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ABN 88 988 504 094

59 Harrington Street
GPO Box 20
HOBART
Tasmania 7001

DX 112 Hobart

Phone (03) 6210 0000
Fax (03) 6210 0099

info@doma.com.au
www.doma.com.au

Law Society of Tasmania
DX 111
HOBART

Attention: Martyn Hagan

By DX and email: Martyn.Hagan@taslawsociety.asn.au

Dear Martyn

Advice on document retention, storage and destruction

We refer to your letter dated 17 November 2009 and our subsequent telephone conversations. You have sought our advice in relation to issues connected with the retention, storage and destruction of a range of documents held by law firms.

We understand that your query has arisen due to the advent of the *Legal Profession Act 2007* ("*LP Act*"), which provides an opportunity to consider whether there is any impediment to scanning client matter files, storing them electronically (on or off site) and destroying the original paper documents. Such scanning could occur at the time the documents are received or produced, or at the time the file is closed.

You have sought our specific advice on whether:

1. an electronic copy of the original documents contained on a client matter file is sufficient for all reasonable purposes. The short answer to this question is "no", and our more detailed answer is set out below; and

Council 13/3/2010 + Council 20/04/2010

2. there is any impediment to destroying the original document without needing to satisfy the requirements of section 650 of the *LP Act* i.e. essentially earlier than seven years. The short answer to this question is "yes", and our more detailed answer is set out below.

We confirm that you do not require advice in relation to "significant" original paper documents, such as wills and title deeds, as it is acknowledged that these documents need to be retained as paper records.

Legislation and other sources considered

In preparing this advice we have considered the following Acts and subordinate legislation:

- *Acts Interpretation Act 1931 (Tas)*
- *Acts Interpretation Act 1901 (Cth)*
- *Electronic Transactions Act 2000 (Tas)*
- *Electronic Transactions Act 1999 (Cth)*
- *Evidence Act 2001 (Tas)*
- *Evidence Act 1995 (Cth)*
- *Legal Profession Act 2007 (Tas)*
- *Legal Profession Act 2004 (Vic)*
- *Legal Profession (Solicitor) Rules 2007(ACT)*
- *Legal Profession (Solicitor) Rules 2007(QLD)*
- *Rules for Professional Conduct and Practice (SA)*
- *Rules for Professional Conduct and Practice (NT)*
- *Rules of Practice 1994 (Tas)*
- *Professional Conduct & Practice Rules 1995 (NSW)*

We have also considered the Law Council of Australia's Model Rules, relevant Law Institute of Victoria Ethics Committee Rulings and *McCabe v British Tobacco (2002) VSC 73*.

Previous provisions

The *Legal Profession Act 1993* (Tas) was silent as to the retention, storage and destruction of documents by law firms. The only relevant reference to document retention was (and is) contained within Rule 58 of the *Rules of Practice 1994*, which provides:

> *A firm must keep each book of account or accounting record required to be maintained under this Part:*
>
> *(a) in good order and condition; and*
>
> *(b) for a period of not less than 10 years after the date of the last entry in that book or record.*

In practice, many firms adopted the approach of retaining paper files for seven years. This approach appears to have been used to accommodate the statutory time limit applying to actions in tort and contract. The reasoning behind the approach was that most actions against legal practitioners were based on contract and/or negligence, both of which have a six year statutory time limit, with an additional year allowed for service of a writ. We note this service period has been reduced to six months. We do not consider this approach to effectively cater for all possible future claims by or against legal practitioners and practices should consider retaining files for a longer period.

The current provisions

Section 650 of the *LP Act* entitled Destruction of Documents provides:

> *A law practice or Australian legal practitioner may destroy or dispose of any documents held by the practice or practitioner relating to a matter after a period of seven years has elapsed since the completion of the matter if the practice or practitioner has been unable, despite making reasonable efforts, to obtain instructions from the client to whom the documents relate as to the destruction or disposal of the documents.*

The section applies to *all* documents, regardless of their form, held by a law practice ("practice") or Australian legal practitioner ("practitioner") relating to a matter. It is not limited to "trust records". It is worth noting, however, that s231 of the *LP Act* still requires trust records to be kept in printed or printable form.

None of the terms "completion of the matter", "destroy", "destruction", "dispose" or "disposal" contained within s650 is defined in the *LP Act*.

