



# paperless office nears reality

Before we reach a paperless utopia, there are legal implications to consider.

**Story** Samantha van Aswegen and Jaime Heap

*"There is absolutely no question that there will be a revolution in the office over the next 20 years. What we are doing will change the office like the jet plane revolutionised travel and the way that TV has altered family life... I don't know how much printed paper I'll want in this world."*

**T**he words of former Xerox Corp chief George Pake, which appeared in *Business Week* in 1975, show us that some things never change.

For years futurists, environmentalists, tech companies and efficiency consultants have been telling us that the paperless office is coming and it will change everything. The

benefits are obvious – easier document searching, cheaper storage costs, disaster security, benefits for the environment – the list goes on and on.

So why, in this technological age of scanners and sophisticated document management systems, are we still drowning in paper? What is preventing us from doing away with paper altogether?

It is widely understood (if perhaps imprecisely) that both individuals and businesses are required to retain certain documents for prescribed statutory periods. However, can these documents be retained electronically?

Although there is no blanket rule one way

or the other, it is safe to say that the tide is changing and the conservative attitudes towards electronic retention traditionally held by legislators and the courts are shifting.

## WHY SHOULD DOCUMENTS BE RETAINED?

One reason is the legal imperative. Various laws specifically prescribe that documents must be retained. For example, under corporations and tax laws, individuals and businesses must keep records that verify and explain transactions, financial position and performance.

Further, there is an obligation to retain records that are or may become relevant

## TIPS FOR GOING PAPERLESS

- > Create a document retention strategy that addresses which documents can be stored electronically, which documents must be retained in their original form, how long to retain them and how they will be stored and accessed in the future
- > Ensure that, whichever electronic storage method is used, the security and integrity of the electronic documents are maintained
- > Be aware that if there is a reasonable anticipation of litigation, documents must be retained
- > If your data is stored by a third party, make sure it is clear in your contract with the service provider that you retain ownership of the data (and the inherent IP in the data) and that you will always have access to it, even if a dispute arises
- > Be prepared to get legal advice as your business is likely to have documents with specific retention requirements.

to reasonably anticipated litigation. For example, the infamous British American Tobacco case confirmed that once litigation has commenced or is anticipated, parties are under strict duties not to destroy any document that may be relevant to the proceedings.

Another reason to retain records is risk management and commercial prudence. A document created today may assist you in defending a claim made against you tomorrow – or more likely, in several years' time. Accordingly, there can be commercial and risk management advantages in retaining documents for example, until the limitation period expires (though, on that, see below).

### WHAT DOES THE LEGISLATION SAY?

We are not yet able to proclaim that every single document can be retained electronically. Indeed, there are some obvious documents where hard copy originals should always be kept – certificates of title, shareholders certificates and mortgage documents for example. However, we are slowly getting closer to George Pake's paperless utopia.

In the past decade various Commonwealth, state and territory *Electronic Transactions*

Acts have been introduced. This legislation states that if a person is required under certain Commonwealth, state or territory law to retain a paper document, that requirement is met if the person retains an electronic form of the document.

Businesses and individuals are susceptible to a number of compliance obligations if they electronically retain documents.

Firstly, the electronic form of the document must be generated so as to maintain the integrity of the document. Under the *Electronic Transactions Acts* this requirement will be met if the document remains complete and unaltered. The best way to keep a document complete and unaltered is to put robust data security controls in place such as a firewall or a secure document management system. Just as paper records are currently stored in hard copy, either locked in your office, or at an off-site warehouse, the same security considerations apply to electronic storage.

Insufficient data security can have serious legal implications. You may find yourself in breach of confidentiality and privacy obligations you have under contract if you don't keep secure another party's confidential information. In some cases, you may be specifically restricted from copying and storing third party data electronically. For example, often under formal non-disclosure agreements, your obligations with respect to security are more strict.

In some cases, businesses engage a third party to store their electronic data. Where this occurs it is critical to obtain express acknowledgement of your ownership of the data and of your unfettered right to gain access to it, even if there is a dispute with the service provider. Many businesses have been locked out of their own data – and not merely archival data, but current information necessary to conduct business.

It is also essential that the contract with the service provider contain a reasonable liability regime dealing with the consequences if data is lost or if its integrity or accuracy is compromised or corrupted. Conflict can arise here because IT service providers often don't want to accept liability for such loss – but it's your data and its loss can be very damaging to your business. You need to be wary of exclusions and limitations of liability that effectively make the service provider immune from having to compensate you for loss.

Secondly, the documents must be readily

accessible in the future. Technology cannot be used as an excuse for failing to access an electronic document. Whichever technology is used, the documents must be readily accessible.

Finally, there is an obligation under the *National Privacy Principles* for organisations to take reasonable steps to protect personal information from unauthorised access, modification or disclosure. What is reasonable will depend on the sensitivity of the information and the harm that is likely to result if there is a breach of security. If you allow sensitive personal information to enter the public domain in breach of privacy rules you may have to compensate the individual.

Businesses which are outed as not respecting privacy are likely to suffer reputational damage. The recent allegations of personal data leakage on the part of Vodafone (whether such allegations are ultimately proven or not) is a good example of the reputational harm that can follow unauthorised access, or an allegation of it.

### HOW LONG DO DOCUMENTS NEED TO BE STORED?

Certain legislation requires that particular types of documents should be retained for a certain period following their creation. For example:

> The *Corporations Act 2001 (Cth)* provides that written financial records must be retained for seven years from the end of the transaction to which the document relates.

> The *Income Tax Assessment Act 1936 (Cth)* requires records to be retained for a period of five years after the person prepared or obtained them or five years after the completion of the transaction or acts to which they relate (whichever is the later)

> Limitation periods for commencement of legal action should also be kept in mind when considering how long to retain documents, for example the *Limitations Act 1969 (NSW)*. Limitation periods vary from jurisdiction to jurisdiction and from cause of action to cause of action. For an ordinary contract breach and negligence, in New South Wales, for example, the limitation period is six years. However, it needs to be remembered that this period starts from when the loss first is manifested. Ⓜ

Samantha van Aswegen and Jaime Heap are lawyers in Bartier Perry's corporate and commercial practice. They may be contacted on 02 8281 7800 or visit [bartier.com.au](http://bartier.com.au)