
Electronic Case Management in New South Wales

Timothy Webb

Timothy Webb is a Senior Solicitor, 'Litigation & Dispute Resolution - IP/IT' practice group of the Sydney office of Clayton Utz.

Introduction

In 2001, Justice Clifford Einstein of the Supreme Court of NSW noted that the "use of technology to achieve necessary efficiencies in relation to litigation is not only highly desirable but sometimes absolutely essential".¹ In the five years since his Honour made those comments, there has been a concerted movement towards electronic case management ("ECM") to enhance the efficiency of legal proceedings in New South Wales. This article will provide a detailed overview of the relevant developments, from legislative reform by the NSW Government to the making of appropriate instruments, rules and practice notes.

NSW statutory framework

The *Electronic Transactions Act 2000* (NSW) ("ET Act") commenced operation on 7 December 2000. The ET Act substantially mirrors the *Electronic Transactions Act 1999* (Cth), which commenced operation on 15 March 2000. The object of both Acts is to provide a regulatory framework that:²

- (a) recognises the importance of the information economy to the future economic and social prosperity of Australia;
- (b) facilitates the use of electronic transactions;
- (c) promotes business and community confidence in the use of electronic transactions; and
- (d) enables business and the community to use electronic communications in their dealings with government.

However, the NSW legislation contains a significant part that does not appear in the Commonwealth statute. Part 2A (sections 14A to 14R)

of the ET Act, entitled "*Courts administration*", was inserted by the *Courts Legislation Miscellaneous Amendments Act 2002* (NSW), which commenced operation on 20 December 2002.

Section 14B of the ET Act empowers the Attorney-General to establish an electronic case management system ("ECM system") to enable:

- (a) documents with respect to legal proceedings to be created, filed, issued, used or served in electronic form;³
- (b) parties to legal proceedings to communicate in electronic form with other parties to the proceedings and with the court before which the proceedings are being taken; and
- (c) information concerning the progress of legal proceedings to be provided in electronic form to parties to the proceedings and to members of the public generally.

The term "*legal proceedings*" is not defined in the ET Act, although "*court*" is defined in section 14A to include any person or body that exercises judicial, magisterial or coronial functions, and includes any other person or body that is declared by the regulations to be a court for the purposes of Part 2A. The *Electronic Transactions Regulation 2001* (NSW) declares the Workers Compensation Commission⁴ and its Registrar to be courts for the purposes of Part 2A of the ET Act.

Section 14C of the ET Act provides that the Attorney General may, by order published in the Gazette, authorise the use of an ECM system by such courts ("ECM courts"), and for such purposes, as are specified in the order. To date, the Attorney General has made two orders pursuant

to section 14C, which are discussed below.

Sections 14D and 14E of the ET Act provide that any statutory requirement for documents filed in or issued by an ECM court to either be in writing or to be signed or sealed is satisfied if the document is, respectively, filed or issued by means of the ECM system or authenticated by a facsimile of the relevant signature or seal or in some other manner allowed by rules of court.

Section 14F of the ET Act provides that any statutory requirement for original or certified documents to be filed with an ECM court is satisfied by the filing of a copy of the relevant document, while section 14G provides that any statutory requirement to file multiple copies of a document does not apply to a document that is filed with an ECM court by means of an ECM system.

Documents created by means of an ECM system, whether by an ECM court or by a party to proceedings in an ECM court, are deemed by section 14H to have been issued by the court, or filed by the party, as the case requires.

Section 14I of the ET Act enables the rules of an ECM court to authorise certain kinds of hearing to be conducted by electronic communication sent by means of the ECM system. In its initial form, the section was limited to hearings authorised or required to be conducted in private. This was amended by the *Crimes and Courts Legislation Amendment Act 2005* (NSW), which extended section 14I to all hearings other than those conducted for the purpose of receiving oral evidence. However, in relation to civil proceedings in the Supreme Court of NSW, District Court of NSW, Dust Diseases Tribunal or Local Court of

NSW, section 14I must be applied subject to section 71 of the *Civil Procedure Act 2005* (NSW) which specifies the limited circumstances when the business of a court in relation to any proceedings may be conducted in the absence of the public.

Section 14J of the ET Act provides that misdirected initiating process (that is, process that is filed with an ECM court that does not have jurisdiction to hear the matter concerned) is to be remitted to a court that has the appropriate jurisdiction and deems that it is taken to have been lodged in the appropriate court as from the time it was originally filed.