"Document", however, is defined in s4 to mean:

> *any record of information, and includes –*
>
> *(a) anything on which there is writing; and*
>
> *(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and*
>
> *(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and*
>
> *(d) a map, plan, drawing or photograph –*
>
> *and a reference in this Act to a document (as so defined) includes a reference to –*
>
> *(e) any part of the document; and*
>
> *(f) any copy, reproduction or duplicate of the document or of any part of the document; and*
>
> *(g) any part of such a copy, reproduction or duplicate;*

Applying this definition, s650 applies to all documents whether in paper or electronic form and to any copy, duplicate or reproduction of a document such as from paper form to electronic form – including copies generated by the practitioner. Notably, the documents caught by the section are not restricted to documents owned by the client, but extend to any document relating to a matter held by the practitioner. The section therefore extends to documents generated and owned by the practice/practitioner such as file notes and internal memoranda.

Reasonable Efforts

Section 650 does not create a positive obligation to retain documents regardless of instructions. What the section does do is direct what a practice or practitioner *may* do where, despite reasonable efforts, they have not been able to obtain instructions.

S650 requires "reasonable efforts" to be made to obtain instructions from the client regarding destruction or disposal of documents before they are destroyed or disposed of. If "reasonable efforts" to obtain instructions are unsuccessful then the documents may be destroyed or disposed of seven years after completion of the matter. The section, therefore, implies a requirement that instructions concerning the destruction or disposal of documents be sought on *all* matters. Implicitly, the section sanctions the destruction or disposal of documents earlier than seven years *if* a practice or practitioner obtains appropriate instructions.

The wording of s650 is identical to s7.2.16 of the Victorian *Legal Profession Act* 2004. In all other jurisdictions with document retention provisions (NSW, ACT QLD, SA and NT), the rules mirror the Law Council of Australia's Model Rules. The key difference between the Tasmanian/Victorian rule and the rule applying in other jurisdictions is that it allows the practitioner to destroy or dispose of documents after making "reasonable efforts" to obtain instructions.

What then are "reasonable efforts"?

This question has been addressed on two previous occasions by the Ethics Committee of the Law Institute of Victoria. On both occasions the committee considered an earlier but almost identical wording of the rule. In Ruling Number R3757 (1 September 2000) the Committee resolved:

> *.....The question of what are reasonable efforts to obtain instructions from the client as to the destruction or the disposal of the documents may vary according to the circumstances and cannot be stated as a general principle. Subject to this qualification, a letter to the client's last known address allowing a reasonable time for reply, would normally be sufficient for the purposes of s443..."*

The matter was again considered by the Committee in 2002, at which time it expressed the (non-binding) opinion that it would be "reasonable" to:

> *Where practical...write to each client advising that unless they hear to the contrary in 60 days, the file will be destroyed. Where not practical, an advertisement should be placed in local, statewide and national newspapers and contact made with relevant organisations for dissemination of information requesting clients to provide instructions (within a fixed timeframe) regarding destruction of their files."*
>
> (Ruling Number R3893, 1 September 2002).

On pages 10-11 below we have detailed our view regarding the instructions that should be sought.

Is an electronic copy of an original document sufficient for all reasonable purposes?

Despite s650 permitting the destruction and disposal of documents when appropriate instructions have been provided, there are legislative impediments and practical reasons to justify not destroying paper documents. Our research indicates that an electronic copy is not sufficient in all circumstances.

General duties owed by lawyers in relation to documents

In *McCabe* v. *British American Tobacco* (2002) VSC 73, Eames J. had cause to review the duties owed by legal practitioners in relation to client documents. Although the decision was reversed on appeal, we believe the general principles enunciated by Eames J remain good law.

The McCabe case held that lawyers have a duty to advise their clients in relation to the clients' duties regarding the destruction of documents. According to *McCabe,* lawyers have a duty to advise their clients not to destroy documents that would be discoverable in "contemplated" litigation – the Court emphasised that litigation need merely be contemplated and not necessarily commenced, pending or imminent. Eames J's decision is authority for the proposition that lawyers cannot destroy client documents in such circumstances either.

Practitioners who are considering destroying or disposing of client files will need to address their minds to whether the files contain any potentially discoverable documents relating to contemplated litigation against or by their client. If so, the destruction of documents even in circumstances where scanning occurs, could amount to a breach of both the practitioner's professional duty to their client and their duty to the Court.

