

NZ COMMENTARY

BUDDLE FINDLAY

Electronic evidence – benefit or burden?

The Evidence Act 2006 will make the admissibility of technology-based evidence easier. However Courts may need to adapt in order to control the spiralling costs arising from e-discovery.

These days most communication is conducted by email and is never produced in paper form. In New Zealand, the Electronic Transactions Act 2002 and the Financial Transactions Reporting Act 1996 have significantly reduced the need to retain original documentation of transactions if an electronic version is kept which is an exact replica and which maintains the integrity of the original information.

This increase in the volume of electronic information has had a major impact on the way in which litigation is conducted in New Zealand. There are many practical benefits arising from having records in electronic form, particularly if parties make use of litigation support software. During the discovery phase, parties often exchange vast volumes of material electronically (e.g. by CD-Rom) rather than request photocopies or laboriously inspect hard copies off-site. Electronic documents can be uploaded into a database which is fully searchable. The litigation support software then provides a powerful tool with which to analyse electronic information and prepare for trial.

Courts are willing to embrace new technologies if they assist in the conduct of a hearing. In large litigation, special arrangements can be made for the courtroom to be networked so that the Judge, counsel and the witness can all see a monitor which displays documents rather than each person having to work with voluminous hard copies of agreed bundles.

The new Evidence Act 2006 will make the admissibility of technology-based evidence easier. Section 137 provides for the admissibility of evidence produced wholly or in part by a machine, device or technical process (for example scanning) based on a presumption that the technology was used in the ordinary way (e.g. to scan the original document). Section 19 will make it easier to admit a business record as an exception to the hearsay rule.

However, a major problem in litigation is now the vast volume of material that may need to be disclosed during the discovery

process. Rule 295 of the current High Court Rules requires discovery not only of documents that are directly relevant to issues in dispute (i.e. they would tend to prove or disprove a relevant fact), but also of documents that may lead to a relevant "train of inquiry" (*Companie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, CA). Such a wide obligation of discovery can be monumentally inefficient and costly.

The obligation to discover all relevant "documents" extends to computer records, no matter how difficult they are to access. In some cases, this may require expensive steps of recovering data from back-up tapes, restoring old computer systems or carrying out forensic recovery work. Even if the electronic data remains accessible on the hard drive, a critical factor is whether effective file management methods have been used so that all the relevant documents are located together. If not, the challenge lies in wading through vast amounts of data to identify the relevant records (e.g. searching through an entire email server if sub-files have not been used).

During 2002, the Law Commission considered whether the *Peruvian Guano* approach to discovery may result in excessive cost because the odd relevant needle is discovered in haystacks of irrelevancies. While many recognised the problem, there has been only limited reform because of the difficulties of coming up with a better alternative (*BNZ Investments Limited & Ors v The Commissioner of Inland Revenue* [2007] NZCA 356, paragraph 32).

Under Rule 293 of the High Court Rules (which will become Rule 8.16 under the proposed changes to those Rules) the Court retains a discretion to modify default discovery orders. Often it will be sensible for the parties to agree to a more limited scope of discovery (e.g. agree that the parties are not required to retrieve deleted electronic data). Under Rule 305 (which will become Rule 8.29 under the proposed changes) the Court may order the party to pay costs if it has discovered documents that are not required to be included (i.e. "over-discovery"). In some cases it may be appropriate to apply in advance for a cost-shifting order if the other party insists on costly electronic discovery which would cause an undue burden or



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expense outweighing the likely benefit (see the principles discussed in *Commerce Commission v Telecom Corporation of New Zealand Ltd & Anor* (2006) 18 PRNZ 251 (CA)).

Conclusion

Businesses should be aware that the costs of e-discovery can be contained far more effectively if appropriate data management systems are put in place before disputes arise. If litigation does occur, the challenge for the parties and the Court is to take advantage of the benefits of technology whilst ensuring that the burden of discovery does not become unduly expensive and time-consuming.

Laura O'Gorman is a partner in the Auckland Litigation team of Buddle Findlay, one of New Zealand's leading law firms. She has special expertise in Fair Trading and Commerce Act issues, international disputes and contractual matters. Laura has served on the Law and Technology Committee of the Auckland District Law Society for the last two years and has a special interest in technology issues. Laura can be contacted by phone: +64-9-358 7031 or e-mail: laura.ogorman@buddlefindlay.com.

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Annexure: - MailRevive™ Purchase Order

1.	Commencement Date	10 th of September 2007
2.	Licence Term	12 months from Commencement Date
3.	Licence Fees	\$ 11.00 per/mth per/mailbox \$ 99.00 once-off activation fee Payable in advance via Direct Debit
4.	Number of Mailboxes	8
5.	Rate for Additional Data Storage	\$ 15 per GB per annum

All pricing above is ex GST