Section 14K of the ET Act provides that transactions effected by means of an ECM system are taken to have been effected in Sydney. This ensures that all such transactions are referable to Sydney time.

Section 14L of the ET Act protects the Crown from actions for defamation and breach of confidence in relation to matters disclosed as a consequence of the use of an ECM system.

Section 14M of the ET Act stipulates that when documents have been filed in, or issued by, an ECM court that are subsequently served electronically are taken to have been served, while section 14N enables the rules of an ECM court to make provision with respect to the operation, use and control of an ECM system in relation to that court and proceedings before that court. These are discussed below under the heading "Rules of court".

The remainder of Part 2A (sections 14O to 14R) contains savings, transitional, deeming and exclusionary provisions.

ECM courts

On 28 October 2005, the Attorney General made the *Electronic Transactions (ECM Courts) Order 2005* ("ECM Courts Order"). The ECM Courts Order authorises the Court of Criminal Appeal⁵ and the Supreme Court of NSW⁶ to use CourtLinkNSW, an ECM system that has been established by the Attorney General under section 14B of the ET Act.

The Court of Criminal Appeal may use CourtLinkNSW for the following purpose:

Use in proceedings under the Criminal Appeal Act 1912 (NSW), but only so as:

- to enable documents to be filed, issued, used and served in electronic form, and
- to enable parties to the proceedings to communicate in electronic form with the Court of Criminal Appeal in connection with any business of the Court that is being conducted in the absence of the public.

The Supreme Court of NSW may use CourtLinkNSW for the following purpose:

Use in civil proceedings in the Corporations List, but only so as to enable documents to be filed, issued, used and served in electronic form. Use in civil proceedings in the Possession List, but only so as to enable documents to be filed, issued, used and served in electronic form. Use in civil proceedings in the Equity Division, but only so as to enable parties to the proceedings to communicate in electronic form with the Supreme Court in connection with any business of the Court that is being conducted in the absence of the public.

For the more convenient dispatch of business, the Supreme Court of NSW is divided into the Common Law Division and the Equity Division.⁷ The work of the Divisions is also distributed among a number of specialised lists. At present, there are seven specialist lists⁸ in the Common Law Division and seven specialist lists⁹ in the Equity Division.

The Possession List (one of the specialist lists in the Common Law Division) deals with all proceedings for the recovery of possession of land. The management of the List encourages early resolution of cases through mediation, other alternative dispute resolution processes, or settlement.¹⁰ The Corporations List (one of the specialist lists in the Equity Division) deals with all proceedings and interlocutory applications that arise out of the *Corporations Act 2001* (Cth) or the *Supreme Court (Corporations) Rules 1999* (NSW), or seek relief under any of those provisions, and proceedings relating to other incorporated bodies such as co-operatives and incorporated associations.¹¹

CourtLinkNSW may thus only be used in the Corporations List and the Possession List but only so as to enable documents to be filed, issued, used and served in electronic form,

and in the Equity Division generally (i.e. including any of its specialist lists), but only so as to enable parties to proceedings to communicate in electronic form with the Supreme Court in connection with any business of the Court that is being conducted in the absence of the public.

On 23 May 2006, the Attorney General made the *Electronic Transactions (ECM Courts) Amendment Order 2006* (NSW) to amend the ECM Courts Order in relation to Comcase, another ECM system that has been established by the Attorney General under section 14B of the ET Act.

Comcase is authorised to be used by the Workers Compensation Commission for use in proceedings under the *Workers Compensation Act 1987* (NSW) or the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), and by the Registrar in relation to any application to the Registrar under those Acts, but only so as to enable:

- (a) documents to be created, filed, issued, used and served in electronic form,
- (b) parties to the proceedings to communicate in electronic form with other parties to the proceedings and with the [Commission/Registrar], and
- (c) information concerning the progress of the proceedings to be provided in electronic form to parties to the proceedings and to members of the public generally.

The nature and use of CourtLinkNSW and Comcase are discussed below.

Rules of court

As noted above, section 14N of the ET Act enables the rules of an ECM court to make provision with respect to the operation, use and control of an ECM system in relation to that court and proceedings before that court. Rules regulating ECM have thus been made for the ECM courts specified in the ECM Courts Order, namely, the Court of Criminal Appeal, the Supreme Court of NSW and the Workers Compensation Commission.

Criminal Appeal Rules (NSW)

The Court of Criminal Appeal is established by and operates pursuant to the *Criminal Appeal Act 1912* (NSW) ("CA Act"). Rules of court for the purposes of the CA Act may be made under the *Supreme Court Act 1970* (NSW).¹² The Rule Committee has made the *Criminal Appeal Rules* (NSW) ("CA Rules") for the purposes of the CA Act.