Litigation and evidence

The *Evidence Act (Cth)* and *Evidence Act (Tas)* abolished the common law principles relating to proving the contents of documents. Courts no longer require original documents and copies are capable of being tendered. However, proof is still required that the copy is identical to the original document, in all relevant respects, prior to it being admitted into evidence. It follows, that the same principles apply to electronic copies of original documents.

Further, practitioners will need to bear in mind the evidence required to prove that an electronic copy is identical to the original paper document. Such evidence will include proof of the integrity of the scanning process.

Section 146 of the *Evidence Act* applies to documents (tendered by a party) produced wholly or partly by a device or process, for instance a device or process for storage and reproduction of records. Section 146(2) provides:

> *If it is reasonably open to find that the device or process is one, 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 the thing on the occasion in question, the device or process produced that outcome.*

To satisfy this section, if challenged, it is necessary for the practitioner to have retained evidence of the integrity of the scanning process. Proof should also be obtained and maintained of the reliability of the electronic records, including audit trails and access logs such as meta data.

Electronic Transactions Legislation

The *Electronic Transactions Act* 2000 *(Tas)* and *Electronic Transactions Act* 1999 *(Cth)* were passed to support the development of electronic commerce and to enable the delivery of appropriate services online. A preliminary consideration of these Acts would suggest that electronic copies of certain relevant client documents were sufficient for a broad range of purposes. On closer examination, however, the range of potential documents covered by the legislation is narrower than might be expected.

The legislation allows for the following requirements or permissions under Commonwealth law to be fulfilled in electronic form:

- giving information in writing;
- providing a handwritten signature;
- producing a document in material form; and
- recording or retaining information.

Section 9(2) *Electronic Transactions Act (Tas)* and section 12 (2) *Electronic Transactions Act (Cth)* provide, if, under the laws of the relevant jurisdiction, a person is required to retain a document (that is in the form of paper, an article or other thing) for a particular period, that requirement is met if the person retains [or in the case of Tasmania only, or causes another person to retain] an electronic form of the document throughout that period, where:

- there is a reliable means of ensuring integrity;
- it is readily accessible and useable for subsequent reference; and
- if a particular kind of storage device is required by regulations, that requirement has been met.

The initial impression created is that the paper form of the relevant document can be destroyed. However, several caveats remain.

First, the "integrity" of information contained in a document is only maintained if the information has remained complete and unaltered, apart from:

- the addition of any endorsement; or

- any immaterial change,

which arises in the normal course of communication, storage or display.

Second, there is also a risk of loss of essential attributes when storing information in electronic form, causing a document to undergo a material change. For instance, the depth of the imprint of a signature on a document may be lost. Therefore, if scanning a client document the practitioner will need to ensure that the integrity of the document is protected and essential attributes are retained.

In addition to meeting the requirements set out above, an assessment needs to be made of the relevant documents on a client's file to determine whether they actually fall within the ambit of the relevant *Electronic Transactions Act*. Notably, the legislation does not apply to all documents and is subject to certain limitations, including:

- the Commonwealth *Electronics Transactions Act* only applies to laws made by or under the authority of the Australian Government Parliament and is unlikely to apply to the common law;
- the Commonwealth legislation does not expressly allow for retention of documents by another person such as storage at another site;
- some laws are exempt from the application of the legislation. Some examples of exemptions are:

  (a) under the Tasmanian Act:

  - a requirement or permission relating to the creation, execution or revocation of a will, codicil or other testamentary instrument;
  - a requirement or permission relating to enduring powers of attorney;
  - a requirement that information or a document be delivered only by personal service;
  - Division 2 of the Act (including retention rights) do not apply to the *Evidence Act*; and

  (b) under the Commonwealth Act:

  - practice and procedure of a court or tribunal including both Commonwealth and Tasmanian *Evidence Acts*, other state laws, and common law that provides for the way in which evidence is given in proceedings in a court; and
  - an extensive list (set out in Schedule 1 of the Act) to which the retention obligations (and other obligations) do not apply.

Therefore, although both the *Electronic Transactions Acts* permit certain documents to be retained in electronic form, practitioners will need to ensure that the integrity of the documents is protected and the documents are readily accessible and useable. Practitioners will also need to determine whether the documents fall within any of the exceptions to the general permission granted under the Acts. Practitioners intending to dispose or destroy client documents will need to be satisfied that none of them fall within the exceptions to the Acts.

