

EVIDENCE AND TECHNOLOGY

**Institute for Information Management Ltd
Discussion on Evidence and Technology**

Issue Paper

MP No 32

Queensland Law Reform Commission
May 1998

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HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on any issues that you believe are raised by the Commission's reference on evidence and technology.

Written comments and submissions should be sent to:

The Secretary
Queensland Law Reform Commission
PO Box 312
ROMA STREET QLD 4003

or by facsimile on: (07) 3247 9045

or by e-mail at: law_reform_commission@jag.qld.gov.au

or via the Commission's
Internet site at: <http://www qlrc.qld.gov.au>

Oral submissions may
be made by telephoning
Cheryl Treloar on: (07) 3247 4552

CONFIDENTIALITY

Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

The Commission may refer to or quote from submissions in its publications. If you do not wish your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.

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EVIDENCE AND TECHNOLOGY

Cheryl Treloar¹

THE QUEENSLAND LAW REFORM COMMISSION

The Queensland Law Reform Commission is an independent statutory body made up of 6 part-time members and 1 full-time member. Wayne Briscoe is the full-time Commissioner. The Chairman, The Honourable Mr Justice Muir, is a part-time member and is a judge of the Supreme Court. Other part time members are barristers, solicitors and legal academics.

The Commission is supported by a small research team.

The Commission receives its references from the Attorney General and it is required to report back to him on the outcomes of our work including recommendations for reform. The Attorney General must table our reports in Parliament although the Government is not obliged to implement the Commission's recommendations. Groups such as yours also play a role in convincing the Government whether to adopt or drop the Commission's recommendations

The Commission currently has 7 major references underway, including this reference on evidence and technology. We are working on all references concurrently as they each have very specific time limits attached to them.

The Commission is happy to answer any queries you may have about the other references currently being addressed.

THE EVIDENCE AND TECHNOLOGY REFERENCE

In April 1997, the Queensland Law Reform Commission began working on a new reference from the Queensland Attorney-General. The terms of that reference - which is known as the Commission's evidence and technology reference - are as follows:

[to review] the capacity of the judicial system, both in its criminal and civil aspects to receive into evidence information stored and conveyed in electronic, magnetic or similar form

¹

Cheryl Treloar B.Comm, LLB(Hons), Grad.Dip.(Information and Library Studies) is a legal officer with the Queensland Law Reform Commission and is the principal researcher on this project.

Essentially, the reference is about the admissibility of records that are produced electronically, transmitted electronically or stored electronically. If an electronic record is "admissible", it is admitted as part of the evidence in a court case. The Commission's main task is to identify those issues affecting the admissibility of electronic records.

Because the Commission is a Queensland statutory body, it can only recommend changes to the law in Queensland. However, it is not uncommon for recommendations made by the Commission to lead to changes in the law in other Australian states and territories.

TIME FRAME FOR THE REFERENCE AND CONSULTATION

The Commission started working on the evidence and technology reference in April 1997. At that time, the Commission sent notices to various individuals and organisations and placed advertisements in various newspapers and journals calling for public input into the identification of issues which should be covered by a discussion paper.

The Discussion Paper is currently being prepared and should be completed by the middle of this year. The release of the Discussion Paper will begin a second period of consultation. Ultimately a Final Report will be prepared and the Commission will report back to the Attorney-General.

Because of time constraints, the opportunity for consultation will be more limited than the Commission would otherwise have liked. However, it is the intention of the Commission to provide the greatest possible opportunity for public input into the reference within the available time.

Your invitation today is a valuable opportunity for the Commission to discuss whether, and if so why, the current admissibility rules are causing practical difficulties for people involved in the difficult task of "managing information".

I would like today to be a group discussion about the Commission's evidence and technology reference. I would encourage you all to share your views on the ideas and work that we have completed so far on this reference.

I have previously said that the Commission is planning to release a Discussion Paper shortly. In that paper, the Commission will identify a number of issues affecting the current admissibility rules. The Discussion Paper will call for submissions on these issues.

If anyone would like to receive a copy of the Discussion Paper, they should contact the Commission so that their name can be placed on a mailing list.