The *Criminal Appeal Rules (Amendment No 1) 2005* (NSW), which was gazetted and commenced operation on 28 October 2005, amended the CA Rules to include a new part (rules 2A to 2G) entitled "*Electronic case management*".

Rule 2B relates to the registration of users of an ECM system. The Registrar of the court may register a person as a user of an ECM system in relation to the court, either generally or for particular proceedings, and may specify the level of access to which the person is entitled and the conditions of use applicable to the person. Subject to an order of the court, a person may not be registered as a user of an ECM system unless the person is a party to the proceedings, a legal practitioner representing a party to the proceedings, or a person authorised to use the ECM system by a legal practitioner representing a party to the proceedings. Further, the Chief Justice may establish a protocol for the registration of persons as users of the ECM system. The Chief Justice of NSW has established such a protocol, which is discussed at below under the heading "ecmCourt Protocol".

Rule 2C relates to the electronic filing of documents. Notices and written submissions may be filed in the court by means of an ECM system by any registered user who is the party's solicitor or authorised agent or a person who has been directed to file the document by the party's solicitor or authorised agent. When filed by means of the ECM system, a document that is required to be signed is taken to have been duly signed, and duly authenticated for the purposes of section 14E of the ET Act, if the person's name is printed where his or her signature would otherwise appear. A filed document is given initial acceptance as soon as it is received by the court, and is given final acceptance

as soon as it is validated by the court. Validation will be refused if any fee payable with respect to the filing is not received by the court within 24 hours after the initial acceptance of the document. A document is initially taken to be filed when it is given final acceptance and, if given final acceptance, is deemed to have been filed at the time it was given initial acceptance. The court must give the registered user, by means of the ECM system, notice of the initial and final acceptance of a document and the dates of those acceptances.

Rule 2D requires a person who directs that a document be filed by means of an ECM system to make a written record of the fact that he or she has given such a direction. If the person is a legal practitioner, he or she is deemed to have affirmed to the court that he or she has been given the direction and is able to provide the court with the written record of the direction if requested.

Rule 2E permits the court, by means of an ECM system, to issue a document to any party who is a registered user for the proceedings. The word "*document*" is defined in section 21 of the *Interpretation Act 1987* (NSW) to mean any record of information. The court can thus use the ECM system to issue anything from notification of a hearing date to a judgment of the court.

Rule 2F provides that a party to proceedings before the court may use electronic mail to serve a document on any other party, whether by means of an ECM system or otherwise, but only with the other party's consent. There is no guidance on the requisite form of such consent. For example, party A could assert that party B has consented to electronic service if the solicitor for party B places his or her email address on court documents.

Rule 2G specifies that any business that may, by law, be conducted in the absence of the public may be conducted by electronic communication sent and received by means of an ECM system, as provided by section 14I of the ET Act.

Uniform Civil Procedure Rules 2005 (NSW)

The Supreme Court of NSW operates pursuant to the *Supreme Court Act*

1970 (NSW) and, in relation to civil proceedings, the *Civil Procedure Act 2005* (NSW) ("CP Act"). Section 8 of the CP Act establishes a Uniform Rules Committee comprising 10 members, the majority of which are judges. The Uniform Rules Committee may authorise or require the use of an ECM system established under section 14B of the ET Act in relation to any proceedings in a court in respect of which the use of such a system is authorised by an order in force under section 14C of the ET Act.¹³ Further, in the case of documents filed with a court, or issued by a court, by means of an ECM system within the meaning of the ET Act, the Uniform Rules Committee may approve the format in which such documents are to be filed or issued.¹⁴

The *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") was enacted as Schedule 7 to the CP Act and commenced on 15 August 2005. Part 3 (rules 3.1 to 3.9) of the UCPR, entitled "*Electronic case management*", substantially mirrors the equivalent part in the CA Rules.¹⁵ There are, however, four key differences.

