

THE FEDERAL COURT OF AUSTRALIA: ELECTRONIC FILING AND THE eCOURT ONLINE FORUM

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Abstract

This paper examines two of the initiatives that form part of the Federal Court of Australia's eCourt Strategy, namely electronic filing and the eCourt Online Forum. It describes the development and implementation of these initiatives, and identifies some of the issues that they have raised.

The Federal Court of Australia

The Federal Court of Australia, created by the *Federal Court of Australia Act 1976*, is a superior court of record and a court of law and equity. It sits in all capital cities and elsewhere in Australia from time to time.

The objectives of the Court are to:

- decide disputes according to law—promptly, courteously and effectively; and in so doing to interpret the statutory law and develop the general law of the Commonwealth, so as to fulfil the role of a court exercising the judicial power of the Commonwealth under the Constitution;
- provide an effective registry service to the community; and manage the resources allotted by Parliament efficiently.

The Court's original jurisdiction is conferred by approximately 150 statutes of the Commonwealth Parliament. It includes trade practices and competition law, taxation, native title, intellectual property, judicial review and administrative law, corporations law, workplace relations and admiralty. It also exercises a substantial appellate jurisdiction over decisions of single judges of the Court, decisions of the Supreme Court of

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Norfolk Island, decisions of the Federal Magistrates Court and certain decisions of State and Territory Supreme Courts exercising federal jurisdiction.

In 1997 the Court introduced the Individual Docket System. The key features of this system include:

- the random allocation of a single judge to a case from commencement to disposition;
- increased judicial involvement and management in all stages of each proceeding; and
- individually tailored directions, procedures and listings for each case by the judge and continual monitoring by the associate and judge of compliance with orders.

The Individual Docket System, and other case management initiatives of the Court, provide the framework within which the Court's new technology initiatives operate.

The eCourt Strategy

The Court is committed to the improvement of its practices, procedures and service delivery standards and outcomes. The Court actively works to identify opportunities that will realise one of its primary aims: to be, and to be recognised, as an innovative world-leading superior court. With this aim in mind, the Court has initiated the eCourt strategy.

The eCourt strategy brings together a number of the Court's existing and new technology initiatives. The strategy aims to maximise the potential of relevant technology to extend and enhance the accessibility of the Court and the ways in which proceedings may be managed. It has several objectives, one of which is that the Court should take advantage of technological opportunities to achieve benefits for both the Court and its users. The eCourt strategy aims to:

- complement traditional means of transacting with the Court;
- develop innovative approaches to meeting the needs of Court users and extend the choices available to those wanting access to services and appropriate information;
- improve and enhance access to justice, and reduce inconvenience and the cost of justice to parties, particularly those in outlying regional and country areas;
- focus on the needs of the broad community (independent of geographic or socio-economic circumstances);

- assist judges, regardless of location, to carry out their duties as efficiently and effectively as possible;
- enable the Court's administration to support the judicial function and delivery of services to Court users, efficiently and with minimum disruption to the user; and
- make better use of tried and tested technologies, such as telephone services and videoconferencing.

The eCourt Strategy is technically and administratively flexible in order to accommodate future changes to the Court's business. In line with worldwide trends, the eCourt Strategy makes use of the internet to facilitate seamless and easy access to internal and external databases.

The eCourt Initiatives

The eCourt strategy consists of a number of initiatives, including:

- the Electronic Filing System;
- the eCourt Online Forum;
- the development of the Court's new Case Management System;
- the use of electronic courtrooms and electronic hearings;
- electronic trials;
- increased use of videoconferencing;
- a Document Management System; and
- information to the public, including the further development of the Court's website.

This paper examines the first two initiatives.

Electronic Filing of Court Documents

BACKGROUND

As in most superior courts, proceedings in the Federal Court involve a significant number of documents. These include the application and supporting documents that are needed to commence a proceeding, notices of motion seeking orders in the course of the proceeding (usually on procedural issues), pleadings and evidentiary material (primarily in the form of affidavits).

Until the introduction of fax filing in late 1999, a party could only file a document in the Court by having it personally delivered to the registry, or by sending the document to the registry by post or document exchange. The next step has been to establish a system,

supported by the *Federal Court Rules*, to allow for the electronic filing of documents.