FOCUS OF THE EVIDENCE AND TECHNOLOGY REFERENCE

As we all know, information is increasingly being produced, stored or conveyed using electronic technologies or formats. These technologies and formats are constantly evolving and creating new practical and legal challenges for those who have to manage the information "tide".

The world of commerce has been particularly affected - the world of electronic commerce is growing at a phenomenal rate. However, areas outside "business" are being increasingly affected. Information about medical treatments, land ownership and educational status are increasingly being generated and stored using non-paper formats.

The increasing "dematerialisation" of information from the physical to the electronic world becomes particularly relevant when one realises that organisations or individuals, at some point, may be required to reveal information in their possession or control in legal proceedings.

To date, the law in Queensland has not provided specifically for the use of electronic records as evidence. Electronic records, have to this point, been treated as "documents" or other tangible things and the existing evidentiary laws and principles applied. These laws and principles, sometimes developed over centuries, may not "fit" or adapt to these new and evolving technologies.

At this point, the Commission is unaware of any extensive practical problems involved with applying existing law on admissibility and authentication of evidence to electronic records. However, as the use of and reliance upon these electronic records increase, the issues surrounding their admissibility and authentication will become more apparent. Already, one could see possible concerns about the lack of certainty surrounding the future use of electronic records. For example, is "legally prudent" for a business to electronically scan and store its accounting and other records and destroy the paper originals?

It is unlikely that existing laws in relation to admissibility of evidence, largely developed with paper records in mind, will be able to adapt easily to these new technologies.

The Commission hopes to anticipate those arguments and suggest some possible solutions.

WHAT IS AN "ELECTRONIC RECORD"?

As mentioned previously, the Discussion Paper aims to identify the major issues affecting the admissibility of "electronic records". This phrase, "electronic records", has been defined quite broadly to include such things as:

- computer-generated records;
- e-mail messages, Internet transactions, and other “paperless” records;
- faxes and other electronically transmitted records;
- imaged, scanned and/or microfilmed records and other reproductions;
- audio-tape recordings, including voicemail recordings; and
- video-tape recordings.

ISSUES FOR DISCUSSION

Do you see potential problems with the use of electronic records, rather than paper documents, as evidence in court? Have you experienced, or know of, any difficulties in this area?

Do you agree with the Commission’s definition of an “electronic record”?

Should the Commission be looking at any additional types of records that are produced electronically, transmitted electronically or stored electronically?

SOME GENERAL POINTS ABOUT THE ADMISSIBILITY RULES

(a) Introduction

As mentioned previously, the law in Queensland does not specifically govern the admissibility of electronic records.

While not universally the case, most electronic records will be seen as fulfilling the same role as a paper document, that is to record or monitor a fact or event. Given that, it may be helpful to quickly review the rules regulating the admissibility of documents.

In Queensland, a document is “admissible” if it is accepted by the court as being sufficiently relevant to an issue in dispute between the parties and no other exclusionary rule, such as the rule against hearsay, is infringed.

The admissibility of a document will generally be determined by whether it fulfils the criteria of admissibility set down in either the *Evidence Act 1977* (Qld) or by the

common law.

A document may be admissible under the *Evidence Act 1977* (Qld), the common law or both.

A document may be used in evidence for different purposes. For example, a document may be admissible:

- as testimonial evidence under the *Evidence Act 1977* (Qld) - that is, as proof of the relevant facts contained in the document. One example of this that some of you may be familiar with, is where a business record which complies with section 84 is accepted as evidence of the truth of its contents;
- as testimonial evidence under the common law or case law; or
- as real or "non-testimonial" evidence . For example a document may be used to show only that a document was prepared on such a day. It is not used as proof of its contents.

(b) Admissibility of Documents under the *Evidence Act 1977* (Qld)

Under the *Evidence Act 1977* (Qld), an electronic record will only be admissible for testimonial purposes if two conditions are fulfilled:

- the electronic record falls within the definition of "document" in section 3; and
- the "document" falls within one of the documentary provisions of the *Evidence Act 1977* (Qld).

