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Paperless Litigation

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Introduction

Technology is changing the way in which litigation is being conducted. The move towards electronic filing of court documents and electronic case management will mean a reduction in costs for filing, directions hearings and ultimately simple hearings. At the other end of the spectrum are the large litigation matters, where the introduction of electronic courtrooms with live transcript enables cases or Inquiries, involving many parties or large volumes of documents that might not otherwise fit into a standard court room, to be efficiently managed.

The 'mega litigation' cases rely on the use of electronic databases or casebooks to manage the large amount of information discovered. The large discoveries are a direct result of the explosion of documents being stored electronically by businesses, which can lead to enormous costs being incurred during the discovery process. The introduction of new discovery rules in some courts is designed to better manage the discovery process, particularly electronic discovery, and so reduce the costs to parties.

e-filing

The Federal Court's 'efiling' service allows parties to file documents electronically in accordance with the Federal Court Rules at any time 24 hours a day, 7 days a week. This minimises the need for firms to physically attend Court, which

can result in significant time and costs savings for parties involved in litigation.

Similar services to those offered by the Federal Court have recently been introduced to New South Wales Courts and Tribunals. The service, JusticeLink, currently allows firms to file documents electronically in the Supreme Court Corporations and Possession Lists. In the future it is intended JusticeLink will offer Online Court, eListing and eTranscript services in the NSW Supreme, District and Local Courts as well as the Sheriff's Office, Coroner's Court and Children's Court. The service is aimed at allowing parties faster and easier access to information and improving overall case management.

One of the advantages is that if one or more parties are located at a distance, e-filing and e-hearings allow solicitors to 'appear' in court without the need to travel or the expense of having an agent appear on the party's behalf.

Use of technology

Many practice notes of Australian courts now require lawyers to consider using technology in litigation where appropriate. This includes the exchange of information during the discovery process and at the trial itself (see for example Supreme Court of New South Wales General PN 7;¹ Supreme Court of New South Wales Equity PN 3;² Supreme Court of Victoria PN 1 of

¹ Supreme Court of New South Wales, Practice Note SC Gen 7, "Supreme Court – Use of Technology" available at: <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/4944da5032e99b2fca2572ed000ceca3?OpenDocument>

² Supreme Court of New South Wales, Practice Note SC Eq 3, "Supreme Court Equity Division – Commercial List and Technology and Construction List" available at: <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/275aca41db3044e8ca25731e00254943?OpenDocument>

2007³ and the Supreme Court of Queensland PN 8 of 2004).⁴

Federal Court Practice Note 17⁵ sets out detailed guidelines for the use of information technology in any civil matter during discovery and during the trial. The Practice Note states that consideration is to be given to the use of technology when there are over 500 documents to be discovered and that parties are to attempt to agree on arrangements for the exchange of electronic documents.

Discovery and electronic documents

Increasingly evidence in commercial litigation is electronic in origin. When the Court makes orders for discovery in proceedings, the parties are required to 'discover' all documents relevant to the dispute, or by categories of documents as ordered by the court. This typically includes all emails, documents and spreadsheets relevant to the issues in dispute. However, this may also include relevant 'information' and previous versions of files. Crucial evidence can be provided from deleted documents (including emails), earlier hidden copies of files and from metadata, which may contain the history, authors and users of a file along with tracked changes and access times.

Litigation databases/casebooks

A litigation database is used for large discoveries and electronic discovery. This means that the electronic material does not have to be printed out and can be processed and discovered electronically, which reduces the costs. It also means that discovery can be made available to the other parties electronically – for example CD Roms with the images of documents and the basic information are handed over rather than folders or boxes of photocopied documents.

The process for building a litigation database for a case includes:

- barcoding or numbering hard copy documents;
- scanning of hard-copy documents;
- electronic bar-coding of electronic documents; and
- coding of documents, which is the entry of information about each document – for example, the date, who it is to and who it is from, the title of the document, document type including email, letter, memo, and whether it is privileged etc.

Once the above steps are complete, the list of documents for discovery can be easily extracted from the database. An important feature of the

³ Supreme Court of Victoria Practice Note 1 of 2007, "Guidelines for the use of Technology in any Civil Litigation Matter" available at: <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb913b0785d01df/PracticeNote-No1-2007_GuidelinesForUseTechnology.pdf>

⁴ Supreme Court of Queensland Practice Direction Number 8 of 2004, "Electronic management of documents" available at: <<http://www.courts.qld.gov.au/PracticeDirections/Supreme/SC-PD-8of2004.pdf>>

⁵ Federal Court of Australia Practice Note 17, "Guidelines for the use of information technology in litigation in any civil matter", available at <http://www.fedcourt.gov.au/how/practice_notes_cj17.htm>

casebook is the ability to carry out very fast electronic searches on the data fields and also on the text of each image (or page of document). From these searches, relevant documents are identified and collated into lists using a stored list function. This enables various lists to be created and built upon as the case or review of all parties' discovery progresses – for example:

