

## **DINOSAURS TO DYNAMOS: HAS THE LAW REACHED ITS TECHNOLOGICAL AGE?**

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### **I. INTRODUCTION**

I once heard a quote to the effect that if you were to put a person living in the seventeenth century into a time machine and bring them into the world today, they would feel very out of place. However, the quote went on to say that if you were to take a lawyer from the seventeenth century and put them here today, they would feel right at home.

The application of technology to the legal profession seems to take place at a much slower pace than the application of technology to other areas of business and industry. The reason for this seems unclear. Perhaps it is because of the unique nature of the legal industry and the quirky nature of legal process. This is particularly so given the sometimes marked differences in legal procedures from jurisdiction to jurisdiction.

However, as lawyers' clients begin to utilise technology and to conduct business on the Internet, lawyers will be forced to keep up. Some of the benefits that technology can bring to the legal profession and some of the reasons why it should embrace technology are considered here.

### **II. DEFINING ELECTRONIC INFORMATION: HOW DO LAWYERS COPE WITH ELECTRONIC DOCUMENTATION?**

Most lawyers do not yet deal well with electronic information. For example, during discovery, it is common for a disk to be included in an Affidavit of Documents as a "document". However, when the disk is opened on a computer, it actually contains several electronic documents. Strictly speaking, each document on the disk is a separate document that should be classified in the same way a hard

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copy document would be classified. Each document has a date, is of a certain type (such as correspondence, memorandum, spreadsheet), has an author and a subject. Just because it has been provided in electronic format should not mean that it should be treated in a different way. Likewise, many documents exchanged in hard copy during discovery already exist somewhere in electronic format, yet it is the hard copy that is treated as a "document".

Within the legal world, electronic information is simply not recognised in the same way as information in hard copy, despite the fact that the information being provided is exactly the same. Cases and legislation obtained from the Internet, for example, will not be accepted by the courts because they are not 'authorised'. A case published in the Commonwealth Law Reports can be photocopied, handed up in court, and will be accepted as the law. The same case located on the Australasian Legal Information Institute (AustLII) site,<sup>1</sup> for example, will not be accepted. The rationale behind this concept is that courts perceive that the integrity of information published in the traditional way can be guaranteed, however, it is argued that information on the Internet is subject to sabotage from those ever present hackers.

However, if courts are serious about implementing and utilising electronic information, these concerns can be addressed. The Tasmanian Government, for example, seems to have decided that the benefits of making electronic information available over the Internet outweigh any security risks. A visit to the Tasmanian Government website<sup>2</sup> allows one to view all Tasmanian legislation. So that this information can be used with impunity, *Legislation Publications Act 1996* (Tas), s 6 provides that "the electronic database has the same status as the paper reprints". In the same way that only those with authorisation can publish hard copy legislation, s 6(10) provides that approval is required to distribute anything from the database.

So, why do lawyers cope poorly with electronic information? Possibly because they do not have to deal with it on a day-to-day basis. Although software is available on the market for lawyers to use in many aspects of their legal practice, there are few statistics on the level of technology use in legal firms. AustLII has recently posted a survey on its website which include questions such as:

- What is your organisation? (eg law firm, barrister, government etc)
- How big is your organisation?
- How often do you use AustLII?
- What services on AustLII do you use most?

The results of the survey are now available and provide an interesting insight into those using AustLII and the ways in which the site is used. However, because the survey only canvassed users of the AustLII site, the survey does not shed light on the use of technology in the legal profession generally.

The Law Foundation of New South Wales has established a Justice Research

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1 <<http://www.austlii.edu.au>>.

2 <<http://www.thelaw.tas.gov.au>>.

Centre and its reports can be found on the Foundation's website.<sup>3</sup> However, the reports so far have focused on issues such as access to justice and the public's view of the legal system.

In the USA, the American Bar Association conducts annual surveys of law firms and the results of such surveys are discussed below in section IV. Within the USA, firms exist which specialise in the provision of information technology (IT) advice to law firms. Andrew Adkins provides such a consulting service and he also publishes the *Internet Lawyer*, a monthly publication which focuses on use of the Internet by lawyers. Adkins' experience has shown that most medium to large firms do have advanced technology, but it is the sole practitioners and small firms that are placed at a disadvantage because of lack of technical advice and support. Adkins estimates that only about 30 to 40 per cent of all sole practitioners use a computer network. This is predominantly because unless the sole practitioner uses a computer him or herself, there is no one else to provide guidance. Another obstacle is lack of time. In the small firms, it is usually the book keeper who also doubles as the network administrator, so the computer network may not receive the attention it deserves.<sup>4</sup>

A big problem in educating lawyers in the ways in which technology can assist them is that lawyers perceive technology as 'belonging to the computer department'. A common response to a first approach to lawyers is "oh, that's information technology, you'll need to speak with Fred in IT". However, often the application is one which has direct benefit to lawyers themselves and Fred in IT often knows little about what a lawyer does in his or her day-to-day practice. Lawyers should view technology as a way to improve their business practices.

A direct and proven benefit of using information technology in the legal process is the use of IT during litigation. Since discovery is often very document heavy, the management of this volume of material can become very cumbersome, without some form of litigation support.