(i) Definition of "Document"

It is the Commission's opinion that the broad definition contained in section 3 will encompass most, if not all, electronic records that are currently in use. The breadth of this definition is obvious from its terms [see overhead], particularly paragraph (g), which if read literally, would seem to encompass just about any type of container of information one could envisage.

(ii) Documentary Provisions of the *Evidence Act 1977* (Qld)

A number of provisions in the *Evidence Act 1977* (Qld) deal with documentary evidence. Examples of such provisions deal with telegraph messages and public documents.

However, the ones that seem to generate the most interest in this area are:

- section 84 - which deals with the admissibility of entries in books of

account;

- section 92 - which regulates the admissibility in civil proceedings of statements made in business documents;
- section 93 - which regulates the admissibility in criminal proceedings of statements contained in business documents; and
- section 95 - which deals with statements in documents produced by computers.

These sections are often described as statutory exceptions to the rule against hearsay. Put simply, this means that these provisions permit documents to be admitted as evidence of the truth of their content, even though the person who has personal knowledge of the events described in the documents is not a witness in the proceedings.

You will have noted that sections 84, 92 and 93 are limited in their operation to documents used in a business or undertaking. Although business documents that infringe the rule against hearsay may be admissible under section 95, section 95 is not limited to business documents or to documents that infringe the rule against hearsay. It is, however, limited to documents produced by a computer that contain information of the kind which is regularly stored or processed by the computer. So section 95 would not, arguably, apply to a "one-off" document. Section 95 is also somewhat inadequate for the more modern examples of technology, given the outdated definition of "computer" which was drafted at a time when the only computers in use were mainframes.

These sections facilitate to some extent the admission as testimonial evidence quite a number of types of electronic records. However, it is also clear that some electronic records will not be admissible under any of the documentary evidence provisions.

Three examples of electronic records that are not regulated by the *Evidence Act 1977* (Qld) include:

- electronic records that are produced for private, non-business, purposes;
- electronic records that are tendered for a "non-testimonial" purpose, that is a purpose which has nothing to do with proving the truth of any statements of fact contained in the electronic record. It may, for example be tendered for the purpose of proving that a conversation transcribed in the electronic record did in fact take place; and
- electronic records that have been produced without any human intervention and that do not fall within section 95 of the *Evidence Act 1977* (Qld). Some examples of an electronic record produced without any

human intervention include: an electronic record of an automated teller machine (ATM) transaction; and a print-out of a computer trace of an individual's use of a computer system.

ISSUES FOR DISCUSSION

1. Should the Evidence Act 1977 (Qld) regulate specifically the admissibility of electronic documents?
2. If yes to question 1, should the *Evidence Act 1977* (Qld) operate as a code or should a person still be able to rely on the common law admissibility rules?
3. Should the *Evidence Act 1977* (Qld) continue to treat electronic records as documents?

As the *Evidence Act 1977* (Qld) does not regulate the admissibility of all documents for all purposes, the admissibility of electronic records under the common law must also be considered.

(c) Admissibility of electronic records under the common law

The rules of admissibility under the common law apply to all types of evidence, whether electronic or not. However, as with the *Evidence Act 1977* (Qld), rules have not developed under the common law to deal specifically with the admissibility of electronic records. The courts have elected to treat electronic records either in the same way as "paper" documents or as the output of mechanical or scientific instruments.

The rules of admissibility for electronic records will differ depending upon whether the person relying upon the electronic record seeks to use it for testimonial or non-testimonial purposes.

(i) Relevance and Authenticity

Regardless of its intended purpose, all evidence tendered under the common law must first be shown to be sufficiently relevant to an issue in dispute between the parties. If the evidence is not shown to be sufficiently relevant it is inadmissible.

One aspect of this "primary rule of relevance" is that the document must be able to be authenticated by an extrinsic source. A document cannot authenticate itself. This means that the party seeking to rely on the document must adduce evidence which confirms:

- that the document is what it purports to be or what the party seeking to rely on the document claims it to be; and
- that the document has not been altered in any way.

The evidence required to authenticate a document will be determined, at least in part, by the nature of the document in issue. For example, a paper document may be authenticated by the testimony of the document's author. Electronic records, by the very fact that they are easily changed, raise more complex issues for authentication.

