Technology is coming, but fear not

The Federal Court is rightly proud of its electronic file system. Judges access digital documents. Those who prefer to work on paper have their associates print the material. But the default starting point is that the material is provided, and viewed, on a screen.

Yet in court the default starting point is paper. Practitioners may use digital devices, but all documents that are to be shown witnesses, tendered or otherwise provided to the court are printed.

So it was, and so it remains. For now. Change is coming.

It is starting slowly. Appeal benches are now making directions for authorities and appeal books to be provided electronically. Where there are no witnesses and no fresh evidence, there is no need for paper. It is a matter for the parties if they wish to use a paper copy.

In the next decade, possibly in the next few years, the court will move from paper being the default to digital documents being the default.

Why? Not simply to reflect modern ways (after all we still wear black robes and jabots centuries after they went out of fashion). It will happen because it is cheaper and quicker: two of the three fundamental principles that underpin all proceedings: s 37M of the Federal Court Act.

Having documents accessible electronically saves court time. The Victorian Bushfire Royal Commission estimated it reduced hearing time by 25 per cent. Even the most old-fashioned of registrars (and Warwick Soden is not one of those) will not hesitate to take advantage of the potential for a substantial increase in hearing time without a corresponding increase in judicial costs, staff costs and hearing rooms.

It saves costs in printing, organising and transporting paper. In a recent case a client decided to buy an iPad to show witnesses the tender bundle. The iPad cost half what it would have cost to print another copy of the bundle.

Using digital documents rather than paper is also easier. Not initially, I accept. It takes a little time to learn how to use a tablet or laptop to access documents as easily as one can find them in a folder. But after no great practice it turns out to be much quicker to

locate a document in an electronic file than in a multi-folder brief.

Those who like to scrawl on their briefs, and tag them with post-it notes, will resist. That is, until they find there are programs using tablets that allow all they could do before, plus the added convenience of word searches and hyperlinks between documents.

These issues were discussed at a recent Federal Court Digital Practice Forum, an event covered in this edition in an article written by Joe Edwards.

I shudder to think of the misinformed, misogynistic and other downright offensive comments that might be made on any app that seeks to rate the bar, assuming it could be accessed by anyone, including witnesses, opposing parties and members of the public who read about cases in the press.

The conference identified obvious access to justice concerns when moving away from paper. Technology should not be a barrier to justice. The concern being voiced in that regard was not a concern for aged barristers unable to navigate a world of pdf documents. Rather, those who represent indigent and disabled clients are concerned they would not have the devices necessary to read documents or would have difficulty using them. And the Law Society, representing thousands of suburban solicitors who occasionally but rarely litigate, is concerned that new technology not be introduced that requires those solicitors to invest significant sums in new technology and training.

They are legitimate concerns. They can be readily met. What follows are my views as to how it can be done.

First, it needs to be led by the court. If the judge is viewing the documents electronically two things will happen. First, the court will want the documents sorted and indexed in a way that allows them to be most readily found and used electronically. Second, lawyers appearing in court will naturally tend to mimic the judge – it is after all effective advocacy to see the case from the judge's viewpoint. A judge that is insisting on everything being on paper is one that will, expressly or implicitly, reduce the likelihood of electronic documents being used, or at least being used effectively.

Hence, the starting point ought to be a move to a new default position. Just as the court currently has all its files in electronic form, but can print them, all documents in court should be provided electronically, although can be printed.

To address access to justice issues, the documents that are filed in advance should be able to be viewed in court by those appearing via screens that are part of the court furniture. Parties can bring their own, but no party should be deprived of the capacity to see documents being referred to because they do not have their own device.

Whenever a document is referred to it should be able to be brought up on each screen. This could be done by the associate having the capacity to identify any document that a judge or party wishes to refer to, which would then appear on the common screens.

It requires a protocol to be established for indexing. Again this must be led by the court, although it could be assisted by a practice note governing how files are to be electronically filed.

There is electronic filing now. All documents filed currently go into an electronic