### III. USING TECHNOLOGY FOR TRIAL

The main use of technology tools within the legal profession has occurred in what is called the 'electronic trials'. These are those court cases that involve huge volumes of documents that are converted to an electronic format for use during the lead up to the trial, and also during the trial itself.

Such tools are known as litigation support tools and should be designed with the needs of lawyers in mind. A litigation support system should not be treated as just another technology system. Rather, it should be treated as an information management tool which can be used to maximum benefit to assist lawyers.

Problems experienced with technology tools for lawyers in the past have included:

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3 <<http://www.fl.asn.au/>>.

4 <<http://www.internetlawyer.com/techplan.htm>>.

- systems have not been designed so that they are intuitive and easy to use;
- systems have not been set up in a way which recognises legal procedures;
- users have not been properly trained; and
- reports cannot be generated easily by users, rather they require input from the IT department.

The result is that duplication of effort ensues. The system ends up being run in tandem with a hard copy system rather than being used instead of a hard copy system.

Lawyers need to sort and re-sort documents in the time leading up to trial. Chronologies are required. Documents are assigned to particular issues. Many lists are generated to categorise documents. Handling information in an efficient and easy-to-retrieve manner is essential in the conduct of any litigious matter, especially to gain an advantage over one's opponent.

Traditional litigation support models have been used to assist in case preparation: gathering, classifying, storing, indexing and retrieving large volumes of documents during discovery and also in the preparation of cases for trial. These systems tend to be 'closed', that is, the litigation support system is used as an additional tool in dealing with hard copy, rather than as a tool kit which assists in piecing together elements of the case.

A collaborative litigation support model takes litigation support into another dimension. In the traditional model, the only documents which tend to be collected in a database are those which are discoverable and any legal research, counsel's opinions and contact details of the other party's legal representatives are collected in hard copy. By collecting and storing this other information electronically, the technology can be used to assist in searching, indexing, sorting, storing, retrieving and piecing together the case.

A collaborative litigation support system can have the following features:

- the database can be accessed by all members of a legal team, including counsel who work from chambers;
- it can be designed to collate all materials within a case, not just material collected during discovery, but all other materials such as research notes, counsel's opinions etc;
- subjective comments can be made against relevant documents within the database and documents and notes can be cross-linked within the database;
- documents such as word processing documents, spreadsheets, audio and video files can be referenced to relevant documents;
- exhibits and real time transcript (RTT) can be added to the database as the hearing proceeds, and can be cross-referenced and noted up as required;
- it can be delivered through a secure on-line system which can be constantly and dynamically updated throughout discovery and throughout the hearing (intranet technology);

- powerful search engine facilities are available; and
- the system is available from within and external to the courtroom.

#### A. Case Example: The Thredbo Coronial Inquest

Auscript's specialist legal/IT team was engaged to provide a solution for the Thredbo Coronial Inquest both before and during the hearing. Auscript's Collaborative Litigation Support System (CLSS) was used to provide both a document preparation and a document presentation system.

##### (i) *The Software*

CLSS is based on Lotus Notes client/server technology. The benefit of this technology is that any changes to the database can be replicated between the server and the client machine. The server at Auscript holds the 'master' copy of the database while the client machine holds a duplicate, or replica, copy. If Auscript makes any customisation to the database, this can be replicated to the client's machine. Similarly, if the client makes any changes to data, this can be replicated to the master copy. The replication functionality will only update information which has been changed which means that phone lines are not being kept open updating static information. In this way, all copies of the database are up-to-date as required. No member of the legal team need be without any of the critical information needed to run the case.

The benefit of the system is that members of a legal team can access the system from anywhere, across the office or across the globe. As long as the lawyer has a desktop PC or a notebook computer with modem and telephone line, connection to the server is possible.

The features of CLSS include:

- Calendar: to track planned events, either personal or for a case.
- Documents: not just discovery, but can include case files, court documents, advices, precedents, research materials, judgments, legislation, even sound and video files, all of which can be cross referenced.
- Binders: documents relevant to particular issues can be placed in "issue binders"; in the hard copy world this would mean lots of photocopying!
- Time Line/Chronology: chronologies can be created as required.
- Transcripts: each day's transcript can be added to the database for searching, retrieving and noting relevant parts of the transcript.
- Discussion Forum: like an electronic bulletin board, members can review and comment on discussion points posted by any other member; this feature is especially useful where team members are geographically dispersed.
- Profiles: contact details of solicitors on the other side, counsel, experts, and witnesses can be recorded.
- References: contains the primary and/or secondary materials as required

by the legal team.

- Security: CLSS has several layers of security from network security to field level security on the database.

Several parties involved in the Thredbo Coronial Inquest used CLSS to prepare for the case.

### *(ii) The Courtroom*

Auscript was engaged to convert the old New South Wales Land and Environment Court in Macquarie Street, Sydney to accommodate the hi-tech courtroom for the hearing of the Thredbo Coronial Inquest which commenced on 10 August 1998. False floors were laid to cover more than 1.5 km of power, video, audio and data cabling.

