Introduction

On 5 February 2009, the Senate ordered a review of Access to Justice in Australia and invited submissions.

This Submission, made by Ian Chivers, Director and Chief Executive of Systematics Pty Ltd, principally addresses the following terms of reference:

c. the cost of delivering justice; and

d. measures to reduce the length and complexity of litigation and improve efficiency.

It is likely, however, that the measures suggested in this Submission to address those specific terms of reference will also positively impact other terms of reference.

The Submission is framed as far as possible, in the context of patent protected technologies, to be commercially neutral but the commercial interest of Ian Chivers and Systematics in this field is declared.

Submission Abstract

The Submission observes that evidence presentation and management technology to support the requirements of Courts, Inquiries and other hearings has been in limited use for more than 15 years.

The Submission cites published papers and public observations of Judicial Officers, academics, senior legal professionals and others that the applied technology very significantly accelerates the hearing of legal proceedings, delivering a better quality of justice in conjunction with substantial cost savings.

The Submission argues that objections to wider adoption of evidence presentation and management technology, including cost, comparative disadvantage between parties and skill and transitional issues have lost the validity some may have once had.

The Submission suggests that the Senate Standing Committee on Legal and Constitutional Affairs should lend its weight to effect the universal application of evidence presentation and management technology as a key measure to reduce the cost of delivering justice, to reduce the length and complexity of litigation and to improve efficiency in Australian Courts.

Credentials

Systematics Pty Ltd was established 1978 and throughout its existence has focused on evidence management requirements and the benefits of applying technological solutions to the litigation process.

The Company is credited with many significant advances in evidence management technology addressing courtroom process and preparation for litigation.

Since 1993 the Company has delivered approximately 30 "technology courts", commencing with the Kalajzich Inquiry in NSW. Highlights of the Company's project history are included at Annexure "f".

The Company conducts ongoing Research and Development into courtroom evidence presentation and management and litigation preparation technologies and has secured patent protection for various inventive developments in these fields. These are described in Annexure "g".

Ian Chivers studied Law and Computer Science between 1973 and 1980 and was admitted to practise as a Solicitor in 1978. He became Chief Executive of Systematics in 1989. A Curriculum Vitae of Ian Chivers is Annexure "h".

Public Observations Addressing Evidence Management Technology Experience in Courts

There is now a significant body of published independent commentary advocating the universal application of technology to support litigation in Australia and supporting the proposition that the proper application of technology reduces hearing time, reduces cost and enhances the quality of Justice delivered. This Submission draws together the commentary of Judicial Officers, academics, legal professionals and others in support of the proposition. The highlights of commentary in historical sequence are:

- In 1994, following the *Kalajzich Inquiry*, Justice John Slattery AO, QC, noted that

  "The course of the hearing was greatly accelerated" … "I would estimate in the vicinity of 25 to 30 per cent with proportional cost savings"[1]

- In 1998, reflecting on his experience in *Re Estate Mortgage*, The Hon. Justice Tim Smith of the Supreme Court of Victoria, suggested that the technology had delivered

  "a better "Quality of Justice", by: increasing the capacity to better examine the full range of evidence, allowing more witnesses and more exhibits, in less time, and allowing more access to the courts." ... "the Plaintiff's solicitors estimated saving of 30% to 40% in hearing time in first eighty days ($3,000,000.00 in legal costs)."[2]

[1] Slattery AO QC, Justice John, "The Kalajzich Inquiry: Harnessing Technology" (1994) 6(11) NSW Judicial Officers Bulletin 81

[2] Smith, The Hon Justice T, "The Estate Mortgage Court System" AIJA Technology for Justice Conference, 23rd March 1998 at http://www.aija.org.au/conference98/papers/estate/index.htm viewed 6 July 2009

- In relation to the same case, the Law Reform Committee of Victoria reported that

  "Those involved in the case have estimated that using the technology reduced court time, and therefore costs, by almost 50 per cent."[3]

- In 2002, Justice Bleby of the Supreme Court of South Australia recorded his reactions as trial Judge to the electronically managed matter of *Re Southern Equities (Bond Corporation)* as follows:

