

# TOWARDS eFILE

## LETTER FROM AMERICA

By the Hon Justice Peter Vickery



Recently, a four year old attended the funeral of an aged aunt. At the conclusion of the service, she asked her mother – “mummy, does your iPhone have an app for heaven?” What does this tell us about the technical age we are witnessing on earth and where is it taking us?

As Richard Susskind has written in his work *The End of Lawyers?*, ‘predicting future trends in technology is a hazardous process’.<sup>1</sup> There can be little doubt as to the wisdom of these words. Even a few years ago, how could we possibly have conceived of the enquiry of the four year old at the funeral, and the thought processes in her young mind that inspired it?

With Susskind’s warning squarely in mind, may I venture a cautious prediction – it will not be too long before nearly all courts in Australia will routinely conduct their business using ‘paperless’ electronic files in place of the customary ‘hard copy’ paper files. This development will in turn have a profound effect on the way courts and lawyers will work, the way they will relate to each other, and the way they will deal with the public they serve. Consider this example: the brief to counsel of the future may include reference to voluminous court papers by the simple shorthand: ‘Counsel is briefed with the court file in matter SCI 1234/2011’. Upon punching in a pre-set password, counsel may then call up the file on a PC at any time and from anywhere on the globe. Instructions from clients may be sought using the same process.

What is the evidence for the prophecy?

First, computer technology has revolutionised what has been called the 'information substructure' in society.<sup>2</sup> This refers to the dominant means by which information is captured, shared and disseminated. Computers are extremely adept at data processing – the production, storage and communication of information by electronic means. Further, computers are now widespread and in everyday use. The machines and the technology are there for courts to exploit and develop. Indeed, to ignore these developments will place the courts at odds with commonplace practices for managing information that have now been adopted by the community at large.

Further, the consistent world trend in the development of information technology, as exemplified by leading courts of the US, is for courts to move to electronic management and filing of processes within their jurisdictions.

In September 2010, I had the good fortune to visit Manhattan in the state of New York; Boston in the Commonwealth of Massachusetts; and Washington DC in the District of Columbia, US, to examine case management and electronic case filing systems (CM/ECF) used in various superior courts. During this time, I was given the opportunity to examine current international developments in the use of case management technology. A dynamic and pervasive trend was observed in courts in the US in moving towards and further developing full electronic filing systems supported by e-filing, with a view to replacing the paper files with electronic files, or substantially so. The three US court systems examined all have in place a system in which a full electronic file is created for each matter, or were well advanced in the introduction of such a system. All filed documents can be read on the electronic screen and worked on by the judge and lawyers acting for the parties, or indeed by the parties themselves. A paperless filing system is recognised as the major value of an electronic case management system. Other facilities such as reporting, financial accounting, generation of standard forms and the like, are seen as secondary, although useful adjuncts to the system.

### THE NYSB

The study commenced with an examination of the electronic filing system which operates in the US Bankruptcy Court Southern District of NY (the NYSB). The NYSB is situated not far from Wall Street, and late last year was exceptionally busy in dealing with some of the more spectacular collapses arising from the GFC. The Court was the vanguard in the US in introducing the CM/ECF and the public access to court electronic records system (PACER), which it commenced in 1995.

The NYSB system proved to be an outstanding success. It has now been adopted and is in current operation in all federal appellate, federal district courts and federal bankruptcy courts in the US, comprising some 200 courts. There are presently some 14,000 registered legal practitioners issued with a password to file documents electronically in the NYSB alone. Over 37 million cases are on US Federal Court CM/ECF systems, and more than 450,000 attorneys and

others have filed documents over the internet into the courts. PACER currently hosts some 500 million case file documents available for public access.

A version of the NYSB system has also been adopted and adapted for use in the state courts of Mississippi. In 2005, the Mississippi Supreme Court commenced a program to evaluate, test and implement the electronic filing and case management system. Commencing in May 2008, the Madison County Chancery Clerk's office began testing a version of the Federal Court's CM/ECF system, now referred to as the Mississippi electronic courts (MEC) system. The project is continuing in its development and application.

The website of the US federal courts<sup>3</sup> describes the CM/ECF and PACER systems in the following terms:

'The federal judiciary's case management/electronic case files (CM/ECF) project revolutionized the way in which the federal courts manage their cases and documents. This easy-to-use system allows attorneys to file documents directly with the court over the internet and allows courts to file, store, and manage their case files in an easy-to-access, transparent way.

