

# It's a "V for the P" on the



Australian courts have embraced the relief of technology for litigation involving large discoveries and volumes of documents – as courts warm to the convenience and functionality of technology, smaller practices will need to consider the massive benefits technology can bring them in terms of cost-efficiency and competitiveness, capabilities, and dealing day-to-day with the courts. This article follows the emergence of technology into the courts and outlines the power that technology has to offer the legal profession.



## Introduction

Words like 'discovery' inevitably send shudders up the spine of any lawyer or paralegal, not to mention secretary or WP operator – not just because it is frequently an arduous task, but because it often amounts to an organisational nightmare yielding shelves of multiple copies of lever-arch folders, the navigation of which is as of little benefit as the initial mass of documents provided by a client in the first place – not to mention the recurring issue of storage space.

In the wake of the accelerated growth of information technology systems, the courts have scarcely had a choice regarding the role computers hold in their future. Practice Notes in numerous jurisdictions have endeavoured

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to introduce technology on advisement from Information Technology specialists and through a process of agreement between parties and their lawyers. The primary motivation behind electronic document management has been to facilitate the obvious benefits of cost-effective and convenient exchange of relevant information in large, often commercial proceedings, involving voluminous documentary materials.

Yet it is easy to overlook the infinite benefits a broader embrace of technological capability can bring to every facet of legal practice. Not just to the top-tier law

cannot be constrained as technology advances and changes. Secondly, the needs in each case and from one practitioner to another will vary significantly. The court's recommendations relate particularly to discoveries and document management, and where those discoveries involve more than 500-1000 documents.

Accessibility is not the only advantage to the use of computer and Internet-based technology. The database where scanned images of every document are stored also contains coding which attaches to each document. Put

nology to "find and replace" functions and tasks performed by legal professionals has already taken a widespread and diverse root across common law countries, where efficiency of courts and legal systems has become of significant concern with the rise and rise of the number of litigants today.

### Document Management

At the present time, a combination of court reporting and technology allows a constantly up-to-date transcript to be accessed from your computer. Documents stored have the additional benefit of HyperText links. If you have used the Internet you would be familiar with hypertext links. A HyperText link appears in underlined blue text and, when clicked, takes the user to the document named by the corresponding text. Therefore, users are able to call up cases, legislation, exhibits, statements, pleadings and any document that has been prepared, tendered or discovered in the matter as those documents are referred to in the transcript. With such a vast range of cases and most legislation available online today, it is convenient to provide immediate links to those resources.

The other documents, such as exhibits, discovered documents, or subpoenaed materials are scanned and then organised using specialised database software such as Ringtail™ Casebook and Courtbook. This database software not only manages the documents but also allows them to be coded or described. The preparation of such a database involves the same if not significantly less human resources, office resources and time than the preparation of a hard copy list of documents and folders. All relevant documents are imaged, that is, scanned and stored. The most notable benefit of having all the materials in electronic form is searching the mass of volumes for fine details – all memoranda from one party to another on a particular date can be called up on a computer with a simple query of the database, and scanned copies of the documents printed within a few

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firms, but to sole practitioners and smaller practices. Indeed the benefits innovations such as the Internet introduce, only make information and resources exceedingly more accessible and cost efficient. Perhaps the most important point to note is that the Internet introduces simple and almost endless resources and conveniences all by way of existing infrastructure, being a basic internet-ready personal computer.

### Practice Notes

Practice Note no. 105 in the Supreme Court of New South Wales,<sup>1</sup> no. 3 in the Victorian Supreme Court<sup>2</sup> and no. 17 in the Federal Court<sup>3</sup> were together, the genesis of Australian jurisdictions acknowledging the inevitable introduction of technology to courts. The practice notes are largely quite similar, and do not import any detailed guidelines regarding how technology may be used. This is of twofold importance. Firstly, courts and practitioners

simply, this coding is a description of the document, broken down into fields. Typical fields include the document type (letter, memorandum, document produced on subpoena), the date (being the date the document was authored or generated), the names of the author and recipient and their respective organisations, the heading or subject and other information which helps identify the document. Additional custom fields can be added to separate document types and assist categorisation in specialised groups as instructed by practitioners.

In other jurisdictions which have embraced reform to incorporate technology have focused on court filing and evidence.<sup>4</sup> Georgia State University has conducted a full analysis of the reforms that would necessarily arise to various pieces of legislation in order to facilitate a system of computerised filing and lodgement of documents with courts across that jurisdiction.