THE ELECTRONIC FILING SYSTEM

The Court's Electronic Filing System allows for the electronic lodgement, filing, service and handling of documents in proceedings that come before the Court. Electronic filing will greatly enhance public access to justice for potential litigants, and is analogous to a court registry being open in every corner of the world, 24 hours a day, 365 days a year.

The system is being implemented in four stages, with the final stage being the introduction of an electronic document system which is fully integrated with the Court's case management and finance management systems. The first two stages of the system have been implemented.

Stage One, which commenced operation in October 2000, enabled litigants to send documents and pay their filing fees via the internet. Each document received by the Court was printed as hard copy, which was then signed and stamped in the usual way. The stamped document would be collected by, or sent by post or document exchange to, the filing party.

Stage Two of the project commenced in March 2001. It allows for the filing, processing and return of documents electronically. In response to the feedback to Stage One, Stage Two also made a number of modifications to further streamline the processes for electronic filing. This included establishing a system where frequent users may register for a user name and password which allows them to send documents without having to complete the cover sheet.

The final stages of this project are critical components of the overall eCourt strategy and include advanced functionality between the Court and parties with regard to their cases. At the completion of these stages, the Electronic Filing System will:

- permit authorised external users online access for filing, viewing and retrieval of electronic documents, and retrieval of information about pending cases, including the ability to search court databases using search engines and hypertext links;
- enable the immediate online delivery (not just in the courtroom) of the orders made by the Court, including comprehensive directions arising from directions hearings;
- enable "hearings" to occur where it will not be necessary for a

party's representatives to attend the actual courtroom but still provide to those representatives immediate access to information from the Court's databases about the status of matters or about earlier terms of directions;

- allow the Court to publish court-related data for public access via the internet; and
- enable judges and staff to obtain ready access to a collection of sophisticated case-related information within the Court's databases.

THE LEGISLATIVE FRAMEWORK

Under s 59 of the *Federal Court of Australia Act*, the Judges of the Court have the power to make Rules of Court in relation to the practice and procedure to be followed in the Court and its registries. O 1 of the *Federal Court Rules* includes a number of rules concerning the manner in which documents are to be filed in the Court.

In August 2000 and February 2001 the *Federal Court Rules* were amended to provide for the lodgement and filing of documents by "electronic communication". "Electronic communication" is defined in O 1 r 4 as meaning "a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, including an email or an email attachment".

O 1 rr 5A and 5AC provide that a document may be filed electronically if it:

- is not more than 50 pages long (including attachments)—O 1 r 5A(2)(b);
- is not an affidavit referred to in O 77 para 19(6)(b)—O 1 r 5A(2)(c);
- is sent using the Court's internet homepage—O 1 r 5AC(2)(a)(i);
- is in an electronic format approved by the Registrar—O 1 r 5AC(2)(b);
- is, to the extent practicable, in accordance with the prescribed form—O 1 r 5AC(2)(c);
- is capable of being printed with the content and in the form in which it was created—O 1 r 5AC(2)(d); and
- is accompanied by a cover sheet—O 1 r 5AC(2)(e).

The 50 page limit was set in light of concerns by the registries as to the time and resources that would be used in printing large documents.

O 1 subr 5AC(3) provides that an affidavit may only be filed electronically by sending an image of the affidavit in accordance with subr 5AC(2). This restriction has been imposed because affidavits set out

information which may ultimately be part of the evidence before the Court. In addition, each affidavit must be signed by the person making it (“the deponent”) and by the solicitor, justice of the peace or commissioner for oaths before whom the affidavit is made. The Court considered that the evidentiary nature of an affidavit, combined with the potential difficulty of electronically affixing two signatures to it, made it desirable that only the image of the executed affidavit should be accepted at this stage of the electronic filing project.

The Rules were also amended to:

- allow most documents to be signed electronically by providing that, where the Rules requires a document (other than an affidavit) to be signed, that requirement shall be satisfied if a facsimile of the signature is affixed to the document by electronic means—O 41 r 7;
- allow the Court to affix its seal and stamp electronically—O 46 r 4A;
- allow parties to specify an “email address for service” and for documents to be sent to that address by way of service—O 7 rr 4, 4A and 7, O 52A r 4 and Form 12.