A main hearing room, public gallery, overflow public and media room, interview rooms, document management rooms, counsels' chambers and coroner's chambers were all geared to have the required technical and equipment upgrades to allow the Inquest to operate. Trolleys have been banned from the courtroom, so paper has been kept to a minimum.

Public viewing screens have been provided so that all seated in the courtroom have an adequate view of any documents being referred to a witness. The latest 33 inch (83 cm) NEC flat plasma screen monitors have been installed which provide 130 degree viewing.

Parties can view not only the public screens, but also have access to their own private database, where they can access their own material and can make their own private notes. Security has been implemented to ensure that one party does not have access to another party's system.

Prior to the hearing, Auscript catalogued, annotated and provided access to data representing over 50 000 A4 pages plus hundreds of graphic images, maps, diagrams and photographs, including colour photographs. More documents have been added to the system since the hearing began.

During the hearing, counsel refers to a document by its unique ID number. Auscript's Court Operator brings the relevant image up on screen which is then displayed over the screens on the 'public channel'. The public channel is fed to the screens on walls around the courtroom and also to each party's table. A switch box is provided so that a party can switch between the public channel and their own private database.

The Court Operator can zoom in on particular parts of the image which acts as an oversized magnifying glass. The witness or counsel can point to relevant parts of the image using a laser pointer. If the witness is required to mark a document, the document can be printed out in court, marked up by the witness, re-scanned and recorded as an exhibit.

The collaborative nature of CLSS means that any new documents entered into the system during the day are available on the lawyer's machines each night. The exhibit list is collated each day and it too is available, via an easily generated report, each night.

*(iii) Transcript*

Real-time transcript (RTT) is being used in the courtroom. RTT allows transcript to be viewed on a screen within seconds of the spoken words. A writer and a scopist both sit in court. The Writer records what is spoken by using a shorthand machine which relays the shorthand into a computer which in turn converts the shorthand into text. The Scopist proofs the text as it appears and corrects any errors as they appear. Software is available which allows users to view and analyse the transcript. Private notes can be made against relevant parts of the transcript and issues can be easily assigned to passages of text. These annotations can be collated each day for the benefit of counsel. The benefit of making notes as the hearing proceeds is that the transcript does not have to be read that night to note it up – it has already been done!

RTT can also be provided over the Internet. This means that a lawyer sitting back at the office can view the transcript while it proceeds, make any notes against the transcript and so on. Likewise, a lawyer sitting in London can be watching the transcript of a trial which is proceeding in Sydney.

Use of systems such as CLSS can reduce hearing time and can also assist the judge in writing the judgment. In a case recently held in Queensland, the judge commented that:

the experiment in the use of technology in which (the parties) have been prepared to participate in this trial has meant that I have been able to give judgment much earlier than would have been the case.<sup>5</sup>

#### IV. THE UBIQUITOUS INTERNET

It seems the Internet is here to stay and within the legal profession, Internet use is only in its infancy. The Honourable Justice Kirby<sup>6</sup> recently commented:

[The Internet] expands at an astonishing rate with world-wide users doubling every twelve months.<sup>7</sup> William Gibson's vision of cyberspace<sup>8</sup> is fast becoming a reality. Starting with 8.5 million users in 1995, the Internet is expected to reach over 142 million users by the year 2000.<sup>9</sup>

Of those users, many will belong to the 'Net Generation', that is those who have grown up with computers in school and "they do not need to be trained to use this new medium, they use it every day."<sup>10</sup>

<sup>5</sup> *Kolback v Coomera Resort* (unreported, Supreme Court of Queensland, Mackenzie J, 20 February 1998).

<sup>6</sup> The Hon Justice Michael Kirby, "United Nations Educational, Scientific & Cultural Organisation International Dimensions Of Cyberspace Law Protection Of Privacy And Human Rights In The Digital Age": <<http://www.hcourt.gov.au>>.

<sup>7</sup> R Miller, *The Internet in Twenty Years: Cyberspace, the Next Frontier?*, OECD (1997).

<sup>8</sup> W Gibson, cited in MS Borella, "Computer Privacy vs First and Fourth Amendment Rights": <[http://www.eff.org/pub/Privacy/comp\\_privacy\\_4th\\_amend.paper](http://www.eff.org/pub/Privacy/comp_privacy_4th_amend.paper)>. As Miller notes, *ibid*, cyberspace will eventually come to life on the Internet infrastructure as a range of information and services spanning, at least for a few analysts, almost all aspects of human experience.

<sup>9</sup> R Miller, note 7 *supra*.

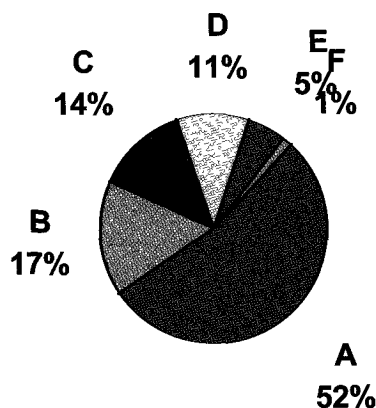
<sup>10</sup> Jim Bannister of Warner Bros On-line, quoted at the National Association of Broadcasters Conference, Las Vegas, April 1998.