  "I came to the system with some trepidation in my technologically impaired state"…
  "I soon found that the system had been developed to such a high standard of user friendliness that its use did not detract from my concentration on the trial" …
  "the actual trial time saved by not moving, retrieving and returning paper is at least 25%." …
  "it was a pleasure to use" …
  "I have since returned to the comparative frustration of conventional techniques of using hard copy documents and transcript"[4]

- In 2008, New Zealand *Law Talk* reported the following time saving in the High Court matter of *Re W –v- Crown*:

  "The saving in court time saw last year's first e-litigation case completed in 32.5 days instead of the estimated 45. Counsel and Judge (Miller J) put this saving down to the use of System@Law".[5]

- Also in 2008, Mr Royden Hindle, Chairman, Human Rights Tribunal, Wellington and Ms Cheryl Gwyn, Deputy Solicitor General, New Zealand, made the observation in transcript of the matter *Re CPA*G that the "*technology applied reduced hearing of evidence from 35 days to 9 days".*

- In 2009, Justice Thomas Granger of the Superior Court of Ontario, expressed the view that it should be possible to "*convert any courtroom into an electronic courtroom for less than $1000"*, that typically, technology in the courtroom should *"save 1 day in a 3 day trial"* and that in the 2007 matter of *Re GasTOPS –v- MxI*, the use of technology had resulted in *"50 Trial days saved".*[6]

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[3] Parliament of Victoria, Law Reform Committee, "Technology and the Law", May 1999 at http://www.parliament.vic.gov.au/lawreform/inquiries/Technology%20and%20the%20Law/final%20report.pdf – Chapter 10 viewed 6 July 2009

[4] Bleby, Justice D, "The First Electronic Trial, South Australian Supreme Court", paper prepared at the request of the Historical Collections Librarian of the Supreme Court library for the purpose of recording some of the judge's reactions as trial Judge to the electronic aspects of the trial, October 2002

[5] New Zealand Law Talk, July 2008

[6] Granger, Justice Thomas, "Going Electronic: Is Justice Denied by a Failure to Adopt Technology in the Courtroom" CT Summation Webinar 5 May, 2009 https://admin.na3.acrobat.com/_a777177044/p99213428/ viewed 24 June 2009; and "Judges Limit Access to Justice in Refusing to Go Electronic" The Lawyers Weekly Vol.28, No 14 August 15 2008

Current deployments of Courtroom evidence presentation and management technology in which participants anecdotally confirm the acceleration of proceedings, enhanced quality of Justice and delivery of cost savings, include:

- *Carter Holt Harvey -v- Genesis Energy and Rolls Royce* before Justice Cooper of the High Court of New Zealand in Auckland.
- *The Pennington Inquiry* - Commissioned by the Welsh Parliament into child deaths from eColi food poisoning in South Wales.
- *Westpac –v- Internal Revenue Department* before Justice Harrison of the High Court of New Zealand in Auckland.
- *The Penrose Inquiry* - Commissioned by the Scottish Parliament into Hepatitis C/HIV acquired infection from National Health Service treatment with blood and blood products in Scotland.

Case Study: The Carter Holt Harvey –v- Genesis Energy and Rolls Royce Experience

Evidence presentation and management technology is currently being applied in the matter of *Carter Holt Harvey -v- Genesis Energy and Rolls Royce* before Justice Cooper of the High Court of New Zealand in Auckland (the CHH trial).

The proceedings commenced on 20 April 2009 and have been sitting without significant interruption since that date.

Between 20 April and 6 July the parties have presented, by publication, 3,834 items of evidence.[7]

As noted by Justice Granger[8], it is typically estimated that, in a traditionally managed courtroom, the elapsed time between calling an item of evidence in proceedings and the point in time when the Court is ready to receive questions addressing that item of evidence is more than 2 minutes. Given the number of items of evidence published electronically in the CHH trial, it has, on this basis of comparison, so far been accelerated by 25 hearing days – a cost saving to the parties of more than $500,000.

Justice Cooper, the presiding judicial officer in the CHH trial confirms the applicability of Justice Granger's basis of estimation.