The CM/ECF system uses standard computer hardware, an internet connection and a browser, and accepts documents in portable document format (pdf). (To improve security and archiving capabilities, plans are underway to require that filers use the newer pdf/A format.) The system is easy to use – filers prepare a document using conventional word processing software, then save it as a pdf file. After logging onto the court's website with a court-issued password, the filer enters basic information relating to the case and document being filed, attaches the document, and submits it to the court. There are no added fees for filing documents over the Internet using CM/ECF. A notice verifying court receipt of the filing is generated automatically and emailed to the parties in the case.

CM/ECF provides courts with the ability to make their documents available to the public over the internet. Electronic access to court data is available through the public access to court electronic records (PACER) program. Litigants receive one free copy of documents filed electronically in their cases, which they can save or print for their files. Additional copies are available to attorneys and the general public for viewing or downloading at eight cents per page, with a maximum cost per document of \$2.40. Copies of court opinions, as designated by the authoring judge, are available at no charge. Neither the free copy nor the maximum cost per document applies to transcripts filed with the court. Directed by Congress to fund electronic access through user fees, the judiciary has set the fee at the lowest possible level sufficient to recoup program costs.'

Income generated by PACER for the NYSB alone is a staggering US \$800,000 per quarter, or US \$2.4 million per annum, despite the relatively modest charges imposed for the service. The income derived from PACER is applied to court technology and maintenance of the system.

In terms of project delivery, following a grant of funds from Congress, the NYSB engaged project administrative >>

staff and external engineers to design the system specifically for the needs of the court. Although a common system is employed in all federal courts that now operate the system, each court within the hierarchy maintains autonomy over the management and development of its individual IT system. This is considered to be an advantage, enabling the individual needs of each court to be accommodated and changes effected to deal with different public demands as they emerge. Effective responses can be achieved efficiently and without delay by avoiding unnecessary layers of administration. The fact that the federal court hierarchy includes an appellate process is not seen in any way as justifying a unitary system of IT management within the federal court structure. Electronic data is freely transferable within the system, enabling the electronic files of the appeal courts to be populated from the electronic files of the trial courts.

The level of satisfaction in the system among judges, the legal profession and members of the public who are users of the system is high. A user satisfaction report on the system was prepared by private consultants in March 2010.<sup>4</sup> The report found that user satisfaction was of a high order. On a scale ranging from 1 (very dissatisfied) to 5 (very satisfied), of the 1,489 respondents analysed, the overall average satisfaction rating for the CM/ECF system was 4.03, with 78 per cent falling within the 4-5 (satisfied) score range. The legal sector recorded the highest level of satisfaction among user types, with 79 per cent falling within the 4-5 range.

There are a number of benefits provided by the NYSB system:

- (a) Registered lawyers are able to file documents 24 hours per day, 7 days a week;
- (b) Of similar benefit is that lawyers do not have to send a staff member or messenger to physically deliver the document to court and no intervention or involvement of court staff is required;
- (c) Upon filing, a receipt with time and date of filing is automatically generated by the system and automatically emailed to the filing practitioner;
- (d) Lawyers registered on the system will also automatically receive emailed notification that a document has been filed by another practitioner in a particular case, once notice has been given electronically that the lawyer acts for an opposing party. At the option of a registered lawyer, such notification may also constitute service upon a party;
- (e) Because ECF uses standard internet software, the out-of-pocket cost for participating lawyers is typically very low, while savings are likely to be achieved by abandoning the requirement for documents to be physically delivered to the court;
- (f) Lawyers without internet access may submit clearly labelled disks (CDs) to the court containing the electronic documents in pdf format;
- (g) On the filing of a new matter, the filing lawyer is required to complete an initiating docket. This includes the names and addresses of the parties, a short description of the matter by reference to specified case types, the name and contact details of the filing practitioner, and a description

of the document filed as the originating process and all accompanying documents (for example, affidavits); and the filing date of each. Thereafter, the docket is added to progressively upon further documents being filed by any party;