However, what affect does this have on the legal profession? The legal profession will be driven by its clients. As businesses go on-line and embrace e-commerce, they will expect to interact with their lawyers in the same way.

So what is happening in business? During May 1998, web site developer Fluid Interactive Communication conducted a survey of 100 businesses from the Business Review Weekly (BRW) Top 1000 list. The survey revealed that 92 per cent of businesses will have a website within two years. Further, 60 per cent of Australian businesses already have a website and of the remaining 40 per cent, most (85 per cent) plan to establish one.<sup>11</sup>

The survey further revealed that 17 per cent of companies are accepting transactions on-line while 68 per cent plan to provide e-commerce capabilities. Mandi McPherson, General Manager of Fluid Interactive Communication believes that "this highlights the Internet's move away from being an information source to becoming an accepted business tool".<sup>12</sup>

Research conducted by Forrester Research shows that Internet-related products and services will generate \$354.2 billion in revenue in 2001 divided as follows:<sup>13</sup>



|                                                                   |               |
|-------------------------------------------------------------------|---------------|
| A: Business-to-business commerce                                  | \$186 billion |
| B: Infrastructure (hardware, software, development services)      | \$ 59 billion |
| C: Internet access (ISP fees, hosting services)                   | \$ 48 billion |
| D: Content (advertising, subscriptions)                           | \$ 38 billion |
| E: Consumer retail commerce                                       | \$ 18 billion |
| F: Financial services (consumer banking fees, stock trading fees) | \$ 5 billion  |

<sup>11</sup> Full details of the survey can be found at <<http://www.fluid.com.au>>.

<sup>12</sup> *Ibid.*

<sup>13</sup> <[http://www.newmedia.com/newmedia/98/07/brainstorm/Go\\_Figure.html](http://www.newmedia.com/newmedia/98/07/brainstorm/Go_Figure.html)>.

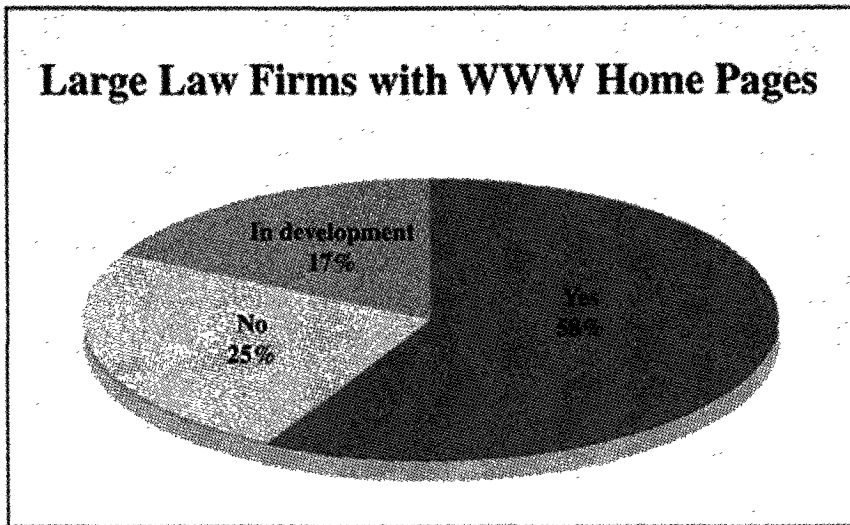
What of law firms: how many are on-line? Research in Australia is difficult to come by, however, in the USA, the American Bar Association (ABA) has conducted surveys since 1988 to provide a comprehensive 'snapshot' of technology use by small law firms across the USA. In 1998, the ABA also conducted a survey of technology used within large law firms.<sup>14</sup> Almost 75 per cent of lawyers in private practice work in sole practitioner and small firm practices. The ABA's surveys indicate that in 1996, 38 per cent of small firm survey respondents reported using the Internet. In 1998, this usage increased to 80 per cent. In addition, 37 per cent of small law firms without Internet access today reported that they plan to provide it in the coming year.

| <b>What lawyers are using the Internet for in the USA</b> | <b>%</b> |
|-----------------------------------------------------------|----------|
| Legal research                                            | 86.4     |
| Non-legal research                                        | 66.1     |
| Communicate with clients                                  | 53.6     |
| Communicate with colleagues                               | 52.7     |
| Access court records                                      | 34.1     |
| Collaborate with clients on documents                     | 21.5     |
| Marketing                                                 | 18.8     |
| Participate in private discussion groups                  | 17.2     |
| Locate expert witnesses                                   | 15.9     |
| Continuing legal education (CLE)                          | 11.7     |

The ABA also surveys the 500 largest law firms in the USA. It is believed that because these firms are much larger than most of the country's law firms, trends established in these firms can influence the technology adopted by other legal professionals.

Of those surveyed, 58 per cent of large law firms had web pages. Of those who do not have web pages, 17 per cent were in the process of developing a website.

14 <<http://www.abanet.org/tech/ltrc/98survey.html>>.



