

E-Mail - Is It Private?

Electronic Mail (or E-Mail), the transfer of electronic messages between parties via a computer terminal, has become an everyday part of many businesses and represents a quick and convenient method of communicating all sorts of information. If you have a message you simply type it into a desktop computer terminal and send it to the intended recipient by electronic mail.

Most users of E-mail consider that E-mail is a private form of communication, similar to a private conversation. As a result, it can be used as a popular forum for potentially defamatory material. However, E-mail messages can be printed out and traced by any user of the system, and there is also a facility for "blind copies" to be sent by the sender or recipient of any message without the other party knowing. E-mail is really not private at all in the absence of some special protection provided by law.

Privacy legislation in Australia is very limited and restricts data matching by governments using tax file numbers and regulates the collection, use and access to personal credit rating information. So far, the Australian government has taken little interest in broadening the privacy protection base. E-mail has not yet been considered.

The situation is different in the United States where the outside interception of E-mail by the government, police or third parties without proper authorisation is prohibited by law. However, inter-office communications are not protected unless, as the Courts have held, the employee had a "reasonable expectation" of privacy when the message was sent.

In a recent case in the United States, two employees were sacked by a major corporation following the monitoring of E-mail between them by a supervisor who did not appreciate unflattering comments that were made about her. The ex-employees argued they had a "reasonable expectation" of privacy in their wrongful dismissal case and lost. The lawyers for the company successfully argued that as the company owned the computer system, its supervisors had every right to read anything created on it.

In Australia there is nothing to stop an E-mail message which bears a defamatory meaning, refers to the plaintiff as the person being defamed and is published to at least one third party, from being sued upon. In the absence of any defence (most notably, truth) a successful defamation action may lie. This occurred in the case *Rindos v Hardwick*, Supreme Court of Western Australia.

Until such time as the law gives protection the privacy of E-mail, it is a good idea for employers to remind the users of E-mail that it is not a private communication channel. This may be done by a banner which appears on screen when a user logs on advising that the material communicated or received through E-mail is the property of the employer and the employer reserves the right to

review all E-mail. Whether or not E-mail is the property of the employer is an open question in Australia but such a banner puts users on notice that E-mail can find its way into someone else's hands.

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Editorial Note:

In addition to the matters raised above, there is also the question of obtaining sensitive commercial information by discovery of E-mail records, and the potential for E-mail messages to be used to evidence discrimination, sexual harassment and the like.

It seems a problem with E-mail is that users are often more lax and undisciplined with the use of E-mail than they are with letters, memos and reports. E-mail messages are often more chatty and personal. There is also the tendency by some people to be open and, perhaps, indiscreet on the basis that an internal E-mail system is confidential - for internal use only or because they presume (often wrongly) that E-mail is temporary and is not printed out, backed up or otherwise recorded and preserved.

In addition to the potential to embarrass and undermine or expose positions in construction disputes through E-mail messages obtained through discovery, in some extreme situations E-mail messages might go to evidence conspiracy or other wrongful conduct.

As an example of the timeliness of the warning provided by this article, readers should note the recent disclosure in the press of the large number of documents leaked from the federal Attorney-Generals Department to the federal Opposition, which included E-mail records.

- **John Tyrill**