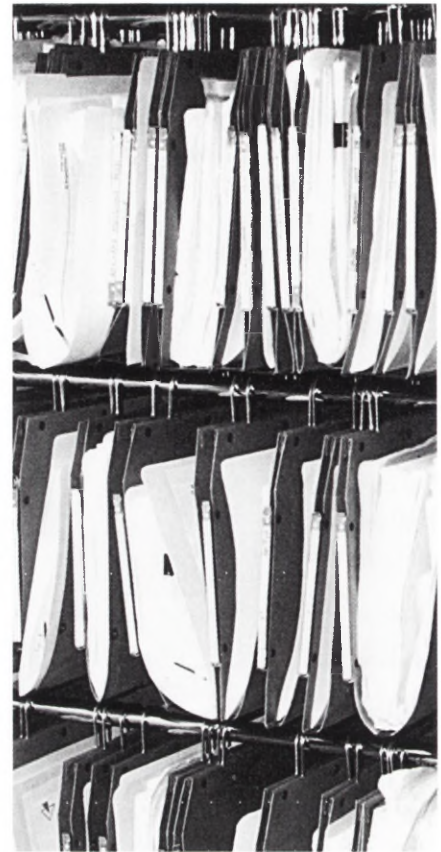
The undisputed potential of tech-

seconds. Lawyers are also able to make personal notes against documents. Documents can be assigned to particular issues in cases, that is, a group could be created for, say, "all documents relating to paragraph 12 of the Statement of Claim". Further, each document need not be paginated (and repaginated following alteration). Instead, database software utilises unique barcodes to identify documents. In short, computerised document management by courts and legal professionals establishes convenience, accessibility and higher functionality, and consequently lowers the costs and disbursements to the client. As this technology permeates more and more practices, it will be the smaller practices that could benefit the most by remaining cost competitive, up-to-date, and in touch with the evolution of the courts.

Importantly, courts have recognised the important role IT consultants play in bringing the infrastructure and systems into being to facilitate document exchange by parties. They have favoured the idea that courts appoint an independent body to perform this task, particularly given accountability issues and also the confidential nature of many documents. If both parties to proceedings have claims for privilege, then neither would be able to prepare a full set of documents for electronic use. This is obviously aside from the fact that traditionally, within the firm, often only one party possessed a level of infrastructure and expertise to establish those systems. Regarding accountability, clearly it is important that an independent party maintain responsibility for the smooth running of the technology and organisation of the records. Parties have agreed to pay the costs of such consultants on the basis that it is a far less expensive and far more efficient and functional way of tackling voluminous documents in litigation. Court-appointed consult-

ants and project managers have traditionally demonstrated formal legal qualifications, extensive experience in the profession in addition to formal IT and computer-based professionals.

Often in large proceedings there is an endless stream of documentary evidence, including witness statements. Frequently as a result of the technical nature of cases, it is not only desirable but necessary that links be set up in statements, accommodating easy access to the relevant materials. If a statement contains a reference to technical terms, diagrams, illustrations or other explanatory or qualifying information, that information can be brought to a user's screen by clicking on references to it within the statement. Where there are issues of confidentiality or privilege, different security levels are achievable in order to accommodate access to or restrictions on access to the documents involved.



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#### **e-filing**

The State of Georgia in the United States has been a leading jurisdiction in the development of e-filing systems. E-filing allows the use of emails and other electronic communications to formally file or lodge court documents. This not only allows fast, cost-efficient filing without the need to queue and wait at registries, but also facilitates the storage (and consequent ability to retrieve) and electronic management of pleadings, evidence and other court documents.

The E-Ct-Filing analysis<sup>9</sup> has outlined a number of important issues relating to the introduction of this system. Firstly, the amendment of legislation and rules in terms of definitions and references such as “paper” needed to be considered. Secondly, the common

requirement that legal documents be signed raises the important issue of electronic signatures, an issue not only crucial to electronic legal systems but to e-commerce and trade.

When considering electronic filing, it is also important to consider which uniform document format is the preferable format – the conventional word processing document formats provide a simple and readily available format, however smart formats such as XML provide exciting new possibilities in terms of the lodgement of not only documents but relevant information relating to each and to the proceedings in question. The automated generation of documents required throughout proceedings is also made possible by the meaningful information that may be

stored and utilised by XML, as discussed below.

