

Cloud Computing and the Lawyer

Introduction

This short comment relates to the growing use by legal practitioners of cloud computing services and the need to perhaps turn off the information highway for a short time and assess the benefits and risks involved. In 1995 it was said:

“Visionaries see a future of telecommuting workers, interactive libraries and multimedia classrooms. They speak of electronic town meetings and virtual communities. Commerce and business will shift from offices and malls to networks and modems . . . Baloney. . . Nicholas Negroponte, director of the MIT Media Lab, predicts that we’ll soon buy books and newspapers straight over the Internet. Uh, sure . . . Then there’s cyberbusiness. We’re promised instant catalog shopping—just point and click for great deals. We’ll order airline tickets over the network, make restaurant reservations and negotiate sales contracts. . . . Even if there were a trustworthy way to send money over the Internet—which there isn’t—the network is missing a most essential ingredient of capitalism: salespeople. . . .”ⁱ

The internet has changed many of the ways people conduct their business. However, legal regulators in Canada, the United States of America and England have identified a growing reliance by legal practitioners of outsourcing legal processes through emerging technologies using the cloud.ⁱⁱ

The cloud

What is it? A simple Google search unveils numerous definitions and opinions. One expression as a starting point is the following:

Cloud computing is the delivery of computing as a service rather than a product, whereby shared resources, software, and information are provided to computers and other devices as a metered service over a network (typically the Internet).ⁱⁱⁱ

It seems to me that the cloud is the space provided by the Internet whereby services, resources and information may be transported between ‘computers’ via enabling software.

Of course we are aware multimedia developments expand the meaning of the term ‘computer’. It is no longer necessary to be at your computer to access information. The results of outsourced research for example, may be viewed from virtually any location.

The services for lawyers

Legal process carried on outside of an office refers to the process of obtaining services associated with legal practice through a service provider where the communication is predominantly online. Where those services are carried out outside of Australia, the process is referred to as 'Offshoring'.^{iv}

The LCA Paper states that outsourcing legal processes began in the late 1990's but dramatically increased in the US in 2005 and more recently in Australia.^v However, I can recall the facility, which I resisted for confidentiality and security based reasons, of faxing bulk copy typed documents offshore to utilise cheaper secretarial services, commenced much earlier than this.

This primitive form whilst not having the benefit of the cloud, also reflected the desire to obtain perceived benefits in the conduct of legal practice out of the office or offshore, as opposed to having those services provided in a more traditional manner.

The nature of the services that are outsourced includes legal research, document review, secretarial and paralegal services, drafting pleadings, conducting due diligence and IT functions which support the delivery of legal activities.

In one trade mark case, the respondent's business provided a means to expedite document delivery through an internet postal service.^{vi} Subscribers to the service were provided with software which enabled them to access a 'virtual' mail room, whereby the document was sent to a location physically proximate to the destination. The mail would be printed at the appropriate location, folded and posted as a local mail.

The benefits

Outsourcing particularly offshore, may bring financial benefit. This is to be expected as the services formerly carried out within the practice are saved. The person, their work station, their computer are now part of the service and borne by the service provider.

The outlay may be the enabling software and possibly hardware to communicate the information however in many cases it is a recovery cost for the provider. Voice recognition files have been used for many years, being sent as attachments to emails and returning as completed Word documents.

'Offshoring' may add to the saving. A small US technology company retained lawyers in India to review 400,000 documents at a rate of \$25 per hour in their breach of confidence case against Dell.^{vii} It followed in that case that claims which might have been abandoned if the usual fees were to be paid, enabled the litigation to proceed. In short it can bridge the disparity in litigation resources.

A further benefit is said to be the 'on demand' service. A consumer may have any number of persons or organisations who will perform the service and in the unlikely event that the service cannot be provided immediately, the time it would take to find an available service provider is minimal.

A further advantage is that it is paid for on a service basis. High initial investment and ongoing upgrade fees are avoided and the exposure is to the extent of service the consumer requires. ^{viii} Associated with this benefit is greater flexibility and readily available support and maintenance.^{ix}

Another aspect which some might perceive as a benefit, is the faceless nature of the outsourcing process. The task is sought, the task is carried out and the task is paid for. The nature of the service can be quite clinical as contact between the consumer and the provider, does not generally require detailed explanations. However, if it did, the explanation can be compressed into a voice file and transported thousands of kilometres.