Examples of the types of evidence accepted to authenticate electronic records under the common law include:

- evidence about the general function and capabilities of the computer that produced the document, including evidence that the computer was capable of producing the document;²
- evidence about the general reliability and accuracy of the computer that produced the document;³
- evidence that, at the time the document was produced, the computer was functioning properly and was being operated by a competent and responsible person(s);⁴
- evidence that the document has not been unlawfully or improperly interfered with or altered;⁵ and
- evidence that extraneous information added to the document, such as a date, is accurate.⁶

(ii) The secondary evidence rule

Where a party seeks to rely on a document for testimonial purposes, the secondary evidence rule applies.

² See *Mehesz v Redman (No2)* (1980) 26 SASR 244; *R v Weatherall* (1981) 27 SASR 238 at 239; and *R v Maynard* (1993) 70 A Crim R 133 at 138.

³ *Ibid.*

⁴ *Mehesz v Redman (No2)* (1980) 26 SASR 244; *R v Weatherall* (1981) 27 SASR 238 at 239; *Mobil Oil Corp v The Registrar of Trademarks* [1984] VR 25 at 29.

⁵ *R v Weatherall* (1981) 27 SASR 238 at 239; *R v Maynard* (1993) 70 A Crim R 133 at 138.

⁶ Ormerod D, "Proposals for the Admissibility of Computer Evidence" (1995) 6(4) *Computing and Law* 22 at 24.

The secondary evidence rule provides that the contents of a document cannot be proved⁷ unless the original of the document is produced or its absence is explained. Where the absence of an original document is explained, a copy of the document or a witness' recollection of the document may be relied on to prove its contents.

It does not apply to a document that is tendered for a non-testimonial purpose, for example, to a document that is tendered for the purpose of proving that a conversation transcribed in the document did in fact take place.

Originally, the secondary evidence rule - which is more than 250 years old and so developed long before computers or even carbon paper were invented - only applied to traditional forms of writing. The original rationales for the rule were the risk of inadvertent error in copying and the prevention and detection of fraud.

Today, the secondary evidence rule applies to all types of documentary evidence, including documents which are electronic records.

(iii) The rule against hearsay

Again, where a party seeks to rely on a document for testimonial purposes, the rule against the admissibility of hearsay applies.

The rule against hearsay provides that a statement made by a person cannot be admitted as evidence of any fact or opinion contained in the statement unless the statement is actually made by a person as a witness in court.

The rule against hearsay applies to documents because most documents contain information supplied by a person. Most electronic records considered to be documents would also be subject to this rule. However, the application of the rule may be arguable where the electronic record has been completely generated by the computer. In such a case, it is not clear which "person" if anyone, provided the information contained in the document.

Some examples of an electronic record which, when classed as a document, infringes the rule against hearsay include:

- an electronic filenote of a conversation (which cannot be admitted as evidence of what was said in the course of the conversation); and
- an electronic record of some information supplied by one person to another, for example, by a customer of a bank to a bank teller (which cannot be admitted as evidence of the information).

7

That is, a document cannot be tendered for a testimonial purpose.

As noted earlier, the rule against hearsay does not apply to an electronic record that is used for a non-testimonial purpose, for example, to an electronic record that is tendered for the purpose of proving that a conversation transcribed in the electronic record did in fact take place.

A document (or an electronic record which is considered to be a document) that infringes the rule against hearsay will only be admissible as evidence in a court case if it falls within a common law or statutory exception to the rule against hearsay.

SOME MAJOR ISSUES TO BE CONSIDERED BY THE COMMISSION

I do not intend to canvass all the issues that the Commission will be considering in the course of its evidence and technology reference. Instead, I would like to focus on just two issues which may be of particular relevance and interest to you as information managers.

(a) The authentication rule

Some general comments

As we have already seen, under the common law, a document is not admissible until the party seeking to rely on the document has adduced extrinsic evidence which confirms firstly, that the document is what it purports to be or what the party seeking to rely on the document claims it to be, and, secondly, that the document has not been altered in any way. We have already discussed some ways in which an electronic record may be authenticated under the common law.

