

Legal Update

WeChat Messages as Evidence in Australian Courts: Navigating Authentication, Admissibility and Weight

WeChat is a popular Chinese developed messaging and social media software being widely used within the Chinese community around the world.

In recent years, the Australian courts have increasingly considered the issues involving the use of WeChat records as evidence, some of which may be crucial to the proper preparation of a party's evidence.

This article examines some of the major issues in relation to the use of WeChat records in Australian courts through recent cases.

1. Authenticity of WeChat Messages

In matters where a large volume of WeChat messages is relied on by the parties as evidence, they may overlook the relevance of some messages and omit those messages in their evidence, which may undermine the reliability of such evidence.¹ However, it would be a different story if a party intentionally omits, alters or fabricates WeChat records for the benefit of their own case.

In the following two cases, the authenticity of the WeChat messages tendered by the parties were in issue and considered by the Court. The cases demonstrate that altered WeChat messages, while may be admitted into evidence for the Court's assessment of the facts in issue, can ultimately lead to serious consequences on the tendering party, including losing their civil proceedings and attracting criminal liability where there is a finding of contempt.

Wang v Fan [2024] NSWSC 1339 is a case where the parties disputed the characterisation of the two payments made by the plaintiff to the defendant in 2022 respectively in the amount of RMB 10 million and AUD 248,500.² The defendant adduced conversations that occurred in two WeChat accounts as supporting evidence, and the plaintiff objected to the

¹ See, e.g. *Top Plus Pty Ltd v Yi Star Pty Ltd* [2023] FedCFamC2G 189, at [124]

² At [1]-[2], [27].

admission of those conversations on the basis that such evidence adduced by the defendant was not authentic.³ Walton J in the Supreme Court of New South Wales provisionally admitted the evidence pursuant to s 57 of the *Evidence Act 1995* (NSW) and considered the issue of admissibility in the circumstances.

The Supreme Court of New South Wales followed the principles helpfully distilled by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd* (No 1) (2012) 207 FCR 448, including:⁴

- There is no provision within the Evidence Act which requires that only authentic documents be admitted into evidence. The requirement for admissibility is that evidence be relevant, not that it be authentic.
- Authenticity may be a relevant fact in issue, either in the sense the fact that a document is not authentic will be what makes it relevant, ie, in a forgery prosecution, or where there may be a debate as to whether a particular document is or is not authentic.
- In cases where the authenticity of a document is contested, the issue of authenticity will be for the tribunal of fact to determine.
- As such, the issue of authenticity does not directly arise for the Court's consideration at the level of objections to evidence. Rather, the relevant question is whether receipt of the document could rationally affect the assessment of the probability of a fact in issue.

Walton J found that in the current case, the messages adduced by the defendant were relevant as they concerned the transactions or payments relied upon in the defendant's case, and in the sense that a particular document found to be not authentic may also reflect on the credit of one or other of the parties.⁵ Notwithstanding the defendant's success in the fight on the admissibility issue, Walton J ultimately did not accept that the WeChat messages tendered by the defendant were authentic.⁶ One factor that Walton J took into consideration was that the defendant refused to enable his phone, which contained the WeChat messages to be openly interrogated by the plaintiff or her legal representative, while His Honour also acknowledged that such arrangement was unusual.⁷ The defendant was found to be only successful in proving a loan of RMB 3 million from the defendant to the plaintiff's mother at the direction of the plaintiff, but failed in all other aspects of his defence.⁸

³ At [16].

⁴ At [105].

⁵ At [109]-[111].

⁶ At [159], [166].

⁷ At [149].

⁸ At [308].

In *Sun v He* [2020] NSWSC 802, the plaintiff, Mr. Sun, initially brought an *ex parte* application for freezing orders against, the defendant, Mr. He, and Mr. He's related entities. It was alleged that Mr. Sun provided Mr. He with sums totaling approximately \$80 million to invest on his behalf in Australia and that approximately \$20 million of that amount has been misappropriated by Mr. He.⁹

During the course of the filing of evidence, there emerged a material discrepancy between the records put into evidence by each of Mr. He and Mr. Sun as to certain WeChat discussions between them. Each party suggested that the other had doctored the records of those conversations.¹⁰ Against that background, a search order was made on 21 November 2019 against Mr. He. During the course of the execution of the search order, Mr. He deliberately, among his other conduct, destroyed electronic records the subject of the Search Order on four devices.¹¹ The Court found that Mr. He's conduct was, beyond reasonable doubt, in deliberate defiance of the search order. The Court further found that his conduct was calculated to interfere with, and to frustrate, legitimate investigations into the electronic devices in his possession and hence that such conduct had a tendency to and was calculated to interfere with the administration of justice.¹²

Mr. He was sentenced to a term of imprisonment of six weeks, as the Court found that no sentence other than a custodial sentence was appropriate.¹³ Mr. He's appeal was unsuccessful.¹⁴

In our view, these cases shed light on the steps that should be taken in the preparation of a client's evidence. In light of the seriousness of the consequences that a party may face, practitioners should be cautious in reviewing WeChat message history provided by their clients. Where there is reasonable doubt as to the authenticity or the completeness of the documents provided by a client, it would be prudent for the practitioner to arrange an examination of the original messages stored in the client's devices with an interpreter present.