[7] Logs of publication at http://www.delium.com/court viewed 6 July 2009

[8] Granger, Justice T, n 6

Objections to Electronic Evidence Presentation and Management

While electronic evidence presentation and management technology has been available to Courts for more than 15 years and the benefits are well documented, use of this technology remains the exception rather than the rule.
The most common objections to the application of electronic evidence presentation and management technology are very clearly described in the webinar presented by Justice Granger.[9] As noted by Justice Granger, the principal objections can be generally reduced to:

1. Tradition
2. Original evidence has historically been in paper format
3. Technological skills of Judges and Senior Practitioners are often inadequate
4. Rules of Practice in many jurisdictions do not cater for the electronic model
5. Cost to establish an electronic courtroom can be great if the technology model is inappropriate

I would describe these objections as traditional - transitional or skill based. Justice Granger addresses these objections comprehensively and extends to observe that effectively all commercial documentary evidence is now initially created in electronic form and that, as such, the paper form is a deficient secondary rendition of the evidence. In short, in Justice Granger's view the community has moved on, the Courts and the legal profession is compelled to catch up if they are to remain relevant.

It is sufficient for the purposes of this submission to observe that even if there were no associated time or cost savings, the pressures of an electronic community are such that electronic evidence presentation and management now represent the only proper vehicle to adjudicate disputes which have been created and pursued in the post-paper world.

Three issues require examination beyond the scope of Justice Granger's commentary.

1. First and critically stands a perception that the "technology court" is a high cost dedicated environment. In earlier days this was true and as a result cost benefit balances suggested that only large scale proceedings could derive net benefit from the required technology infrastructure and support services.

   For some years now, however, at least for evidence presentation and management technologies, this is simply not true. The vehicle of the Internet, coupled with secure wireless technology makes it possible to deliver electronic evidence presentation and management to any courtroom at very little cost to the participants and no cost to the Court.

   To illustrate this point the moot event to exercise electronic practices which is part of the Electronic Practice and Litigation final year undergraduate elective at Murdoch University is conducted part in the University purpose built "technology court" and part in a University coffee shop. The functionality in both locations is effectively identical.

   Both the Carter Holt Harvey –v- Genesis Energy and Rolls Royce and Westpac –v- Internal Revenue hearings in the High Court of New Zealand are being conducted in courtrooms with no relevant pre-existing technology. Auckland Court 1, the venue for Westpac –v- Internal Revenue is a heritage building more than 150 years old.

[9] Granger, Justice T, n 6

2. Second, the impact of the change on the business of legal practitioners must be considered.

   While Courts are overcommitted, some legal practitioners are finding it increasingly difficult to make a profitable business in law and reducing the duration of court sittings has a direct effect on the revenue of participant legal firms and legal practitioners.

   While reduced legal costs are very attractive to the community, this necessarily presents a challenge to legal practitioners attempting to conduct a profitable business in what has become a very competitive market.

   The issue of how to effectively apply the resource which becomes available upon the implementation of effective evidence presentation and management technology might be considered by the committee when addressing its other Terms of Reference.

3. Finally, perhaps most significantly, is the issue of relative advantage between parties.

   The Courtroom is necessarily an adversarial environment in which any form of change will deliver advantage to one party and relative disadvantage to another. Typically, from a technology perspective this is manifested in a lesser resourced, less technologically advanced party arguing that cost and other factors will disadvantage that party relative to the party which comes armed with more resources and technology.

   An application on this basis is normally understood and accepted by the trial judge. In fact, as far as I am aware, the only rejection of an application of this type in Australia was the Judgment of Justice Bleby of the Supreme Court of South Australia in Harris Scarfe & Ors –v- Ernst & Young & Ors (No 3) – Annexure "e".

   To my mind, this is the most difficult issue to accommodate but ultimately, as costs have diminished, skills have advanced and the benefits of applying evidence presentation and management technology have developed the argument in favor of applying technology have become overwhelming.

   As an aside, it might be worth considering the position of the more advanced party in this scenario. That party commences the conventional trial understanding it has an advantage. The introduction of current generation courtroom technology, that is both inexpensive and simple to use, can only serve to level the playing field and dilute that advantage. I would suggest this is understood by the more technologically advanced party but perhaps not understood by the less technologically developed party or the Court. Perhaps in this context, it is understandable that applications against the use of evidence presentation and management software, typically made by the technologically inhibited party, are not vigorously contested by the technologically advanced party.