- (h) All documents filed are in a text-based pdf format. This provides a facility for users to readily 'cut-and-paste' from the electronically filed documents into documents being prepared by a judge (for example, rulings and judgments), or by a party (for example, written submissions). No security issues were reported to the author arising from the NYSB system using the pdf format in the 15 years of its operation;<sup>5</sup>
  - (i) The full text of all documents filed may be called up and viewed, printed out, cut and pasted into opinions prepared by a party's lawyers or into judgments written by the judge, or emailed to any person;
  - (j) The NYSB provides a facility for public access to the electronic files maintained by the court through the use of the PACER system described below;
  - (k) Important reports for the use of the court are efficiently and speedily generated. In one example demonstrated, a report was generated in about one second for a category of cases before the NYSB (all Chapter 11 filings between 1 January 2010 to date), which consisted of 588 cases in the category;
  - (l) Even though some or all of the documents in an electronic file may be printed out and used in the conventional way, in the same fashion as one would use a hardcopy file, the repository for the file is the electronic record maintained by the court. This has important and beneficial implications:
    - (1) A considerable saving of physical space in expensive city real estate may be achieved from a reduced need for the court to store paper files. Although NYSB has not become a totally paperless court, significant space savings have been achieved. Recently, one area of the court that was formerly used to store paper files has been converted into two new chambers for judges;
    - (2) The loss of court files or parts of files will become a thing of the past. Considerable time, resources, anguish, and public embarrassment are unfortunate features of the paper file system. NYSB has eliminated these problems with electronic filing. No tracking system is required. The electronic file contains all of the filed documents, which is readily accessible at any time, from any location.
    - (3) The system of electronic filing applies only to registered lawyers. If a person has an attorney acting for them, the attorney is not permitted to file documents in hard copy 'over the counter'. On the other hand, persons who wish to act for themselves must file documents conventionally with the court in hard copy. Registry staff will then exercise quality control over the documents filed, and if in acceptable form, will create the electronic docket and scan the filed initiating process into pdf format for filing, or help the litigant to do so. In the case of the NYSB,

this process has resulted in some 95 per cent of documentary material being filed electronically by registered lawyers, and only about 5 per cent of material being filed in hard copy 'over the counter'.

Strict protocols are required to be observed by lawyers when filing material which is sensitive or regarded as 'confidential'; for example, material that may reveal the identity of a minor. The court may order a file not to be made available for public inspection on the PACER system. Any such file will be posted on a secure, dedicated database maintained for the purpose. The court may also order that documents be filed in a redacted form, with documents scanned into the electronic file from a redacted hard copy document.

The courts of Massachusetts have also recognised the need for, and have embraced, e-filing and e-access. They are working towards establishing e-filing by the legal profession and members of the public, and have made substantial progress in this regard. A pilot e-filing process will 'go live' towards the end of 2011. The judge in charge of the project, the Hon Judge Andre Gelinas, whom I was very privileged to meet in Boston, has recently reported on progress in an email to me:

'Our IT program proceeds apace, with upgraded versions providing new and important functionality. We are in the process of rolling out the full module for civil cases and financials in our district and Boston municipal courts; public access is becoming a reality and a much-appreciated

tool for the bar; we're planning a range of e-filing projects; and we're preparing to install the system statewide in our Juvenile Court, the last but one of the court departments that are left to complete.'

The District of Columbia Superior Court in Washington uses a system of full electronic filing, including e-filing. The problem sought to be addressed by this process was well described in a press release issued at the time of the release of the e-filing package in the District of Columbia Superior Court in 2002:

'One of the most active legal environments in the United States, the Superior Courts of Washington, DC, was swimming in an ocean of paperwork. Historically, cases filed within the courts arrived as a mound of paper that had to be hand-processed through time-intensive and costly methods. Not only was this method cumbersome and costly, but the procedure delayed documents and hindered the flow of the judicial process.'

#### WHAT ARE THE PITFALLS EXPOSED BY THE US STUDY?

If there is one important lesson to be learned from recent history, it is this – wherever it is possible to do so, it is highly desirable to purchase a system that has been thoroughly tested for its various applications and is in common use in the market place. A 're-inventing the wheel' approach is replete with risk.

Further, it is generally regarded as a mistake to develop the >>

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electronic software before developing the rules and protocols that should govern e-filing and e-access. Substantial added cost may be incurred if the project proceeds the other way around.

A court must have a free hand to develop these processes, in consultation with the legal profession. It is, after all, in the best position to achieve an acceptable balance of the relevant interests, and to match the outcome to the technology and the technology to the outcome. In devising the necessary processes, a court should not, as far as possible, be inhibited by the technology employed. Rather, the technology should be constructed around the processes, and the two should work together as an integrated system.

