiency

Thank You

If you have any questions or feedback regarding this presentation please contact:

Seamus E. Byrne

+61 (0)416 214 388/ +44 (020) 7193 8588

seamus@seamusbyrne.com

sbyrne@ediscoverytools.com



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