First, rule 3.2 stipulates that Part 3 of the UCPR applies to those courts, and for those purposes, for which the use of an ECM system is authorised by an order in force under section 14C of the ET Act. There is no equivalent rule in the CA Rules. While rule 3.2 initially appears to state what would otherwise be implicit, it does have a significant - and probably unintended - consequence. Rule 3.8 (which is within Part 3) provides, akin to rule 2F of the CA Rules, that a party to proceedings before the court may use electronic mail to serve a document on any other party, whether by means of an ECM system or otherwise, but only with the other party's consent. In other words, rule 3.8 provides for consensual electronic service irrespective of whether an ECM system is involved. However, as rule 3.8 only applies to those courts, and for those purposes, for which the use of an ECM system is authorised by an order in force under section 14C of the ET Act, the entitlement is effectively restricted to circumstances where electronic service is permitted by the ECM Courts Order. In effect, rule 3.2 thus restricts the operation of rule 3.8

to civil proceedings in the Equity Division of the Supreme Court of NSW, and prevents it operating in relation to civil proceedings in the Common Law Division of the Supreme Court of NSW, the District Court, the Dust Diseases Tribunal and the Local Court.¹⁶

Second, the documents that can be filed in the court by means of an ECM system include pleadings, notices of appearance, notices of motion, affidavits and subpoenas.¹⁷ A notable omission, particularly given its subsequent inclusion in rule 2C of the CA Rules, is submissions.

Third, rule 3.5 applies to an affidavit that is filed in the court by means of an ECM system. If the affidavit is filed by a legal practitioner, the legal practitioner is taken to have affirmed to the court that he or she has possession of the original affidavit, and to have undertaken to the court that, if the court so directs, he or she will file the original affidavit in accordance with the court's directions. If an affidavit is filed otherwise than by a legal practitioner, the original affidavit must be filed in the court in certain circumstances.

Fourth, rule 3.6 applies in circumstances where an application for probate of a will or for administration of a person's estate is filed by means of an ECM system, but the will is not filed.

Workers Compensation Commission Rules 2006 (NSW)

The Workers Compensation Commission ("Commission") has jurisdiction pursuant to the *Workers Compensation Act 1987* (NSW) and the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ("WIM&WC Act"). Section 364 of the WIM&WC Act empowers the Minister to make rules of the Commission for or with respect to any aspect of procedures to be followed in connection with the jurisdiction or functions of the Commission.

On 27 October 2006, John Della Bosca, Minister for Commerce, made the *Workers Compensation Commission Rules 2006* (NSW) ("WCC Rules"). The WCC Rules, which commenced operation on 1 November 2006, introduced a new Part 5 (rules 5.1 to 5.5) entitled

"*Electronic case management*". Part 5 of the WCC Rules is substantially similar to the equivalent part in the CA Rules. There are, however, a few differences worth noting.

First, rule 5.2 provides that a person may not use an ECM system for particular proceedings unless the person is a party to the proceedings, a legal practitioner representing a party to the proceedings or a person authorised by such a legal practitioner. The WCC Rules do not, in contrast to the CA Rules and UCPR, provide for the registration of users. This is reflected in rule 5.5, which provides that the Commission or Registrar may issue a document to any party by means of an ECM system. Unlike subrule 2E(1) of the CA Rules and subrule 3.7(1) of the UCPR, it is not necessary that the party be a registered user for the proceedings. It is yet to be seen whether this reflects an intention that, in the future, all parties will be required to use the ECM system.

Second, subrule 5.2(2) provides that the President¹⁸ of the Commission may establish a protocol for the use of an ECM system. As noted above, the Chief Justice of NSW has established a protocol for the purposes of the Court of Criminal Appeal and the Supreme Court of NSW (discussed below). To date, the President has not established a protocol for the Commission.

Third, rule 5.3 of the WCC Rules provides for the lodging of any document on behalf of a party by means of an ECM system. The rule does not delimit the electronic lodging of documents to specified types of documents, as is the case under rule 2C of the CA Rules and rule 3.4 of the UCPR.

Fourth, rule 5.4 applies to a statutory declaration that is lodged by means of an ECM system. It is in equivalent terms to rule 3.5 of the UCPR which relates to the filing of affidavits.

ecmCourt Protocol

On 22 March 2006, the Honourable James Spigelman, the Chief Justice of NSW, issued Practice Note SC Gen 12 entitled "*Supreme Court – ecmCourt Protocol*".¹⁹ The Practice Note applies to:²⁰

- (a) matters in the Court of Criminal Appeal where either an Application for Extension of Time or a Notice of Appeal has been lodged; and
- (b) selected matters in the Equity Division of the Supreme Court of NSW.