I have at times had a number of students at the university I have been associated with, conduct research. It has been most convenient to have the work in progress contributed to by the various researchers in the familiar cloud space 'Google docs'. Those permitted to access the project could see what had been done and what was required to be done by instantly 'tapping into the space, adding their contribution and exiting.

The projects were in all cases administrative in nature and disclosed no information on client's matters which were not in the public domain. The cloud permitted the collection of many pieces of information required for the project. The advantage became two fold:

- Other contributors would not waste time doubling up on things already carried out;
- There was no requirement to meet regularly to assign tasks and make sure no-one had overlapped.

The concerns

The first concern is confidentiality. Of course, this will depend on what you plan to use the cloud for. If it is intended to store confidential client information then it becomes critical to ascertain further matters regarding the service:

- How is access gained to the information?
- What security is in place to protect the information?

These matters are give rise to regulatory and professional issues.

It is suggested that there are ethical concerns regarding outsourcing:

- Lack of data security and confidentiality of client's information may give rise to a waiver of privilege;^x
- Those who provide the legal outsourcing service must be required to observe the ethical standards required of the consumer who retains them;^{xi}
- The lawyer has a duty to supervise documents prepared in their offices. The duty cannot be less if the lawyer unilaterally chooses to use these services onshore or off-shore;

The American Bar Association issued an opinion that US lawyers were free to outsource work to lawyers and non-lawyers off-shore if they adhered to 'ethics rules requiring competence, supervision, protection of confidential information, reasonable fees and not assisting unauthorised practice of law.'^{xii}

There are some difficulties associated with this. How does one discharge these obligations when time and distance make constant supervision impossible? Confidentiality agreements with the provider, evidence of qualifications may be required if it is required that a lawyer off-shore is conducting the service. These issues of course raise the problem of enforceability.

In the UK, the Solicitors Regulation Authority (SRA), introduced on 13 October 2011, new regulatory requirements and an updated code of conduct. Chapter 4 of the SRA Code provides:

'IB (4.3 you only outsource services when you are satisfied that the provider has taken all appropriate steps to ensure that your clients' confidential information will be protected.'^{xiii}

It is further advised, as expected that the client should be informed in the retention agreement, that outsourcing may take place. The Ethics Committee of the Law Society of England and Wales states:

'In addition to taking all necessary steps to ensure information will be kept confidential by third parties, you should ensure that the client is aware, for example through the practice's terms and conditions, that such outsourcing may take place. You should also consider whether specific consent is needed from clients prior to outsourcing taking place.'^{xiv}

Conclusion

There are many benefits to outsourcing. However caution should be exercised in taking a selective approach to such services until all the criteria are able to be met. One must consider the nature of the service to be provided, the competency required to carry out the service and the confidential disclosures which might be made in the course of a briefing or even in proofreading.

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ⁱ Clifford Stoll 'The Internet? Bah! Hype Alert: Why Cyberspace Isn't, and Will Never Be, Nirvana' published February 27, 1995, *Newsweek* magazine. Stoll was the author of the book 'Silicon Snake Oil – Second Thoughts on the Information Highway'.

ⁱⁱ Law Council of Australia, Professional Ethics Committee Issues Paper: 'Outsourcing, social networking and cloud computing' 1 February 2011 (the 'LCA Paper') at p53.

ⁱⁱⁱ Wikipedia: http://en.wikipedia.org/wiki/Cloud_computing (24 February 2012).

^{iv} LCA Paper p55.

^v Ibid.

^{vi} *Bing! Software Pty Ltd v Bing Technologies Pty Limited (No 1)* [2008] FCA 1760 (Collier J, 25 November 2008)

^{vii} LCA Paper at p56.

^{viii} The Law Society of Scotland 'Cloud Computing – Advice for the profession: <http://www.lawscot.org.uk/search?query=cloud+computing>

^{ix} Ibid.

^x LCA Paper p56.

^{xi} Ibid.

^{xii} LCA Paper p57.

^{xiii} <http://www.lawsociety.org.uk/productsandservices/practicenotes/outsourcing/5044.article>

^{xiv} Ibid.