The Federal Court has led the evolution towards the electronic or cyber court in Australia. Order 1 Rule 5AC of the Federal Court Rules provides for the filing and lodging of pleadings and other court documents by electronic transmission. Once again the time and cost-saving benefits are clear – further, courts will be able to streamline their processing of pleadings, documents and proceedings generally. Australia has certainly led the way in the provision of free legal services and resources via the Internet. Discussion Paper 62<sup>6</sup> of the Australian Law Reform Commission clearly supported the notion that the efficiency and capabilities of electronic and internet resources was to largely benefit the more marginalised members of the community. Almost anyone may now access court forms, cases, legislation, information guides, and private web sites, all providing information to prospective litigants, victims of crime and even accused criminals. In Australia it is also clearly to the benefit of not just rural communities, but all Australians, to be able to traverse distance by using technology.



### Legal XML

Many people will be aware of HTML, HyperText Markup Language. It largely underpins the format, layout, and contents of Internet websites. HTML comprises of about 90 pre-defined tags that instruct a web-browser (e.g. Microsoft Internet Explorer) how text and information should be displayed.

**<FONT Colour='Blue'>punch</FONT>**

In an HTML document this code would instruct the browser to display in blue text, the word "punch".

The tag in this instance is <FONT>, and the entire instruction is what is called an element. The web browser does not display the text of the tag or element; they are merely to instruct the browser how the text "punch" is to be displayed. The hidden information that describes the content text is therefore limited. The word "punch" in this case could therefore relate to a hole punch, a party beverage, a boxing move, an assault, or any number of other topics.

XML seeks to use tags to describe text, words and terms in documents in a far more meaningful fashion. Custom tags could be used.

**<ASSAULT><BATTERY>punch</ASSAULT></BATTERY>**

This code could be used to mark up the word punch with meaningful tags, which can then be used by users, search engines or other information management systems. XML is not a set of predefined elements, but rather a syntax through which custom elements may be created. The word "punch" marked up with tags such as <ASSAULT> and <BATTERY> provides users and computers with information that the word punch in this instance refers to the action of striking another, commonly considered an assault or battery.

**<FONT Size='12'>I agree to give you a peppercorn in exchange for your services.</FONT>**

This HTML element only instructs a browser to display the text in 12 point, in addition to any obvious words in the sentence, which a search engine may detect.

**<Legal><Contract><Clause><Paragraph>I agree to give you a peppercorn in exchange for your services.</Paragraph></Clause></Contract></Legal>**

These XML elements allow a search engine to identify the sentence as being related to legal matters, specifically contracts and more specifically paragraphs and clauses.



The first obvious benefit of Legal XML is to provide the means to conduct accurate searches through masses of legal information such as case law and legislation. Larger firms may have any number of paralegals and junior solicitors who can spend time researching, and large clients who can afford the costs of the professional time associated with it. Smaller practices do not have that luxury – they need efficient tools to aid fast and accurate legal research. Another application being explored for XML is in the management of information by courts. The Douglas County Superior Court is presently trialing a system where XML sentencing documents are filed from the judge's bench into a case management system. Also Legal XML capabilities have been used to explore the automation of civil litigation. Perhaps the step that XML will take professional practice could be likened to the introduction of the word processor, where precedent pleadings were prepared and specific pleadings could be prepared by simply completing blank fields – only the advancements of XML are exponentially greater.

XML and its application have been largely developed and outlined by Winchel "Todd" Vincent III as he continues to explore how the technology may be used by the legal profession worldwide. His article "**Legal XML and Standards for the Legal Industry**"<sup>7</sup> provides further illustrations of how XML operates.

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### **The Future Is Now**

Computer or "tech" courts are already here. Email is already a more increasingly utilised means of communications and correspondence. Courts across Australia and the world continue to invest time and money in the development of projects such as E-filing. When the capabilities of technology are considered along side the needs and difficulties of the legal profession, it is inevitable that the coming decade may see the vanishing of many aspects of litigation as it is today. Courts also stand to

save on their overheads and costs as processes become more streamlined; yet those savings would almost inevitably be reflected in court fees.