The Evidence Act 1977 (Qld) has also set down some authentication requirements - although these are different from those determined by the common law. I have previously said that an electronic record, which fulfils the definition of a "document" may be admissible under sections 84, 92, 93 or 95 of the *Evidence Act 1977* (Qld). Each of these four sections contains different authentication requirements.

For example, before a statement contained in a document produced by a computer will be admissible under section 95, the person seeking to tender the statement must establish a number of matters, including:

- (1) the identity of the document containing the statement and a description of the manner in which it was produced;
- (2) evidence that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over

that period;

- (3) evidence that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement; and
- (4) evidence that throughout the material part of that period the computer was operating properly or, if not, that any malfunction did not affect the production of the document or the accuracy of its contents.

Under section 95, the authenticating evidence may be produced to the court in the form of a certificate signed by a "person occupying a responsible position in relation to the operation of the [computer system] or the management of the relevant activities (whichever is appropriate)".

Under section 96(1) of the *Evidence Act 1977* (Qld), a court may, in determining the authenticity of an electronic record tendered pursuant to sections 92, 93 and 95, "draw any reasonable inference from the form or contents of the [electronic record]". This provision abolishes, for the purposes of sections 92, 93 and 95, the common law rule that authenticating evidence must be extrinsic to the electronic record itself.

Some options for reform

On some occasions, complex and expensive technical evidence about the functions, capabilities and reliability of an electronic system is produced, in order to satisfy the authentication rule, when those matters are not seriously in dispute.

Consequently, the authentication rule has been criticised for increasing the cost and time spent on court proceedings.

The authentication rule could be, and has been, reformed in numerous different ways. For the purposes of today's discussion, I only intend to mention three different options which have been implemented or considered in other jurisdictions.

Option 1: Abolition of requirement of extrinsic evidence

The Commonwealth and New South Wales Evidence Acts have totally abolished the rule that a document or object can only be authenticated by evidence which is extrinsic to the document or object itself. Section 58(1) of both Acts provides that:

"... the court may examine ... and draw any reasonable inference from [an electronic record], including an inference as to its authenticity or identity."

In addition, sections 146 and 147 of both Acts create presumptions about the reliability of a document produced by a device or process. Section 146 (which is a narrower presumption) applies to all documents produced by a device or process, including business documents. Section 147 applies only to business documents.

The presumption of reliability in sections 146 and 147 of both Acts is rebuttable.

A party who wishes to rebut a presumption of reliability is assisted by sections 166 to 169 of both Acts. Those sections give parties to court proceedings significant rights of access to their opponents' documents for the purposes of determining issues such as the authenticity of an electronic record.

Option 2: Rebuttable presumption

The New Zealand Law Commission has recently recommended that the New Zealand evidence legislation be amended to include a rebuttable presumption about the reliability of evidence produced by a machine, device or technical process.

The proposed presumption differs from sections 146 and 147 of the Commonwealth and New South Wales Evidence Acts because, unlike sections 146 and 147, it requires a party seeking to rely on the presumption to adduce evidence of the functions which the machine, device or technical device is designed to perform and to adduce evidence that the machine, device or technical device ordinarily performs those functions.

The Commonwealth and New South Wales provisions presume that machines used by businesses produce the outcome that a party seeking to rely on the provisions asserts they produce without requiring evidence of the machine's ordinary operation.

The New Zealand Law Commission believes that the New South Wales and Commonwealth provisions give too much weight to the assumed reliability of machines used by businesses and that there should be some evidence of a machine's ordinary operations before an inference of reliability is drawn.

Option 3: Recognition of digital signatures, etc.

The United Nations Commission on International Trade Law has recently produced a model law on electronic commerce.

The model law applies to any kind of information in the form of a data message. "Data message" is defined in article 2 to mean:

information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

Although the model law is not confined to issues of evidence, it does contain some provisions which touch on the issue of authentication of electronic records. It is particularly relevant to the situation where there is no original paper version of the electronic record.