**ABA Survey**

## **V. CYBER COURTS: ARE THEY A REALITY?**

Courts within Australian jurisdictions have made significant headway in the last two to three years in implementing technology to assist in legal process. As the former Chief Justice of Australia Sir Gerard Brennan has commented:<sup>15</sup>

[I]nformation technology has proved to be useful from the stage of filing of originating process to the stage of final appellate judgment. We have barely begun to discover the benefits which information technology can provide in litigation: filing documents, preparing and transmitting proofs of evidence, plans, photographs, and videos, cross-referencing of subject matter, searching for authorities, citations, principles and annotations and even statistical analysis of prospects of success or failure.

Indeed, Sir Gerard was the force behind the Council of Chief Justices electronic appeals project, which is discussed below (see section B).

The areas in which technology has the most significant impact within courts are electronic filing, electronic appeals, case management, virtual courts; and access to justice.

### **A. Electronic filing (e-filing)**

David J Egar notes:<sup>16</sup>

<sup>15</sup> The Hon Sir Gerard Brennan, former Chief Justice of Australia, "Key Issues in Judicial Administration", joint presentation with the Rt Hon Sir Thomas Eichelbaum, GBE, Chief Justice of New Zealand, presented at the 15th AIJA Annual Conference, Wellington, New Zealand, September, 1996 at 14-15.

<sup>16</sup> <[http://www.ncsc.dni.us/ncsc/ctc4/articles/elec\\_c.html](http://www.ncsc.dni.us/ncsc/ctc4/articles/elec_c.html)>.

Imagine a lawyer working late at night putting the finishing touches on a set of pleadings. A few more clicks of the mouse and the document is on file with the court.

Electronic filing (e-filing) of court documentation rather than hard copy filing can provide benefits to litigants, their legal practitioners and the courts. The capture of legal documentation in electronic form at the source means that the information can be used and manipulated in a number of ways to meet registry or judicial requirements.

Many e-filing pilots have been conducted in the USA and many have not been successful because they have been proprietary systems requiring law firms to purchase software just to lodge their documents. E-filing needs to be easier and less expensive than it is now before lawyers will embrace it. Logically, the Internet is the tool which meets both criterion. Indeed, some 'experiments' in e-filing over the Internet have been highlighted by Bradley Hillis.<sup>17</sup>

In the USA, the Federal Court rules facilitate a court's decision to accept electronic filings. The Administrative Office of the Federal Courts of the United States has also designated several Federal Courts to be Federal Electronic Filing Pilot sites. In March 1997, the Administrative Office of the United States Courts issued a discussion paper<sup>18</sup> which focuses on the transition towards electronic case files (ECF) in the federal courts. The impetus for the drive towards ECF is to reduce the large volumes of paper presented to and held by the federal courts.

The National Center for State Courts (NCSC) and West Group recently announced that they have agreed to collaborate on model rules for the electronic filing of documents in state courts around the country. James E McMillan, director of the NCSC's Court Technology Laboratory, remarked that:<sup>19</sup>

Electronic filing of court documents is an idea whose time is about to come. What is needed is a collection of model rules and plans which can easily be customized and adopted by individual state courts or entire statewide judicial systems.

The model rules for state courts will include:

- A financial analysis of electronic filing showing the productivity gains that can be attributed to the use of this technology;
- Model electronic filing rules for use by state courts; a review of management and policy issues to be addressed by the state courts;
- A side-by-side comparison of work flow differences and similarities between a manual system and a technology-based system;
- An assessment of budget planning and infrastructure needs; and
- A thorough implementation process review.

In Australia, e-filing projects underway, or piloted include:

- the Magistrates' Court in Victoria, the Courts Electronic Document

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17 B Hillis, "Experiments in Internet Court Filing", *The Internet Legal Practice Newsletter*, 20 October 1997. Available at: <<http://www.collegehill.com/ilp-news/hillis2.html>>.

18 Administrative Office of the United States Courts, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead*, March 1997.

19 <<http://www.westgroup.com/>>.

Interchange (EDI) program has been available for commercial sale since June 1994 and it allows law firms to issue legal process and file documents electronically in the court, from their office;

- a pilot conducted within the Queensland Court of Appeal in 1997; and
- e-filing via the Internet which was implemented by the Residential Tenancies Tribunal in Victoria.<sup>20</sup>

## B. Electronic Appeals

In October 1995, the Council of Chief Justices (CCJ) agreed that work should be undertaken to investigate the use of Electronic Appeal Books within courts. A Working Party was established in January 1996 with Mr Warwick Soden, Federal Court Registrar, as Convenor. An IT sub-committee was also formed to provide guidance and operational support.<sup>21</sup> Pursuant to a recommendation contained within the Working Party's Interim Report, a consultant was engaged in April 1997 to conduct further investigation of the use of Electronic Appeal Books. The consultant appointed was Queensland Law Foundation Technology Services Pty Ltd (QLFTS).<sup>22</sup>

In May 1998, the CCJ endorsed the recommendations which were made as part of the Final Report<sup>23</sup> prepared by QLFTS.