The time involved with lawyers corresponding, courts processing, and the investigations necessary to the conduct of litigation is unquestionable – the solution is clear. Consider remote or web access to files by lawyers – all photographs, case law, file notes, correspondence, pleadings and court records from the court file could be retrieved at the office, at the bar table, or from any inter-

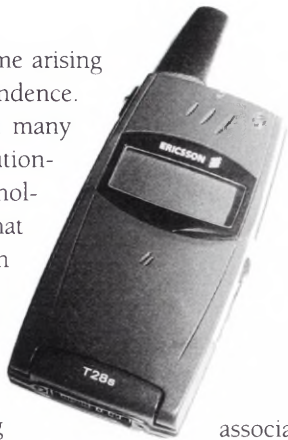
net-capable computer. Losing photographs, inquiring about court orders made, filing documents, shipping trolley-loads of files to court, and flicking through large files at the bar table will all be farewelled with a more complete advent of technological capabilities.

Consider the idea of such a fully functional tech court. Take for example a subpoena for production. A subpoena could be prepared, filed, and served all via personal computer in the office, home office, or from the beach if you carry a laptop and a mobile phone. Documents could then be produced by being scanned and posted to the exhibits section of the relevant court on a web-based court management database. If at the time of posting (that is, production) a claim for privilege is made by a party, an affidavit substantiating the claim would automatically be generated, inserting the parties' names, proceedings numbers, and even clauses specifying which documents had been marked as privileged, which the lawyer would complete and post or email for filing at the same time. The court would then grant access orders by instructing the case management software to allow first access to a particular party until a certain date.

The electronic court would keep records administered by the court of what has been served and when, such as expert reports. In an appropriately equipped tech courtroom all of this would be available through the web to practitioners appearing at interlocutory hearings, motions, arbitrations, or hearings. Many of the functions performed by Registrars in chambers could be performed by email-based communications with parties. Exchanges of particulars could be stored and marked up with XML allowing important points and references to be created for future searches or just convenient access. The electronic court centralises information so that it is accessible and easy to update without going near a court. It is undeniable that a large amount of cost to clients arises from administrative attendances at Court Registries, in exhibits and in the


mere consumption of time arising from snail mail correspondence.

The beauty of what many may consider the revolutionary implications of technology on legal practice is that it does not come at an exorbitant cost. Indeed the majority of technology presently in place saves money, and can be fully operated using any internet-ready personal computer. Consequently, it establishes a basis for small practices to access the benefits and advantages of technology. Technology replaces the expensive need for clerks to file documents and to copy subpoenaed materials. It removes the necessity of the small practitioner spending countless hours perusing large defendant corporations' documents and instead being able to custom search scanned documents for precisely what they require. It is the overheads



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associated with administrative staff, time, and limited resources that large firms can afford, which smaller ones

generally cannot. Technology empowers the small practitioner. Technology evens out the playing field not only between large and small practices, but between large and small clients – litigation can become more affordable and accessible to a greater number in the community. Technology offers efficiency in an increasingly litigious world. Technology is inexpensive, as it becomes more and more a part of daily life and already the courts have handed down their verdict on technology. It would appear to be a “V for the P”. 

#### Footnotes:

- 1 Use of Technology in Civil Litigation, 15 March 1999
- 2 Guidelines for the use of technology in litigation in any civil matter, [1999] IVR 843
- 3 Information Technology, 20 April 2000
- 4 Georgia, United States of America
- 5 <http://gsulaw.gsu.edu/gsuexp/CourtFilings/CourtRules/index.html> (4 April 2001)
- 6 Review of the Federal Civil Justice System, Part 6
- 7 <http://e-ct-file.gsu.edu/Documents/Library01/XML/SMULRLegalXMLAndStandards.pdf> (15 January 2002)

## NSW STATE CONFERENCE 2002

15<sup>TH</sup> & 16<sup>TH</sup> March – Manly Pacific Parkroyal

#### KEYNOTES SPEAKERS:

The Hon Bob Debus, MP NSW Attorney General  
The Hon John Della Bosca, MLC Special Minister of State,  
Minister for Industrial Relations  
Her Hon Judge Margaret Sidis  
Mr Peter Semmler, QC  
Mr Brian Donovan, QC  
Ms Anna Katzman, SC  
Mr Dennis Wheelahan, QC  
Mr Bernard Gross, QC  
Mr Tony Bartley, SC  
Dr Patricia Jungfer  
Dr Peter Cashman  
Mr David Baran, Barrister  
Ms Kylie Nomchong, Barrister  
Mr Christopher Barry, QC

#### LEADING EDGE TOPICS:

- Forum Discussion – *The Future of Common Law*
- Advocacy Workshop

#### COCKTAIL PARTY

followed by

#### HYPOTHETICAL DEBATE:

“Should Judges follow the ‘Laws’ and the ‘Jones?’”  
Moderator: James O’Loughlin



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