The Rules provide that copies of all original documents sent electronically must be retained by the sender and produced as and when directed by the Court. If the Court directs that the paper copy of the document be produced, the first page must be endorsed with a statement that the paper copy is a true copy of the document sent by electronic communication and the date that the document was sent.

HOW THE ELECTRONIC FILING SYSTEM OPERATES

The Electronic Filing System is accessed by going to the Court’s website at <<http://www.fedcourt.gov.au>> and following the relevant links. The site explains how a document may be filed electronically, and includes information on the Federal Court forms and the filing fees that may be payable. There are also links to the forms which can be downloaded and completed offline. Guides to completing the most commonly used forms are also available.

Documents and Related Information on the Court’s Website

The development of the Electronic Filing System site has highlighted a couple of issues concerning the Court’s forms. The first issue is that the Federal Court Rules prescribe a large number of forms. For example, there are prescribed forms for applications, notices of motion, defences,

statements of claim, affidavits and various other documents. The particular form that must be used depends on the type of application or procedure being invoked. To help address this issue, the Court has prepared a guide that sets out the relevant form or forms to be used for each type of application or procedure.

The second issue is that most of the prescribed forms are incomplete—that is, before a form can be completed and sent to the Court it is necessary to add to it the prescribed heading and footer. To help address this issue, the Court has prepared “complete” versions of a number of the most commonly used forms. Each of these forms is also accompanied by a guide as to when the form is to be used and how it should be completed.

Both of the above issues will be considered by the Court in the course of its Rules Revision Project. The goal of this project is for the Court to have Rules (and forms) which:

- facilitate access to justice
- promote efficiency in the administration of the law;
- complement and reflect the Court’s case management philosophy and systems;
- take into account current and future advances in information technology (eg facsimile filing and electronic filing);
- are easily capable of being updated;
- are simple and clear.

Electronically Sending a Document for Filing

Having gone to the website, a person wishing to send a document must:

1. complete the cover sheet (which sets out details of the sender, the document(s) to be filed and any fees to be paid);
2. complete the document to be filed and attach it to the cover sheet;
3. complete the payment details for any fees or, if an exemption or waiver of the fees is sought, an application to that effect; and
4. send the cover sheet and attached documents.

In accordance with the Rules noted above, documents to be filed or lodged electronically must be:

- capable of being printed with the content and in the form in which it was created;
- no more than 50 pages long (including any attachment); and
- in Rich Text Format (RTF), Portable Document Format (PDF),

Tagged Image Format (TIF), Graphical Information Format (GIF), Joint Photographic Experts Group (JPG) or Word.

Any filing and other fees may be paid electronically by credit card (VISA, MasterCard or Bank Card).

Senders are advised that complex documents such as maps (where photo reduction results in poor image quality or loss of scale) or images where colour is a critical component (for example, in some intellectual property cases) may not be suitable for electronic filing.

Document Acceptance

Once a document is sent to the Court, a transmission number is provided. Provision of this transmission number does not mean that the document or application has been accepted or filed. A document or application is not accepted as filed by the Court until it is received, checked for completeness and accuracy and stamped by the Court. If filing of the document or application is refused, the sender will be advised and the filing fee returned by the registry. Documents and/or applications received after 4.30 pm (local registry time) on a business day are deemed to have been received at the start of business on the following working day.

Once a document is accepted by the Court, the registry will electronically affix the Court's stamp to, and enter the relevant details on, the document. The document will be returned to the sender by email or, if the sender requests, by facsimile transmission, post, document exchange or by holding them for collection at the registry. The documents are returned electronically in PDF format.

If the stamped document is returned by email or facsimile transmission, copies of it may be printed for the purpose of service on the other party or parties. If the documents are to be returned by post or held for collection from the registry, the person filing or lodging the documents must specify the number of copies of each document they will require. The copies are prepared by the registry at a fee of AUD\$1.00 per page.

SERVICE OF ELECTRONIC DOCUMENTS

As noted above, the *Rules* have been amended to allow documents to be served electronically in certain circumstances. An application or other originating process that commences a proceeding must still be personally served on the respondent, even if filed with the Court electronically.