The consultant's goal was to investigate the feasibility of Electronic Appeal Books and to propose a framework to support future implementation. A prototype or proof of concept Electronic Appeal Book was developed using a 'web browser' as its interface.<sup>24</sup>

The Electronic Appeal Book initiative is not a paper replacement program. Rather, it is designed to support the concept of "paper on demand" and to reduce the often huge volume of paper which comprises traditional hard copy appeal books.

The general theme arising from the project is that source documents (such as judgments and transcript) should be produced in a way which is consistent. It is not intended that this would involve prescriptive standards (such as font and line spacing) but rather general standards which would facilitate the capture of certain information common to source documents (such as judge name, hearing date and parties names). One solution is for documents to be 'tagged' in such a way that a computer can pick up these 'tags' automatically to render the production of Electronic Appeal Books easier.

The recommendations contained within the final report are as follows:

- **Recommendation 1:** Each court establish its own electronic judgments database, accessible to the judges within that court.

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20 <<http://www.justice.vic.gov.au/~rtt>>.

21 The IT sub-committee comprises Bruce Finaly of the Federal Court, Tony de la Fosse of the High Court, Ian Rohde of the South Australian Courts Administration Authority, Bruce Howe of the Supreme Court of NSW and Allison Stanfield, then of the Queensland Court of Appeal.

22 Jo Sherman was appointed principal consultant.

23 QLFTS, *Electronic Appeals Project - Final Report*, May 1998; available at: <<http://www.ccj.org>>.

24 The prototype can be viewed at the CCJ website: <<http://www.ccj.org>>.

- **Recommendation 2:** Courts make arrangements with the relevant transcript preparation agencies for transcript to be stored electronically for either an indefinite period or at least for five years. It is important to cover those situations where leave may be given to lodge an appeal out of time.
- **Recommendation 3:** Courts embrace paragraph numbering for their judgments. This is essential to enable quick reference to the relevant location of the trial judgment when it is being referred to in electronic form during an appeal.
- **Recommendation 4:** Courts adopt medium neutral citations for their judgments.
- **Recommendation 5:** Courts develop consistent protocols, rules or practices concerning electronic appeals and that any draft rules concerning appeals be provided to the Council of Chief Justices' Judges Sub-Committee on Appellate Practice and Procedure for any comment, particularly with regard to rules that deal with the electronic aspects of appeals.
- **Recommendation 6:** There should be consistency in the preparation and production of the electronic version of judgments and quality control mechanisms should be established by each court.
- **Recommendation 7:** The electronic version of court transcripts should be prepared and produced in a consistent format.
- **Recommendation 8:** Rules of court should allow the use of electronic material in appeal cases.
- **Recommendation 9:** Practice Directions, or similar, should be prepared for each jurisdiction which cover the arrangements for the submission of electronic material on an appeal.
- **Recommendation 10:** The use of an Electronic Appeal Book or electronic material should be considered in suitable cases. A guide for those agencies considering the use of Electronic Appeal Books or partial Electronic Appeal Books should be prepared.
- **Recommendation 11:** Courts should consider piloting Electronic Appeal Books using the prototype as a model where appropriate.
- **Recommendation 12:** The Working Party should continue to provide advice to the Council of Chief Justices, with the assistance of appropriate Judges and nominated personnel from the Courts.
- **Recommendation 13:** Courts should consider the introduction of electronic filing to facilitate the movement of electronic appeal material.

The Council of Chief Justices has now endorsed these recommendations so it will become increasingly important for courts to consider their implementation in line with their strategic directions and within budgetary constraints.

It will also be important for the profession to support this judicial initiative by:

- embracing the use of technology to support the litigation process where there is a clear cost benefit;
- thinking laterally about new costing models (such as loss of photocopy revenue, new electronic delivery vehicles); and
- ensuring that they are technology prepared in terms of in-house software and hardware environment and external communication facilities.

### C. Case Management

Lord Woolf in his Final Report to the Lord Chancellor<sup>25</sup> recommended that judges use technology for case management. His Lordship refers to two broad categories of case management:

1. those which assist in the management of a group of cases, with particular attention to the allocation of resources involved (courtroom, judges and witnesses); and
2. case flow management systems to support the management and progress of individual cases from their inception to final disposal.

Automated case management systems are now fairly standard within courts and several 'packages' exist on the market, particularly in the USA. The National Center for State Courts in the USA has a section of their website devoted to case management.<sup>26</sup>

Automated case management tools have been proven to provide the following business benefits to courts:

- increased staff efficiency by reducing duplication, allowing faster and easier access to information about cases, including remote access to the CMS;
- accuracy, integrity, reliability and consistency of case information;
- improved case monitoring; and
- consequent improved service to clients of the court.

Case management tools can produce a multitude of statistical information which can then allow courts to strategically manage their caseload. With courts under increasing pressure due to budgetary constraints and ever increasing workloads, these types of statistical reports are valuable.

To take case management to the next level, and to really move courts into the 'cyber' era, the case management tool will act as the 'driving seat' for court information, in the following ways:

- electronic filing over the Internet with the relevant case information being placed automatically into the case management system;
- the public and legal profession dialling in to search case information over

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25 The Right Hon Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, July 1996; available at <<http://www.ltc.law.warwick.ac.uk/woolf>>.