2. Operation Manual and Expert Evidence

While WeChat is widely used within the Chinese community, judicial officers in Australian courts may not necessarily be familiar with how the platform operates may be assisted if there is relevant evidence in this aspect, e.g. an operation manual.

⁹ At [12]-[13].

¹⁰ At [6].

¹¹ At [1], [5], [35].

¹² At [258]-[259].

¹³ *Sun v He (No 2)* [2020] NSWSC 1298 at [114].

¹⁴ *He v Sun* (2021) 104 NSWLR 518.

In *Wang v Fan* [2024] NSWSC 1339, the Court observed that while a significant component of the parties' submissions involved technical considerations as to the functionality of WeChat, there was no expert evidence either as to the nature and operation of the system or the establishment and operation of the WeChat accounts in general. Nor were there any manual or other systems instructions provided to the Court.¹⁵

The plaintiff argued that where there is not in evidence a WeChat manual or expert opinion, the Court should not be in a position to forensically assess the parties' respective assertions on the authenticity of the messages.¹⁶ The Court did not accept that argument but made its assessment based on the limited information available before it.¹⁷

The observation made by the Court in this case has demonstrated that where available, practitioners should turn their mind to consult the official manual of WeChat and consider including relevant sections into evidence where the functionality of WeChat is in issue. Where such information is not available in the official manual, the Court may be assisted by expert evidence in this regard.

3. Translation

Where large volumes of WeChat messages are in a foreign language, questions are often raised as to the accuracy and the reliability of the content's translation. Namely, the method of translation, precise meaning of words, and the correct account of the nature of conversations can be the subject of contention between witnesses and parties.

The case of *Firmtech Aluminium Pty Ltd v Xie* [2024] NSWSC 1293, involved a dispute between the directors of a business manufacturing and construction company, in which the plaintiff alleged that his co-director, alongside the general manager, breached their contractual and statutory duties as well as fiduciary obligations by diverting numerous projects to two other companies solely within their control.¹⁸

Amongst the critical issues of the proceedings was the knowledge and consent of the parties during their professional engagement with one another.¹⁹ In particular, the parties gave competing accounts of the content and nature of their group WeChat conversations amongst themselves, with both parties submitting translations with interpreter's certification. Each party submitted that the Court should disregard the evidence of the other party's witnesses

¹⁵ At [117].

¹⁶ At [98].

¹⁷ At [119]-[166].

¹⁸ At [1]-[12].

¹⁹ At [20].

and interpreters.²⁰ Questions were also raised as to the reliability of each witness' affidavits, as only one out of the multitude of affidavits submitted into evidence, were translated by an accredited interpreter, with the remainder of evidence being given by virtue of resources such as 'Google Translate or the assistance of an unidentified employee'.²¹

The Court emphasised the difficulty in the accurate interpretation of the WeChat messages, given the fact that many of the sentences were 'incomplete' and 'assume a familiarity with the relevant subject matter or with prior discussions',²² coupled with the 'fallibility of human memory', per *International Holdings Ltd v Cheung* [2021] NSWCA 24.²³ It was also raised by the Court, that each party tended to 'interpolate, and repeat,' certain notions which would be favourable to their case.²⁴

The Court cautioned against making credibility findings based predominately upon the candour and demeanour of the witnesses, due to the ambiguity of the accurate interpretation of the WeChat messages. Rather, the Court emphasised that in the event of alternative translations being in evidence, the objective facts, logic, and effect of the evidence as a whole, is of utmost importance.²⁵

This necessarily means that clients need to be advised where translations of the messages are in issue, the context of the messages read as a whole will matter for the Court in determining the true effect and meaning of the original messages.

Further information

This article demonstrates that the use of WeChat messages as evidence in Australian courts can be complex and, if improperly prepared, may lead to serious consequences.

Should you have any questions on the preparation of WeChat messages as evidence in Australian court proceedings, or the admissibility of evidence generally, please get in touch with the team at PDLegal.

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²⁰ At [23], [37].

²¹ At [29]-[32].

²² At [37].

²³ At [27]-[28].

²⁴ At [39].

²⁵ At [43].



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