I would be pleased to provide more detailed supplementary submissions addressing the specifics of these issues if this would assist the Committee.

Conclusion

Evidence presentation technology is a proven measure to "reduce the cost of delivering justice" and to "reduce the length and complexity of litigation and improve (the) efficiency" of the delivery of justice substantially.

Evidence presentation and management technology delivers:

- "a better Quality of Justice"*
  ** Smith J: AIJA Published paper re Estate Mortgage 1998 to Harrison J – Westpac –v- Internal Revenue Department.*

- Substantially accelerated hearings and proportional cost savings.
  "I would estimate it to be in the vicinity of 25 to 30 percent with proportional cost savings" #
  #Slattery J Published paper re Kalajzich 1994 to Cooper J – Carter Holt Harvey –v- Genesis Energy and Rolls Royce 2009.

- Personalised data and Private Editions of Evidence and Legal Professional operational control
  "We didn't think personalization of evidence would be possible." ~
  ~Professor Frederic Lederer College of William and Mary Virginia 2009

- These benefits are possible without making operational demands on Court staff or requiring specialised technical infrastructure. The cost of deployment and operation to achieve these outcomes can be very low.
  "convert any courtroom into an electronic courtroom for less than $1000"
  Justice Granger – Superior Court of Ontario "Going Electronic: Is Justice Denied by a Failure to Adopt Technology in the Courtroom" CT Summation Webinar 5 May, 2009 -
  https://admin.na3.acrobat.com/_a777177044/p99213428/

In his article, "Judges Limit Access to Justice in Refusing to Go Electronic" published in "The Lawyers Weekly" Vol. 28, No. 14 (August 15, 2008) Justice Granger summarises the position from a number of perspectives:

> "Meaningful access to justice requires being able to access the justice system in a timely manner and at an affordable cost."
>
> "The use of electronic (evidence presentation and management) technology can make the courtroom more efficient and thereby reduce legal fees, which will increase access to justice". …
>
> "The efficiencies of electronic technology in the courtroom can be realized in both large document cases and small family law actions."

Justice Granger's commentary links the effectiveness of measures designed to address terms of reference "c" and "d" with the wider issues of access to justice the subject of the balance of the terms of reference being addressed by the committee.

Resistance to the application of evidence presentation and management falls into three classes:

- Traditional – Society has moved on, the Courts and the Legal profession must follow.
- Business – Unfounded protectionism is unacceptable. The disposition of redundant resources is beyond the scope of this submission.
- Tactical – It is the responsibility of judges to respond to the full scope of relevant issues, some of which may fall outside the scope of submissions being made to them.

It is suggested the Committee should observe the commentaries cited and report the capacity of evidence presentation and management technology to substantially reduce the cost of delivering justice and reduce the length and complexity of litigation and improve efficiency.

The Committee should press for the adoption of measures to compel the use of evidence presentation and management technology in all Australian courts.

I would be pleased to expand on any aspect of the submission as necessary.

Thank you for the opportunity to make this submission.

Ian Chivers – 7 July 2009

Annexures

- Annexure "a" Published Paper Justice John Slattery Article Judicial Officers Journal Re Kalajzich
- Annexure "b" Judicial Archive Paper by Justice Bleby SA Supreme Court Re Electronic Trial of SECL (Bond) -v- Arthur Andersen
- Annexure "c" Published Paper Justice Thomas Granger Lawyers Weekly Re Access to Justice and Technology
- Annexure "d" Published Paper Assoc Professor Sheryl Jackson Harnessing the Benefit of Trial Technology
- Annexure "e" Judgment and Direction Justice Bleby Re Harris Scarfe Electronic Courtroom
- Annexure "f" Evidence Presentation and Management Project History – Systematics Pty Ltd
- Annexure "g" Summary of Patents and Inventions - Systematics Pty Ltd
- Annexure "h" Curriculum Vitae of Ian Chivers