

NEWSLETTER OF THE LEGAL PRACTITIONERS LIABILITY COMMITTEE

How to play it safe with e-mail

The volume and variety of uses made of e-mail in a law office today fills risk managers with a sense of panic. The use of e-mail, like all new technologies, has crept up on us all and, like most things, management principles and policies are a step behind.

The good news is we have not had any major claims relating to e-mail incidents. That is not to say that there have not been any near misses. Vigilance is necessary. The major areas for risk from our perspective are:

- Monitoring of both outgoing and incoming mail.
- The use of casual and imprecise language, almost conversational.
- There is an unrealistic expectation of timeliness. E-mails can be easily missed or accidentally deleted.
- Use of e-mail often emboldens both lawyer and client to ask for things that they would not ask for in person. This can lead to protracted negotiations.
- Risk of an inadvertent breach of confidentiality.
- 'Useable trail' problems if people do not print off e-mail and file the hard copy so the file is complete for someone else to use.
- Forged or false e-mail (yes, we have seen this here in Australia).

While it is difficult to overcome all of these problems, developing a protocol for e-mail use will go a long way to managing the risk. Draft internet and e-mail guidelines have been developed by the LIV and are available on their website. The guidelines are designed for each firm to adapt to suit their own needs and culture.

Set out below are our top 10 items (many of which are included in the LIV guidelines) which we believe should be included in any policy you develop.

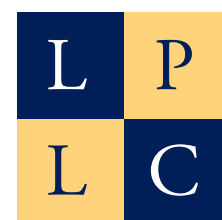
1. Always print out a copy of file related e-mail and put it on the file.
2. Specify what type of e-mail junior staff can respond to, or who the e-mail must be copied to, and how e-mail, no matter how short or pithy, is to be signed off by partners.
3. Provide e-mail and typing training.
4. Develop templates for formatting of e-mail.
5. When important or urgent advice is to be sent by e-mail, telephone the recipient first to advise that the e-mail is on its way.
6. For group external e-mail consider using the blind copy facility for all recipients so no one has their address divulged unless you have the recipient's consent to do otherwise.
7. Always open and check any attachments before sending any e-mail.
8. Require use of automatic spell check before an e-mail is sent.
9. Require use of the function that advises you when your e-mail has been received and opened (particularly in relation to important or urgent matters).
10. Where an e-mail looks suspicious or contains important instructions, verify the contents by another medium (eg. telephone the sender to avoid any false or forged instructions).

GST — Note this...

The government has now released a statement on the proposed amendments to s.13 of the *GST Transition Act* for the GST treatment of long term non reviewable contracts when the transitional relief expires on 1 July 2005.

Under the proposal, from 1 July 2005 all suppliers with long term non reviewable contracts will be entitled to recover the net impact of the GST from recipients whether or not the recipient is entitled to an input tax credit.

Full details of the proposal dated 21 November 2003 may be found on the Treasury website at www.treasury.gov.au Click on *Published Information* and then on *Reviews, Inquiries and Consultations*.



Enduring powers of attorney — ‘capacity’ ain’t what it used to be!

The *Instruments (Enduring Powers of Attorney) Act 2003* (Vic) brings with it many welcome changes to the legislative regime for enduring powers of attorney, however for lawyers there are some hidden traps.

The Act received royal assent on 23 October 2003 and is due to come into operation on 1 July 2004.

There are many changes practitioners should be aware of, however the changes that are of concern for the LPLC are in relation to witnessing. One witness must be a person who is authorised to witness the signing of a statutory declaration (s.125(3) of the *Instruments Act 1958* as amended). Each witness must sign a certificate stating that:

- a) the donor signed the enduring power of attorney freely and voluntarily in the presence of the witness; and
- b) at the time, the donor appeared to the witness to have the **capacity** necessary to make the enduring power of attorney. (s.125A)

Section 118 has the heading ‘When does a donor have capacity to make an enduring power of attorney? The wording of the section however does not include the word ‘capacity’ nor is ‘capacity’ defined in the Act. The section states that a donor may make an enduring power of attorney only if the donor understands the nature and effect of the enduring power of attorney. It goes on to set out that ‘understands the nature and effect’ includes:

- a) that the donor may, in the power of attorney, specify conditions or limitations on, or instructions about, the exercise of the power to be given to the attorney;
- b) when the power is exercisable;
- c) that once the power is exercisable, the attorney has the same powers as the donor had (when not under legal incapacity) to do anything for which the power is given subject to any limitations or restrictions on exercising the power included in the enduring power of attorney;
- d) that the donor may revoke the enduring power of attorney at any time the donor is capable of making an enduring power of attorney;
- e) that the power the attorney is given continues even if the donor subsequently ceases to have legal capacity;
- f) that at any time that the donor is not capable of revoking the enduring power of attorney, the donor is unable to effectively oversee the use of the power.

At this stage it appears that if practitioners are asked to witness enduring powers of attorney after 1 July 2004 they will need to at least raise the matters referred to in (a) to (f) above with the donor before certifying that the donor appeared to have capacity. Of course practitioners should also keep a file note of the matters raised.

We will be producing further material on the subject closer to the commencement date.

A timely reminder

With the long foreshadowed flattening of the property market apparently upon us it may be timely to remind practitioners not to take anything for granted. One practitioner has sent us a copy of a sale of land copyright contract which appeared to be a standard form but, in fact, a page of clauses had been removed, new clauses

had been added and some clauses had been included twice. The result was that it had the same number of pages as the real copyright contract and, with only a superficial reading of it, the document looked like the standard copyright contract.

The moral of the story is to be vigilant. Not every contract that looks like a standard form contract is a standard form contract.

Why risk management?

Minimising your risk is the best way to contain the cost of your insurance.

LEGAL PRACTITIONERS LIABILITY COMMITTEE

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