I valued the opportunity to confer with Judge Brook Hedge, an Associate Justice of the District of Columbia Superior Court who joined the Superior Court in November 1992. Judge Hedge has served as chair of the Court's technology committee and was actively involved in developing and implementing the court-wide integrated case management data system and e-filing. The judge offered this central piece of advice: if you do move to e-filing, it must be made a mandatory process for legal practitioners.

As to the appropriate strategic approach to implementation, these projects require careful planning, and great attention to detail in their execution. With this in mind, how should courts approach the development of e-file case management systems?

In his work, *The End of Lawyers?*, Susskind quotes a favourite example,<sup>6</sup> which I call the 'parable of the electric drill': one of the world's leading manufacturers of electric power tools conducts an induction course for its new recruits. At the opening session, the recruits are asked to consider a powerpoint slide of a gleaming power drill. The inductees are simply asked: "Is this what our company sells?" Most tentatively answer, "Yes". The instructors with a flourish then present another slide, depicting a hole in the wall. "What the customers want is holes in their walls ... It is your job as executives to provide competitive, efficient and imaginative ways of giving the customers what they want – holes in the walls of their choice of the correct placement and dimension."

With this parable in mind, may I suggest that the task of developing an e-file case management system should be commenced by considering the following key questions:

- What do the future users of the system want from the process, and what do they regard as useful?
- What is it they do not want, or see as unnecessary?
- How is litigation best conducted using the technology? and
- How should the system accommodate these objectives in the interests of justice?

It is only after these matters have been carefully and fully explored, and if necessary modified as the project proceeds, that a workable strategy for implementation can be devised and managed; the right products and personnel can be sourced from the market place; and an appropriate model developed to meet the needs of the end users can be achieved.

Further, once introduced, an electronic system calls for intelligent and continuous review, followed by timely system upgrades, to keep it up to the mark and meet community

expectations as technology continues to develop. For example, in the case of the US Bankruptcy Court Southern District of New York, its particular in-house system was first introduced in 1995. Since then, it has gone through a number of iterations to achieve its very successful level of present operation. Even with this laurel, it is not standing still. The NYSB system is currently the subject of further review to meet the demands of the next decade. For this reason, adaptability and flexibility to meet present and future demands is a key attribute which it is essential to explore in the assessment of any new proposed system.

There is no doubt that, with the introduction of electronic case management and e-filing, we are presiding over perhaps the greatest single procedural change in court history. Such projects will impact on the way courts serve the community at every level.

At the same time, they are, and will continue to be, enormously challenging endeavours. Computer technology projects cannot be approached with a starry-eyed and bullish confidence that obscures the hard earned wisdom of experience. They are technically complex. Indeed, some projects can be on the scale of designing and constructing an off-shore oil rig – but with a critical difference – the important components of computer systems are for the most part invisible. Commerce, industry and governments have all contributed to a graveyard of failed projects, often resulting in vast levels of wasted expenditure.

Finally, computer technology, while providing a very useful and powerful tool, should not be approached as if it will provide the answer to everything. In the mid-1980s, thought was given to the possibility of computers eventually replacing judges and, perish the thought, possibly even lawyers.<sup>7</sup> May I conclude by venturing the following prediction, with some confidence – that such a function is well beyond the power of current and foreseeable computing, and thankfully our present careers are likely to remain secure from such alien competition. I hope I am not haunted by this being quoted by a Susskind of the future. ■

This article is based on an earlier article published in the *Australian Bar Review* (2011) 34 196.

**Notes:** 1 R Susskind, *The End of Lawyers?*, OUP, 2008, p59. 2 *Ibid*, at p17. 3 <http://www.uscourts.gov/FederalCourts/CMECF/AboutCMECF.aspx>. 4 Pacific Consulting Group (PCG), *User Satisfaction Report*, March 2010. 5 The relatively new pdfA format provides an enhanced facility for electronic records to be permanently archived, which will be important for any fully electronic 'paperless' filing system. PdfA was recently introduced into Federal Courts in the US (in October 2010) for this purpose, and conversion of the US federal court electronic filing systems is presently underway. 6 Susskind, *Op.Cit.*, pp158-9. 7 R Susskind, *Expert Systems in Law*, OUP, 1987; paperback edition, 1989, pp249-51.

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