The Practice Note does not apply to proceedings involving self-represented litigants.²¹ Further, ecmCourt is only available to legal practitioners who are registered users and are invited to participate in accordance with rule 3.9 of the UCPR or rule 2G of the CA Rules, and support staff who are nominated by those legal practitioners to submit messages to the ecmCourt on the practitioner's behalf.²² ecmCourt is not available to litigants, self-represented litigants or non-parties.²³ The Practice Note thus narrows the potential users of an ECM system from those contemplated by subrule 2B(2) of the CA Rules and subrule 3.3(2) of the UCPR, which explicitly envisage that a party to the proceedings (as distinct from their legal practitioner) could be registered as a user.

An ecmCourt may be initiated only by a Judge, associate Judge or registrar ("Judicial Officer"), their respective associate, or nominated registry staff on their behalf.²⁴ While the Practice Note provides that a legal practitioner who is a registered user may request that an ecmCourt be initiated,²⁵ this must be read subject to the earlier stipulation that ecmCourt is only available to legal practitioners (and their nominated support staff) that are "*invited to participate*". There is currently no publicly available data on the number of invitations that have been extended.

Paragraph 11 of the Practice Note provides that, at the discretion of a Judicial Officer, ecmCourt may be used for any hearing permitted under section 71 of the CP Act and section 14I of the ET Act.²⁶ Section 71 of the CP Act provides that the business of a court in relation to any proceedings may be conducted in the absence of the public in any of the following circumstances:

- (a) on the hearing of an interlocutory application, except while a witness is giving oral evidence;

- (b) if the presence of the public would defeat the ends of justice;
- (c) if the business concerns the guardianship, custody or maintenance of a minor;
- (d) if the proceedings are not before a jury and are formal or non-contentious;
- (e) if the business does not involve the appearance before the court of any person;
- (f) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit;
- (g) if the uniform rules so provide.

The limited permission granted by the section emphasises the fundamental, though not inflexible, principle that courts ought to conduct their hearings in public.²⁷ This fundamental principle is deeply rooted in the history of the common law and regarded as an essential part of the character of courts of law. It is important in promoting public confidence in judicial integrity and independence.²⁸

Paragraphs 12 to 16 of the Practice Note relate to conduct in an ecmCourt. As ecmCourt is a virtual courtroom, it must only be used for issues requiring consideration by a Judicial Officer (i.e. ecmCourt is not to be used for communications solely between the representatives of the parties) and the language used in ecmCourt must be the same as that used if the matter were being dealt with in an ordinary courtroom. Undertakings given in an ecmCourt are binding as if the undertakings were given in an ordinary courtroom and the rules of contempt apply to proceedings conducted using ecmCourt.

An ecmCourt may, pursuant to paragraph 17, be terminated at any time at the absolute discretion of a judicial officer.

The Practice Note requires each participant to the ecmCourt to keep their User Identification Code (i.e. user-id) and password confidential.²⁹ When a user-id is used to send messages and documents to an ecmCourt, the person to whom that user-id was allocated will be deemed by the Judicial Officer presiding over the ecmCourt to be the person who

sent the messages and documents and is responsible for the contents.³⁰

Paragraphs 20 and 21 of the Practice Note relate to messages posted in an ecmCourt, while paragraphs 22 to 24 relate to documents. Interestingly, paragraph 24 provides that "[d]ocuments sent to the ecmCourt must be in PDF. The documents must not be scanned documents and they must not be locked as the judicial officer may wish to edit them". Many practitioners would find these statements confusing as, frequently, the image format for scanned documents is PDF. Presumably, the intention of the Practice Note is that documents in Word format should be saved as PDF using Adobe Acrobat. This process, unlike scanning a document, will retain the capability for full text searching. The Judicial Officer will still be able to edit the document using Adobe Acrobat.

The final paragraphs of the Practice Note relate to draft consent orders³¹ and the entering of orders.³²

CourtLinkNSW

CourtLinkNSW is the ECM system established by the Attorney General under section 14B of the ET Act for use by the Court of Criminal Appeal and the Supreme Court of NSW for certain purposes.

According to the Chief Justice of NSW, the CourtLink program aims to:³³

- (a) provide a range of services online that will reduce the cost of administering justice;
- (b) standardise and simplify processes to attain a common approach across all jurisdictions; and
- (c) replace all current paper-based data exchanges between courts and Justice Sector Agencies with electronic data exchanges.

The implementation of CourtLinkNSW began in November 2005 (i.e. immediately following the making of the ECM Courts Order) and is forecast to be completed by July 2007. The components of the ECM system have and will be rolled out as set out in the table below.³⁴

The two significant elements of CourtLinkNSW to date have been the pilot programs for electronic document lodgement and the online court. These are each discussed below.