However, where a party provides a written notice to the Court and other parties specifying an email address for service, documents may be served on the party by sending them to that email address.

SECURITY AND AUTHENTICATION

The Court has approached the issues of security and authentication with the view that the electronic filing system should, to the extent possible, replicate the filing and processing of documents in an ordinary registry. The integrity of messages and documents sent to the Court using the electronic filing system is protected by 128-bit encryption. Once a message or document is posted it cannot be withdrawn or amended in any way.

The Court has taken a pragmatic approach to the issue of authentication. Most documents lodged with the Court are authenticated by the signature of the party lodging the document, or the party's legal representative. As the signature on a hard copy document is rarely verified by the registry at the time the document is filed, the Court has taken the view that it is not necessary for a document filed electronically to be subject to any greater verification.

Accordingly, O 41 r 7 of the Rules allows most documents to be signed electronically by providing that, where the Rules requires a document (other than an affidavit) to be signed, that requirement shall be satisfied if a facsimile of the signature is affixed to the document by electronic means. The Rules also provide that copies of all original documents sent electronically must be retained by the sender and produced as and when directed by the Court.

What constitutes a signature for the purposes of O 41 r 7 will ultimately be a matter for the Court. However, under the common law, a signature is any mark that has been affixed by the signer with the intent to be bound by the contents of the document that has been signed. The intention is implied and the onus is on the signatory to prove otherwise. It may therefore be sufficient for a party or their lawyer to "sign" a document by using their typed name with the intention to be bound by it.

The eCourt Online Forum

INTRODUCTION

The Court has been piloting the eCourt Online Forum ("the eCourt") since late February 2001. The forum is a web-based online system that operates as a virtual courtroom where issues may be addressed, and direc-

tions and other orders made. It has been established to provide judges and parties with another mechanism to deal with directions and interlocutory matters, and is intended to complement the existing options of ordinary hearings, teleconferences and videoconferences. The eCourt is accessed by going to the Court's website at <<http://www.fedcourt.gov.au>> and following the relevant links. The eCourt site can also be bookmarked.

The eCourt is being piloted until the end of 2001. At that time the legislative framework and the security, technical and administrative arrangements will be reviewed in light of the pilot and the feedback the Court receives.

THE BENEFITS OF THE ECOURT

The eCourt will not remove the need for traditional hearings before a judge with the parties, their legal representatives and the witnesses all present in the same courtroom. However, in many cases there are legal and procedural issues that can be resolved without the need for such a hearing. It is in these cases that the eCourt has an important role. That is, the eCourt will enable parties, through their representatives or individually, to participate in an electronic hearing which will replicate the usual manner in which court hearings are conducted but without the need for the judge and the parties to be in the courtroom at the one time.

The eCourt will enable the parties to communicate with the Court at times convenient to them (subject to any timetable and other directions set by the judge). It is also expected that the eCourt will enable practitioners to substantially reduce the costs of "appearing" before the Court because there will be fewer attendances.

THE LEGISLATIVE FRAMEWORK

Subject to the outcome of the evaluation of the eCourt pilot, it is expected that the Court will seek amendments to the *Federal Court of Australia Act* to provide a legislative framework for the use of electronic communications in the conduct of a proceeding. In the meantime, the following provisions of the Act and *Federal Court Rules* form the basis for a proceeding to be conducted using electronic communication.

Subs 47A (1A) of the Act provides that the Court or a judge may, for the purposes of any proceeding, direct or allow testimony to be given by video link, telephone or *other appropriate means*. S 59 of the Act allows the Court to make rules for and in relation to its practice and procedure. In particular,

- para 59(2)(ta) allows rules to be made for the administration of oaths and affirmations in respect of testimony to be given by video link, telephone *or other appropriate means*;
- para 59(2)(tb) allows rules to be made for the making or receipt of submissions by video link, telephone *or other appropriate means*; and
- subs 59(2A) allows rules to be made in relation to the taking or receipt of evidence where the evidence is given by video link, telephone *or other appropriate means*, and the Court or a judge is authorised to receive the evidence under another provision of the Act or another law of the Commonwealth.