For example, article 7(1) of the model law provides that:

Where the law requires a signature of a person, that requirement is met in relation to a data message if:

- (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message [for example, a digital signature is used]; and
- (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

ISSUES FOR DISCUSSION

1. Should the different authentication requirements set out in sections 84, 92, 93 and 95 of the *Evidence Act 1977* (Qld) be consolidated, bearing in mind that, at the moment, it is possible and quite common for an electronic record to be admissible under more than one of the four provisions?
2. Should the *Evidence Act 1977* (Qld) contain rebuttable presumptions similar to sections 146 and 147 of the Commonwealth and New South Wales Evidence Acts?
3. Should the *Evidence Act 1977* (Qld) contain similar "discovery" provisions to sections 166 to 169 of the Commonwealth and New South Wales Evidence Acts?
4. Should the *Evidence Act 1977* (Qld) contain a rebuttable presumption in similar terms to the presumption proposed by the New Zealand Law Commission?
5. Should the *Evidence Act 1977* (Qld) contain special authentication requirements for electronic records, including "paperless" electronic records?
6. If yes to question 5, should the special authentication requirements address the issue of tampering?

(b) The secondary evidence rule

Some general comments

As we just discussed, the secondary evidence rule applies to all documents sought to be tendered under the common law as testimonial evidence. However, just how relevant is the secondary evidence rule to documents which are electronic records?

It is arguable that the original rationales for the secondary evidence rule are just as relevant to electronic records today as they were to traditional forms of writing 250 years ago. When I say this, I have in mind the fact that imaging and scanning technology is not 100 percent reliable and the fact that it is possible to tamper with electronically produced and electronically stored documents.

Having said that, I can understand why some of you might argue that the secondary evidence rule - at least as it applies to electronic records - is in urgent need of reform.

For a start, the search for the "original" of an electronic record can sometimes - especially where there is no original paper version of the electronic record - be an artificial exercise. Many electronic records do not have a meaningful "original" and certainly do not have an original that is distinguishable from their display on a screen or in a printout.⁸

In addition, it is unclear whether the contents of a document that have been scanned on to an optical computer disk may be proved by producing a printout of the computer disk. In other words, it is unclear whether the reproduction and destruction of an original document for commercial reasons, such as more efficient document management and storage costs, is an adequate explanation for the "absence of the original document".

The Evidence Act 1977 (Qld)

The secondary evidence rule has been modified to some extent by the reproduction provisions contained in sections 104 to 129 of the *Evidence Act 1977 (Qld)*. An important provision is section 106 which provides for the admissibility of certain reproductions of business documents.

A reproduction will only be admissible under section 106 if the original document would have been admissible under the common law or some other provision of the *Evidence Act 1977 (Qld)*. As currently drafted, the section only applies to machine-copy documents such as photographs, micro-photographs, photocopies and carbon copies.

For a reproduction to be admissible under section 106, the person tendering the reproduction must prove that:

- the reproduction was made in good faith; and
- that the original document has been destroyed or lost, or
- that it is not reasonably practicable to produce the original document.

⁸

Uniform Law Conference of Canada, Uniform Electronic Evidence Act Consultation Paper (March 1997) at 4.

A copy of this consultation paper is found at:

"<http://www.law.ualberta.ca/alri/ulc/current/eelev.htm>".

It is generally accepted that section 106 and the other reproduction provisions in sections 104 to 129 of the *Evidence Act 1977* (Qld) are unreasonably cumbersome.

I have previously said that an electronic record may be admissible under sections 84, 92, 93 or 95 of the *Evidence Act 1977* (Qld). Each of these four sections allow the contents of a document to be proved by the production of a copy of the document which has been "authenticated in such manner as the court may approve".⁹ The Act does not provide any guidance as to how a copy of a document should be authenticated.

Some options for reform

The secondary evidence rule could be, and has been, reformed in numerous different ways. For the purposes of today's discussion, I only intend to mention two different proposals.

Option 1: Abolition of rule

The Commonwealth and New South Wales Evidence Acts have both abolished the secondary evidence rule.¹⁰ Both Acts contain a provision which spells out the ways in which the contents of a document can be proved.¹¹ Under the provision, a copy of a document can be tendered in evidence irrespective of whether the original document is available. The provision includes the following methods:

- by tendering a document that is, or purports to be, a copy of the document and which has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
- if the document is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it - by tendering a document that was, or purports to have been, produced by use of the device; and

⁹ For s84 of the *Evidence Act 1977* (Qld), see ss84(b) and 86. For ss92, 93 and 95 of the *Evidence Act 1977* (Qld), see s97.