Electronic document lodgement

In November 2005, the Supreme Court of NSW implemented a limited release of electronic filing in the Possession List and Corporations List. A pilot group of five law firms participated in the trial. The facility enables law firms to pay filing fees by credit card, to file documents electronically and then to download the document certified and ready to serve. The court has published a detailed guide to assist with e-filing.³⁵

According to the court, the feedback from the pilot group was "extremely encouraging" and all firms "recognised e-filing's potential to significantly cut down the amount of time required to process these applications compared to traditional over-the-counter filing methods".³⁶ Between November 2005 and August 2006, there were over 1,700 documents filed online.³⁷

ecmCourt

Justice Ian Gzell has conducted a pilot program of the ecmCourt in the Equity Division of the Supreme Court of NSW.³⁸ On 24 March 2006, two days after the commencement of Practice Note SC Gen 12, his Honour delivered the judgment of *Koompahtoo Local Aboriginal Land Council v KLALC Property & Investments Pty Ltd (No 2)* [2006] NSWSC 169 (24 March 2006). After outlining the statutory framework and the court's power to open an ECM Court, Justice Gzell held at paragraph [8] that "[i]n order that future directions and interlocutory applications that is appropriate to conduct in the absence of the public may be conducted by the ECM system, I will open an ECM Court". His Honour then made the following order:

Pursuant to the *Civil Procedure Act 2005*, s 71(f) I direct that any future directions hearings and, unless otherwise ordered, any interlocutory applications in these matters be conducted in the absence of the public. In terms of the *Electronic Transactions Act 2000*, s 14I and the *Uniform Civil Procedure Rules 2005*, r 3.9, I direct that until further order such

pre-trial directions and interlocutory applications be conducted by electronic communication sent and received by means of the ECM system.

Justice Gzell thereafter commenced using the virtual court for pre-trial directions hearings in suitable proceedings.³⁹ In addition to making an order equivalent to that made in *Kaompahtoo*, his Honour has adopted the practice of issuing a short note to the solicitors on the record which reads as follows:

ecmCourt

Requirements by Justice Gzell

Please note that Justice Gzell will no longer hold pre-trial direction hearings. Instead his Honour will conduct ecmCourts for all formal matters.

All counsel and solicitors in any matter set down for hearing before his Honour are required to register for eServices and to advise his Associate when this is done.

To register, please visit website: www.lawlink.nsw.gov.au/courtlink

As at 22 August 2006, Justice Gzell had successfully completed 14 such hearings on-line and was looking to expand its use to all directions hearings under his jurisdiction.⁴⁰ There is only one public example of the ECM Court causing difficulty. In *Hill v W & F Lechner Pty Ltd* [2006] NSWSC 440 (12 May 2006), Justice Gzell had opened the ECM Court and directed the solicitors and counsel for the parties to become registered as users of the ECM system under rule 3.3 of the UCPR. Despite repeated requests, the solicitor for the defendant failed to cause counsel for the defendant to become a registered user and to notify his Honour's Associate. Justice Gzell listed the matter for a hearing in the ordinary courtroom and delivered an ex tempore judgment which, at [10] to [12], held:

As s 56(1) of the *Civil Procedure Act 2005* states, the overriding purpose of the Act and the *Uniform Civil Procedure Rules 2005* is to facilitate the just, quick and cheap resolution of the real issues in proceedings. The ECM Court facility for which provision is made in the *Electronic Transactions Act 2000*, s 141 and in the *Uniform Civil Procedure Rules 2005*, r 3.9 is one way of obtaining that objective. But it will not work if the legal representatives of the parties will not co-operate.

In view of the failure of the solicitor for the defendant to carry out my Associate's

requests I make these orders. I order the legal representatives of the defendant and any other legal representatives of the plaintiff to apply to the Registrar for registration of themselves and any person authorised by them as users of the ECM system in terms of the *Uniform Civil Procedure Rules 2005*, r 3.3 and inform my Associate of the names of the persons so registered by no later than 4.00 pm on Tuesday 16 May 2006.

Again, because the system is new, I do not propose to order the solicitor for the defendant to pay the costs of this unnecessary hearing personally under the *Civil Procedure Act 2005*, s 99. I order the defendant to pay the plaintiffs' costs of today's hearing on an indemnity basis forthwith upon assessment or agreement.