26 <<http://www.ncsc.dni.us>>.

the Internet;

- publication of judgments directly from the case management system to the Internet;
- judgments viewed from within the case management system (this would work as a link to the relevant judgment); and
- transcripts available over the Internet (High Court transcripts are available over the Internet now).<sup>27</sup>

Although the above innovations are technically possible, without standards in place such as consistent capture of source information and the use of 'tags' (discussed above) to mark relevant parts of documents, these facilities will not be practically possible.

#### **D. Virtual Courts**

A virtual court is one which need not exist anywhere but electronically. Documents can be filed without actually attending the court registry. Appearances can be made without attending a courthouse and evidence can be given by a witness across the other side of the globe.

In Singapore, a Technology Court has been geared to serve as a virtual courtroom.<sup>28</sup> In the USA, Courtroom 21,<sup>29</sup> which takes evidence from off-site witnesses, is used to conduct hearings. In Australia, the High Court often hears special leave applications via video conference link.

The virtual court is now possible. Questions still remain as to whether it is desirable for a witness to give evidence over a screen rather than being physically present. Being able to see the demeanour, body language and those other human elements which affect a witness' credibility must be preserved.

#### **E. Integrated Justice**

If electronic information can be easily exchanged, then this will make it easier for justice organisations to share information. At the moment, a lot of duplication of information occurs. For example, if a person is charged at the police station with a particular offence, that person's details, and details of the offence, are entered into the police database. That person may then obtain legal aid funding for his or her case. The person's details, and details of the offence are again obtained and entered into Legal Aid's database. An application may be filed in court. A hard copy application is filed and from that hard copy, details are entered into the court's database. The same information has been entered into three separate databases, so it is easy to see the benefits in sharing electronic information.

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<sup>27</sup> <<http://www.hcourt.gov.au>>.

<sup>28</sup> <<http://www.gov.sg/judiciary/supremect/computerisation/index.html>>.

<sup>29</sup> <<http://www.courtroom21.net>>.

## VI. EDI: EXCHANGING INFORMATION ELECTRONICALLY

As discussed in the previous section, the exchange of information electronically is technically possible. However, without appropriate standards in place, it will be practically difficult to exchange information electronically.

### A. Consistency and Standard Format

Many organisations have tried to agree upon and implement standards in the past and have failed. This has been because often the standards have been far too prescriptive. Standards which have worked are those which have evolved out of demand. Television would be difficult to watch without standards. International flight would be difficult without standards. The standard of living to which we have come to expect would be impossible without standards. The Internet as we now know it would not have evolved to the point it has without standards. The most well known standard on the Internet is *html* which is a mark-up language used internationally.

As the volume of material on the Internet increased, it became apparent that there was a need to reference data so that each time a user undertook a search, that search was not scanning across millions of meaningless words. To make searches more meaningful, it was desirable that documents had certain parts marked so that they could be readily identified and retrieved. For example, if a search is conducted for all books about gardening, this search can be conducted across the 'subject' field of all books indexed on the Internet. This same concept can be applied to legal documents. 'Metatags' can be used to mark information such as the judge's name, the date of the hearing, the name of the matter and so on. These 'tags' can then be used in database, to generate an electronic appeal book index, to make searching over the Internet more effective and so on.<sup>30</sup>

So that court generated information can be 'tagged' and collected in a consistent way, macros, or templates could be developed for use by word processing staff when typing documents such as judgments.

### B. Medium Neutral Citations

The medium neutral citation debate is an important one in the future use of electronic legal information. A medium neutral citation means that a document can be viewed using any medium, whether it be a word processor, the Internet or even in hard copy. Further, such citations means that authorities can be cited without relying on publishers.

In its first judgment delivered in 1998, the High Court utilised both medium neutral citations and paragraph numbering.<sup>31</sup> An example of a medium neutral citation used by the High Court is:

*Smith v Jones* (1998) HCA 2

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30 For further information on 'tagging', see *Electronic Appeals Project - Final Report*, note 23 *supra*. For more information on metadata generally, see: <[http://purl.oclc.org/metadata/dublin\\_core\\_elements](http://purl.oclc.org/metadata/dublin_core_elements)>.

31 <<http://www.hcourt.gov.au>>.

Where "Smith v Jones" is the short title; "(1998)" is the year in which the judgment is delivered; "HCA" is the Court in which the judgment is delivered (in this case, the High Court of Australia) and "2" is the number of the judgment delivered during that year (that is, the second judgment to be delivered in the High Court during 1998).

In the USA,<sup>32</sup> the ABA's Special Committee on Citation Issues submitted, in May 1996, a report to the Board of Governors and House of Delegates of the ABA which recommended that all jurisdictions adopt a system for citation to case reports which would be equally effective for printed case reports and for case reports electronically published on computer discs or network services.<sup>33</sup> The House of Delegates adopted the Special Committee's Resolution in August 1996 and since then, some courts, such as the Montana Supreme Court, have adopted the medium neutral citation format. Some opposition to the adoption of medium neutral citation has been received from the publishing houses who perhaps see medium neutral citations as a threat to their long standing business of publishing the 'authorised' reports.