Privacy Issues

Scanning client files can raise privacy issues for practitioners, especially if the scanning is outsourced. Where the practice/practitioner has an annual turnover of more than $3 million they must comply with the National Privacy Principles (NPP) applying under the *Privacy Act 1988 (Cth)* which apply to individuals (as distinct from corporate clients).

The act of scanning a document is likely to involve "collection" of personal information within the meaning of the *Privacy Act*, even if the practice or practitioner already holds the original document. Accordingly, it would be advisable privacy practice to obtain the individual (as distinct from a company) client's consent to collect personal information by scanning, and essential for the "collection" of health and other types of sensitive information to comply with NPP 10.

A practice's privacy policy should provide for document scanning by expressly stating that it collects personal information using scanning devices. The policy should also expressly state what information technology security measures are in place to protect personal information whilst electronically stored, as well as when outsourced for scanning and storage by third parties.

Confidentiality

Rule 11(1) of the *Rules of Practice 2004* provides that:

> *A practitioner must not disclose any information obtained in the course of handling a client's matter without the consent of the client.*

Accordingly, unless the practitioner obtains specific instructions enabling them to do so, the practitioner may be in breach of their duty of confidentiality if they allow a third party to scan a client's file. Again, we recommend that appropriate consent be obtained from clients at the start of the retainer.

Conclusion

In conclusion we are of the opinion that:

1. section 650 of the *LP Act*, in effect, requires practitioners to retain *all* documents that they hold in relation to a matter unless they have obtained instructions from their client permitting them to destroy or dispose of them;

2. in circumstances where a practitioner is *unable*, despite making reasonable efforts, to obtain client instructions, section 650 of the *LP Act* permits the destruction or disposal of documents seven years after the completion of the matter;

3. in circumstances where a practitioner *is* able to obtain appropriate client instructions, section 650 of the *LP Act* implies that it is permissible to destroy or dispose of documents earlier than seven years from completion;

4. despite section 650 allowing for the destruction or disposal of some documents in accordance with client instructions, there are other statutory provisions and practical reasons that could render the practice inadvisable and potentially could result in both the practitioner and the client breaching a statutory requirement or duty;

5. if practitioners intend to scan paper documents from client files for the purposes of converting them to electronic files, specific instructions should be sought from the client in order to comply with confidentiality obligations and, where applicable, the practitioner's privacy obligations; and

6. for reasons of risk management and client relations, it is advisable in many circumstances for practitioners to retain documents for a period longer than 7 years from completion of a matter.

In response to your key questions our advice is:

1. an electronic copy of an original document contained on a client matter file is ***not*** sufficient for ***all*** reasonable purposes. Where seeking consent from a client to destroy paper records and rely on electronic files instead, consideration needs to be given to whether an electronic copy of the documents will suffice if the originals are destroyed. This requires evaluation of all legislation relevant to the matter including the exemptions and limitations on the application of the *Electronic Transactions Act* at State and Commonwealth level. In litigious matters an evaluation of the documents, including their integrity and whether there is sufficient evidence to prove the electronic copy is a copy of the original document, needs to be undertaken; and

2. there are impediments to destroying original documents without satisfying the requirements of section 650 of the *LP Act*. All types of documents (whether in paper or electronic form) and copies, duplicates and reproductions come within the definition of a document. Consequently, they must be retained for the seven year period to comply with section 650. Destroying an original document, after replacing it with an electronic copy, is not acceptable, unless instructions have been obtained permitting this.

It is our view that the most prudent course for practitioners would be for specific instructions to be obtained in writing at the commencement of the retainer:

- authorising the scanning of any and all documents related to the matter, including by outsourcing the scanning;
- authorising the storage of documents on and/or off site;
- authorising the destruction of documents, whether paper or electronic as and when determined by the practice; and
- acknowledging there is no requirement on the practice to retain documents for seven years from completion of the matter.

This applies to all matters, regardless of whether there is any requirement under the *LP Act* to have a costs agreement with the client.

Where applicable, the practice's privacy policy should also specifically provide for scanning and off site storage of electronic files.

Please contact us if you wish to discuss our advice.

Yours sincerely

Susan Larsen-Scott
Partner
Direct Line: (03) 6210 0031
Direct Email: susan.larsen-scott@doma.com.au

Yours sincerely

per:
Gretel Chen
Senior Associate
Direct Line: (03) 6210 0058
Direct Email: gretel.chen@doma.com.au