O 10 subpara 1(2)(a)(xviii) provides that the Court may make orders as to “the taking of evidence and receipt of submissions by video link, or telephone, or electronic communication, or such other means as the Court considers appropriate”.

HOW THE eCOURT ONLINE FORUM OPERATES

The following section looks at how the eCourt operates. A diagram of how a matter might be dealt with on the eCourt appears at the end of this paper.

When Will the eCourt Be Used?

The Court may, on its own motion or at the request of a party, direct that a matter, or part of a matter, be dealt with on the eCourt. Whether, and to what extent, a matter will be dealt with on the eCourt is for the Court to determine. In making this determination, regard will be given to such things as the nature and complexity of the issues to be resolved, the number of parties, the access of each party to email and the internet, the views of the parties, the nature and extent of any evidence that may be required, and the urgency of the matter or part of a matter. The Court will determine which issues will be dealt with on the eCourt, and may give directions as to the time in which parties must login to the eCourt and respond to messages. The Court may also set a timetable or deadline for when the issue is to be resolved. The Court may terminate the use of the eCourt for a matter or part of a matter at any time either on the Court’s own motion or at the request of a party.

Security and Authentication

The Court has approached the issues of security and authentication with

the view that the eCourt should, to the extent possible, replicate the openness of an ordinary courtroom. This means the Court does not control who may see the messages posted to the eCourt—in fact, these messages are available on the eCourt site as “eTranscript”. The Court is concerned, however, with who may post messages and documents to the eCourt, and with protecting the integrity of those messages and documents.

Accordingly, the eCourt provides for three levels of access. The first level is public access. Anyone may visit the eCourt site and view the “eTranscript” for each matter without an account name or password. A public visitor cannot post messages to the eCourt, and does not have access to any documents that may have been posted in an eCourt matter.

The second level of access is for a person who is a party to one or more matters being conducted on the eCourt. Each party is given an account name and password which will allow the party to post messages and documents to the eCourt, and to read messages and documents posted to the eCourt by the Court or another party, but only in those matters to which the party has been granted access. A party cannot add, remove or amend matters on the eCourt. Nor can a party make changes to the access that the party (or any other party) has to a matter on the eCourt.

The third level of access is for administrators. An administrator can create and amend (but not remove) matters; create, vary and delete accounts for parties; and grant or revoke the access of a party to a particular matter. An administrator also has access to all the matters on the eCourt.

The integrity of messages and documents posted to the eCourt is protected by 128-bit encryption. Once a message or document is posted it can not be withdrawn or amended in any way. Messages and documents sent to the eCourt from a particular account are deemed to have been sent by, and to be the responsibility of, the person to whom that account was allocated. The issue of authentication—of ensuring that messages and documents are in fact from the party who has apparently sent them—will be reviewed at the end of the pilot.

The eCourt Protocol

In general terms, the use of the eCourt is governed by a protocol that all users are assumed to have read and agreed to follow. In particular matters, the Court or judge may also give specific directions as to the use

of the eCourt. The protocol makes it clear that conducting a matter using the eCourt is the equivalent of conducting a matter in an ordinary courtroom. This means:

- the eCourt must only be used for issues requiring consideration and determination by the Court or a judge;
- the eCourt is not to be used for communications solely between the parties or their representatives, particularly where the communications are confidential or otherwise sensitive;
- the language and modes of address used on the eCourt must be same as that used if the matter were being dealt with an ordinary courtroom;
- undertakings given on the eCourt by a party or their representative to the Court or a judge or other parties are binding as if the undertaking were given in an ordinary courtroom;
- the rules of contempt apply to proceedings conducted using the eCourt; and
- a copy of the discussion thread for each topic dealt with on the eCourt will, unless the Court or a judge otherwise orders, be publicly available as read-only text on the Court's website.

The Court or a judge may give directions as to how a matter, or part of a matter, will be conducted on the eCourt. For example, the Court or a Judge may give directions as to:

- the topic or topics to be dealt with on the eCourt;
- who may participate in the eCourt;
- the maximum length of messages and attachments; and
- the maximum time in which messages (including replies) must be posted to the eCourt.

Messages

Posting messages and documents to the eCourt is done in a similar manner to an email system. The Protocol provides that messages posted to the eCourt must be relevant to the topic or discussion thread to which they are sent; brief and to the point; and timely.