### C. Digital Signatures

Although evidence legislation does now provide for computer generated information to be accepted as evidence, no method of authentication yet it exists in Australia for electronic information.

This problem of authentication also applies where forms filed in court are required to be personally signed. In the USA, digital signature legislation has been implemented.<sup>34</sup>

California followed Utah's lead last year by passing similar statutes and the American Bar Association has proposed a draft model for national legislation based on Utah's example. Other jurisdictions such as Canadian provinces, and Chile, are also setting up digital signature infrastructures.<sup>35</sup>

Indeed, the laws in California and Utah provide the legal framework to make digital signatures as binding as pen on paper which may be considered a necessary step for widespread employment of electronic commerce and to create a system for ensuring the integrity of digital signatures.

Standards Australia has formed a sub-committee to look specifically at public key authentication frameworks (which includes digital signatures). The Strategies for the Implementation of a Public Key Authentication Framework (PKAF) Report (SAA MPA 75) is being used as the framework to develop standards being developed by sub-committee. In July 1997 the Federal Attorney-General announced the establishment of an expert group, the Electronic Commerce Expert Group (ECEG) to "identify and, where necessary, propose remedies to any legal impediments to the adoption of electronic commerce". One of the challenges is to

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32 See J Silversmith, "Universal Citation: The Fullest Possible Dissemination of Judgments", *Internet Elgal Practice Newsletter*, 19 May 1997: <<http://www.collegehill.com/ilp-news/silversmith.html>> for a good summary of the medium neutral citation issues in the USA.

33 ABA, *Official Citation Resolutions*, May 1996: <<http://www.abanet.org/citation/resolution.html>>.

34 <<http://www.jmls.edu/cyber/statutes/udsa.html>>.

35 <<http://www.govtech.net/1996/gt/feb/digsigfeb/digsigfeb.htm>>.

address the issue of digital signatures.<sup>36</sup>

## VII. PRIVACY

Now that so much information is available over the Internet, privacy issues have become important. Never before has so much been so readily available. The Honourable Justice Kirby recently commented about the Internet:<sup>37</sup>

To some extent the absence of a controlling and enforceable law promotes free expression, the communication of ideas and notions of individual liberty which are themselves important human rights. But such values are not the only human rights, as a glance at the Universal Declaration and its progeny of international law demonstrates. *There are other fundamental human rights which sometimes compete, or conflict, with the right of free expression.*

The right of the public to obtain information can conflict with the right of individuals to maintain and protect their privacy.

The right of the public to obtain information held by government bodies is given by the Freedom of Information legislation,<sup>38</sup> although there are exemptions available for documents which contain personal information about a person.<sup>39</sup>

The *Privacy Act* 1988 (Cth) provides that personal information is not to be collected for inclusion in a record or in a generally available publication unless (a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector; and (b) the collection of the information is necessary for or directly related to that purpose. Section 14(1) of the *Privacy Act* 1988 (Cth) sets out the Information Privacy Principles, however, acts or practices done pursuant to the *Freedom of Information Act* 1982 (Cth) are not acts or practices for the purposes of the *Privacy Act* 1988 (Cth).

Legal information published on the Internet does not breach privacy principles as long as no unauthorised material such as case files is published. If, for example, decisions are published which have been available for many years in commercial law reports, then no breach of privacy legislation occurs. This was the direction made by the Federal Attorney-General following an allegation that AustLII had breach privacy legislation by publishing Family Court Reports.<sup>40</sup>

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36 Report of the Electronic Commerce Expert Group to the Attorney-General, *Electronic Commerce: Building the Legal Framework*, March 1998; available at: <<http://law.gov.au/aghome/advisory/eceg/eceg.htm>>.

37 Emphasis added. Universal Declaration of Human Rights, Article 12; International Covenant on Civil and Political Rights, Article 17.1. See generally HH Perritt and CJ Lhulier, "Information Access Rights Based on International Human Rights Law" (1997) 45 *Buffalo Law Review* 899 at 906 ff.

38 *Freedom of Information Act* 1982 (Cth), s 11; each Australian State may also have its own Freedom of Information legislation.

39 *Freedom of Information Act* 1982 (Cth), s 14(1).

40 see <<http://www.austlii.edu.au>> for further information on AustLII's privacy policies.

## VIII. CONCLUSION

If the law is in its technological age, then it is only in its infancy. Many other business communities have embraced technology and are already using the Internet as a business tool, with signs that this use will only increase. Lawyers are the consummate masters of information, yet information technology is not being used as effectively as it could be. Electronic information is still viewed as something mysterious, with hard copy still being regarded as the only authentic media. This, however, will change as the generation comfortable with technology and the Internet moves into the upper echelons of the legal profession.

However, technology can only be used as a tool to assist the legal process, and to assist lawyers. As Sir Gerard Brennan said earlier this year "technology is but a tool for the well trained analytical mind".<sup>41</sup>

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<sup>41</sup> Sir Gerard Brennan, Introductory Address, presented at the Australian Institute of Judicial Administration Technology for Justice Conference, April 1998.