To date, Associate Justice Richard Macready is the only other Judicial Officer that has opened an ECM Court. His Honour did so to manage 80 concurrent applications under the *Family Provision Act 1982* (NSW).⁴¹ Associate Justice Macready has not used the ECM procedures in other proceedings.⁴²

Comcase

Comcase is the ECM system established by the Attorney General under section 14B of the ET Act for use by the Workers Compensation Commission and its Registrar in relation to certain proceedings under the *Workers Compensation Act 1987* (NSW) or the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

There is very little public information about Comcase. Strategic Business Consulting Pty Ltd was the successful tenderer for a contract with the WorkCover Authority of NSW⁴³ in relation to the development of Comcase. The contract, which commenced on 26 September 2005 and has a term of 194 weeks, is in the amount of \$863,909.⁴⁴ The ECM system is presumably still in development as a pilot program has not yet commenced.

Conclusion

The movement towards ECM in NSW is a welcome development and one which is likely to facilitate the more efficient conduct of both civil and criminal proceedings. However, there are numerous complex issues that will need to be carefully managed in adopting the new systems. For

example, addressing security issues associated with electronic filing, protecting the principle that legal proceedings should generally be conducted in public, identifying and managing technological risk, and ensuring that technology does not operate as a barrier to access to justice. Provided that ECM is approached in a considered and cautious manner, the benefits for the Government, the courts, practitioners and litigants is likely to be considerable.

¹ See Justice Clifford Einstein, *Technology in the Court Room - 2001 - [Friend or Foe?]*, <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SC_O_speech_einstein_201101> at 14 October 2006

² See section 3 of the *Electronic Transactions Act 1999* (Cth) and section 3 of the ET Act.

³ As initially made, section 14B provided for documents to be "created, filed, issued, stored, retrieved, viewed and served" in electronic form. The *Civil Procedure Act 2005* (NSW), which, relevantly, commenced operation on 15 August 2005, amended the ET Act to replace "stored, retrieved, viewed" with the catchall "used".

⁴ The Workers Compensation Commission, an independent statutory tribunal established by section 366 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), resolves workers compensation disputes between injured workers and employers. See Workers Compensation Commission, *Home page*, <<http://www.wcc.nsw.gov.au/default.htm>> at 29 October 2006.

⁵ The Supreme Court of NSW is, for the purposes of the *Criminal Appeal Act 1912* (NSW), the Court of Criminal Appeal: see section 3 of the *Criminal Appeal Act 1912* (NSW).

⁶ Established as the superior court of record in NSW by the 1823 *Charter of Justice*, the existence of the Supreme Court of NSW is continued by section 22 of the *Supreme Court Act 1970* (NSW).

⁷ See section 38 of the *Supreme Court Act 1970* (NSW).

⁸ The Administrative Law List, Bails List, Criminal List, Defamation List, General Case Management List, Possession List and Professional Negligence List. See Supreme Court of New South Wales, *Annual Review 2005* (2006) at 17.

⁹ The Admiralty List, Adoptions List, Commercial List, Corporations List, Probate List, Protective List, and Technology and Construction List. See Supreme Court of New South Wales, *Annual Review 2005* (2006) at 19.

¹⁰ See Supreme Court of New South Wales, *Practice Note No. SC CL 6: Possession List*, <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/c48bee8cd137a0ca257062001f01bb?OpenDocument> at 31 October 2006.

¹¹ See Supreme Court of New South Wales, *Practice Note No. SC Eq 4: Corporations List*, <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/b279930d6f397d94ca25715d00156590?OpenDocument> at 31 October 2006.

¹² See subsection 28(1) of the CA Act.

¹³ See subsection 9(4) of the CP Act.

¹⁴ See subsection 17(1) of the CP Act.

¹⁵ See rules 2A/3.1, 2B/3.3, 2C/3.4, 2D/3.4A, 2E/3.7, 2F/3.8 and 2G/3.9.

¹⁶ However, note that the service of documents by electronic mail is permitted in these courts when a person's address for service is a solicitor's office and the notice advising the address for service includes an electronic mail address: see rule 10.5(2)(c) of the UCPR.

¹⁷ See rule 3.4 and Schedule 4 of the UCPR.

¹⁸ The President is the head of the Commission and determines appeals and questions of law. The current president of the Commission is the Hon. Justice Terry Sheahan AO.

¹⁹ See Supreme Court of New South Wales, *Practice Note No. SC Gen 12: Supreme Court - ecmCourt Protocol*, <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/0ae6b05990a2f3daca25713a00815164?OpenDocument> at 14 October 2006

²⁰ See paragraph 2.

²¹ See paragraph 4.

²² See paragraph 6.

²³ See paragraph 7.

²⁴ See paragraph 8.

²⁵ See paragraph 9.