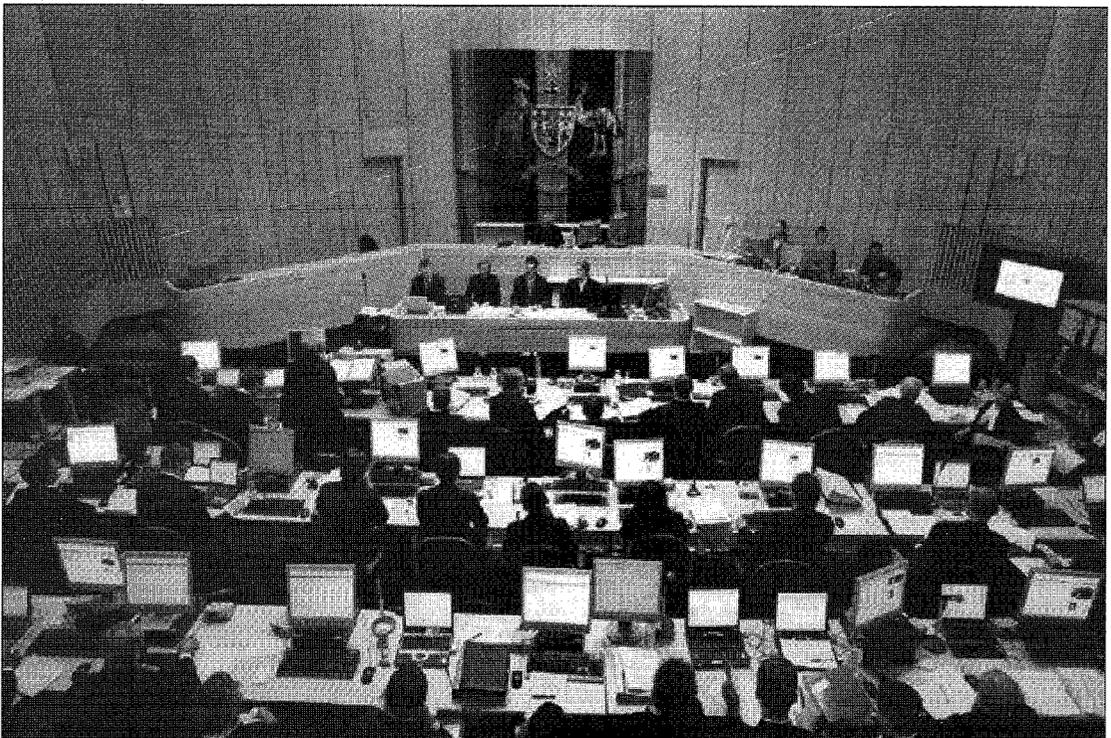
- chronologies of documents relevant to particular issues;
- documents relevant to each witnesses; and
- identification of tender bundle.

The tender bundle list can be easily exported and then imported into the e-CourtBook used in the e-courtroom. These benefits make casebooks

essential in large litigation cases and far more time and cost efficient than a traditional hardcopy discovery.

e-courts

In e-courts, networked computers are able to display the electronic documents visually rather than parties having to tender paper documents. At court each counsel and solicitor has access to a PC that allows lawyers to view material in the electronic courtbook. The courtbook contains the tender bundle, statements of each party, exhibits and transcripts. This innovative step away from traditional court practice facilitates large quantities of documents being readily available without having any hard copy documents in court.⁶



Example of e-courtroom

⁶ Photo of e-courtroom supplied by Bruce Phillips, Federal Court of Australia.

The need for paperless courts is highlighted in both 'mega-litigation' cases and large scale Inquiries where there are many parties appearing and vast amounts of material. Recent examples of e-courtrooms include the C7 litigation⁷, the HIH Inquiry⁸ and the Oil-for-Food Inquiry⁹. In these matters the lawyers had access to the live transcript, the exhibits, statements and discovery, saving time and resources. Instead of attempting to extract a particular document from one of many lever-arch folders, lawyers are able to search for the document on the database courtbook. When a document is shown to a witness, it would automatically be shown on each networked computer screen. The courtroom also displayed the e-documents on plasma-screen televisions for the public and press.

The size and location of the matter will influence whether a matter should be heard in an e-courtroom. For example, in smaller matters the convenience of an e-courtroom may be greatly outweighed by associated costs, which are borne by the parties. Conversely, in large cases involving many documents or many parties an e-courtroom may be the only logistical option.

Implications

With the support of modern technologies, e-courts greatly facilitate court efficiency

especially in larger cases and inquiries. A corollary is the development of new skills by those lawyers who have the opportunity to participate in e-litigation and also the establishment of a new industry of litigation-support businesses. While some larger firms have well-established litigation support teams, many firms outsource this part of the litigation process either in part or entirely to specialist litigation support businesses.

Handling such large volume cases can result in increased expectations on lawyers charged with managing discovery processes and it is important firms take proactive measures to ensure their client's electronically stored information is being adequately managed and organised. As Justice Sackville commented in the C7 case (at [4]) "*Electronic trials have many advantages, but reducing the amount of documentation produced or relied on by the parties is not one of them.*"

At a time when electronic processes are increasingly being introduced to the litigation process, continuous training and development for those in the legal profession is crucial. This involves a shift from a traditional legal practice approach to a more technological progressive approach towards e-litigation to ensure that litigation is conducted efficiently and cost effectively for clients.

⁷ *Seven Network Limited v News Limited* [2007] FCA 1062 (27 July 2007).

⁸ *HIH Royal Commission* (Justice Neville Owen) <<http://www.hihroyalcom.gov.au/>> at 13 March 2008.

⁹ *Oil for Food Inquiry* (T R H Cole AO, RFD, QC) <<http://www.oilforfoodinquiry.gov.au/>> at 13 March 2008.