¹⁰ See s51 of the *Evidence Act 1995* (Cth) and s51 of the *Evidence Act 1995* (NSW).

¹¹ See s48 of the *Evidence Act 1995* (Cth) and s48 of the *Evidence Act 1995* (NSW).

- by tendering a document that forms part of the records of or kept by a business and is, or purports to be, a copy of, or an extract from or a summary of, the document, or is, or purports to be a copy of such an extract or summary.¹²

Option 2: Focus on integrity of system

In March 1997, the Uniform Law Conference of Canada ("the ULCC") - which is an independent organisation that aims to promote uniform legislation throughout Canada - published a consultation paper on electronic evidence.¹³ In August 1997, they also published a draft *Electronic Evidence Act* for public comment.¹⁴

The ULCC has recommended that the law in Canada be changed so that a person who wishes to tender an electronic record does not have to demonstrate that the record is, or is close to, an "original".¹⁵

The ULCC believes that the best way to ensure the reliability of an electronic record produced in evidence - which is, of course, the main purpose of the secondary evidence rule - is to focus on the integrity of the record-keeping system (which has maintained, displayed, reproduced or printed out the electronic record) rather than the integrity of the electronic record itself.

The ULCC's recommendation is set out in clause 4 of the draft Act. That clause provides that:

In any legal proceeding, the [secondary] evidence rule is satisfied in respect of an electronic record on proof of the integrity of the electronic records system in or by which the data was recorded or preserved.

The ULCC has recommended that the integrity of an electronic records system be presumed if there is evidence that:

- (a) at all material times the computer system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record; and

¹² The New Zealand Law Commission has recently looked at the secondary evidence rule and concluded that the rule should be retained but that the exceptions to the rule should be expanded. The exceptions recommended by the Commission are very similar to the methods for proving the contents of a document that are set out in s48 of the Commonwealth and New South Wales Evidence Acts.

The Commission's recommendations were, to some extent, specifically aimed at addressing the uncertainty in the commercial community regarding the admissibility of some records stored by different computer methods.

¹³ The Consultation Paper can be found at:
["http://www.law.ualberta.ca/alri/ulc/current/eelev.htm"](http://www.law.ualberta.ca/alri/ulc/current/eelev.htm).

¹⁴ The draft Act can be found at:
["http://www.law.ualberta.ca/alri/ulc/current/eueea.htm"](http://www.law.ualberta.ca/alri/ulc/current/eueea.htm).

¹⁵ See the ULCC's Consultation Paper at 5.

- (b) there are no other reasonable grounds to doubt the integrity of the electronic records system.¹⁶

ISSUES FOR DISCUSSION

1. What relevance does the secondary evidence rule have to electronic records? Should the secondary evidence rule be abolished or changed?
2. If yes to question 1, how will this change interact with an obligation to retain original documents imposed by some other legislation?
3. Should the *Evidence Act 1977* (Qld) contain a provision similar to s48 of the Commonwealth and New South Wales Evidence Acts, that is, a provision which spells out the ways in which the contents of a document can be proved?
4. Should the microfilm and photocopy reproduction provisions in sections 104 to 129 of the *Evidence Act 1977* (Qld) be repealed?
5. Do you agree with the "integrity of the electronic records system" approach adopted by the Uniform Law Conference of Canada?
6. Can you think of any alternative methods for testing or ensuring the reliability of an electronic record produced in evidence?

FINAL REMARKS

The aim of this talk has been to give you an overview of the Commission's evidence and technology reference.

I would like to thank the organisers for inviting us to attend and for giving the Queensland Law Reform Commission this opportunity to discuss this project with you. We would urge you all to let the Commission know the particular issues that are of concern to you within the terms of our reference so that we may address every issue as fully as possible. We hope that your interest in this reference will continue.

¹⁶

See cl5 of the draft uniform Electronic Evidence Act.