Documents

Documents may be attached to messages sent to the eCourt. These may be formal documents such as applications, notices of motion, affidavits and consent orders, or other documents such as submissions, lists of authorities and draft orders.

However, as the eCourt is not yet integrated with the Court's electronic filing system, documents cannot be filed by posting them to the eCourt. Documents can only be filed by delivering them personally, or by sending them by post, document exchange, facsimile transmission or electronically to a registry in accordance with the Federal Court Rules. In urgent matters, a document that is to be filed may be sent to the eCourt with an undertaking that it will be filed in the Court on the next business day.

Where a message refers to a document that has been filed, a copy of the filed document may be attached to the message for ease of reference. In these cases the message should indicate the date on which the document was filed.

Open Court

There is an issue about the extent to which the Court can exercise jurisdiction in proceedings conducted on the eCourt given that members of the public do not have real time access to a proceeding conducted on it. S 17 of the *Federal Court of Australia Act* provides:

Exercise of jurisdiction in open court and in Chambers

- (1) Except where, as authorized by this section or another law of the Commonwealth, the jurisdiction of the Court is exercised by a Judge sitting in Chambers, the jurisdiction of the Court shall be exercised in open court.
- (2) The jurisdiction of the Court may be exercised by a Judge sitting in Chambers in:
 - (a) a proceeding on an application relating to the conduct of a proceeding;
 - (b) a proceeding on an application for orders or directions as to any matter which, by this Act or any other law of the Commonwealth, is made subject to the direction of a Judge sitting in Chambers; and
 - (c) a proceeding on any other application authorized by the Rules of Court to be made to a Judge sitting in Chambers.
- (3) A Judge may order a proceeding in Chambers to be adjourned into court.
- (4) The Court may order the exclusion of the public or of persons specified by the Court from a sitting of the Court where the Court is satisfied that the presence of the public

or of those persons, as the case may be, would be contrary to the interests of justice.

During the pilot, the eCourt has been used to hear and determine applications relating to the conduct of a proceeding on the basis that this is analogous to the Court's jurisdiction being exercised by a judge sitting in chambers pursuant to para 17(2)(a) of the Act.

The analogy to a judge sitting in chambers is not a strict one as there is scope for some public scrutiny of a proceeding on the eCourt. In particular, the messages posted to the eCourt in a matter may be read by the public by going to the eTranscript for the matter. No account name or password is needed for this purpose. The eTranscript sets out the various discussion threads in the matter, and is continually updated as new messages are posted to the eCourt. Documents posted to the eCourt are not available to members of the public, but can be viewed at the relevant court registry subject to the usual rules governing access to Court documents.

The evaluation of the eCourt pilot will include consideration of whether the *Federal Court of Australia Act* should be amended to include a definition of a "judge sitting in chambers" as including a judge using electronic communication to conduct a proceeding. Consideration will also be given to amending the Act to make express reference to the Court being able to exercise jurisdiction in an electronic environment, and to amending the *Federal Court Rules* to prescribe in greater detail the proceedings or applications that might be dealt with using electronic communications such as the eCourt forum.

Consent Orders

Where the document sent to the eCourt is a draft consent order, the protocol provides that the message to which the document is attached should include a certification by the sender that all the parties have seen, and agreed to, the terms of the consent order. Alternatively, a message seeking consent orders may attach: a copy of the orders to which the signature of each party or their representative has been affixed pursuant to O 41 r 7 of the *Federal Court Rules*; or a document that is an image of the signed consent orders.

Entering Orders

Orders made by the Court or a judge on the eCourt must be entered in

the usual way under O 36 of the *Federal Court Rules*. This means a copy of the orders in the prescribed form must be lodged with the registry of the Court for signing and sealing. This may be done electronically using the Electronic Filing System.

Conclusion

The Court is committed to ensuring that the justice system is relevant and responsive to the needs of the Australian community in the 21st century. The innovative use of technology, as demonstrated by the initiatives described in this paper, will help to extend and enhance the accessibility of the Court and the ways in which proceedings that come before it may be managed.

Diagram 1: Conducting a case via eCourt