²⁶ Paragraph 11 of the Practice Note refers to section "141" of the ET Act. No such section exists and the intention is clearly to refer to section 14I.

²⁷ See *Scott v Scott* [1913] AC 417 at 439; *McPherson v McPherson* [1936] AC 177; *R v Governor of Lewes Prison* [1917] 2 KB 254; *R v Hamilton* (1930) 30 SR (NSW) 277; *R v Local Government Board; Ex parte Arlidge* [1914] 1 KB 160 at 187; *Harvey v Harvey* (1951) 68 WN (NSW) 241 at 242; *R v Page* [1976] 2 NSWLR 173 at 174; *R v Chief Registrar, Friendly Societies; Ex parte New Cross Building Society* [1984] 2 All ER 27 at 31; *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1.

²⁸ See *Russell v Russell* (1976) 134 CLR 495 at 520; *McPherson v McPherson* [1936] AC 177; *Harman v Secretary of State for the Home Dept* [1983] 1 AC 280 at 316; *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1983) 50 ALR 461 at 467; *R v Wilson; Ex parte Jones* [1969] SASR 405 at 413; *Taylor v A-G* [1975] 2 NZLR 675 at 678.

²⁹ See paragraph 18.

³⁰ See paragraph 19.

³¹ See paragraph 25.

³² See paragraph 26.

³³ See The Honourable James Spigelman AC, *Case Management in New South Wales*, <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SC_O_spigelman220806> at 16 October 2006

³⁴ See *ibid*.

³⁵ See CourtLinkNSW, *eFiling and eForum Guide* (2005) available at [http://www.lawlink.nsw.gov.au/lawlink/eservices/ll_eservices.nsf/vwFiles/05102-eServices-ExternalUserGuidev1-0.pdf/\\$file/05102-eServices-ExternalUserGuidev1-0.pdf](http://www.lawlink.nsw.gov.au/lawlink/eservices/ll_eservices.nsf/vwFiles/05102-eServices-ExternalUserGuidev1-0.pdf/$file/05102-eServices-ExternalUserGuidev1-0.pdf)

³⁶ See Supreme Court of New South Wales, *Annual Review 2005* (2006) at 32.

³⁷ See The Honourable James Spigelman AC, *Case Management in New South Wales*, <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SC_O_spigelman220806> at 16 October 2006

³⁸ See The Sydney Morning Herald, *Internet court gets first case*, <<http://www.smh.com.au/news/technology/internet-court-gets-first-case/2006/03/31/1143441337794.html>> at 29 October 2006

³⁹ See, for example, the reference to the ECM Court in *Sheahan v Slattery (No 2)* [2006] NSWSC 711 (13 July 2006) at [7].

⁴⁰ See The Honourable James Spigelman AC, *Case Management in New South Wales*, <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SC_O_spigelman220806> at 16 October 2006

⁴¹ See The Sydney Morning Herald, *Internet court gets first case*, <<http://www.smh.com.au/news/technology/internet-court-gets-first-case/2006/03/31/1143441337794.html>> at 29 October 2006.

⁴² Telephone conversation with the Associate to Associate Justice Macready, 15 November 2006.

⁴³ The WorkCover Authority of NSW is constituted by subsection 14(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). The primary function of the Authority is ensuring compliance with the workers compensation legislation and the occupational health and safety legislation.

⁴⁴ See NSW Department of Commerce, *RFT 0402024 Details (Archive)*, <https://tenders.nsw.gov.au/commerce/shared/rftdetail.cfm?p_id=6002&p_criteria=0402024&p_advert=0> at 29 October 2006

Electronic Case Management in New South Wales

Date	Component	Status
November 2005	Launch of eService pilots: Electronic Document Lodgement and Online Court	Delivered on target
April 2006	Costs Assessment, Supreme Court	Delivered on target
January 2007	Crime – Supreme Court and Court of Criminal Appeal	On Track
February 2007	Crime – District Court	On Track
May 2007	Civil – Supreme Court and Court of Appeal	On Track
June 2007	Civil – District Court	On Track
May 2007	eServices Release 1	On Track
July 2007	Crime & Civil – Local Courts and Sheriff's Office	On Track

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Sheahan v Slattery (No 2) [2006] NSWSC 711 (13 July 2006)

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Civil Procedure Act 2005 (NSW)

Criminal Appeal Act 1912 (NSW)

Electronic Transactions Act 1999 (Cth)

Electronic Transactions Act 2000 (NSW)

Electronic Transactions (ECM Courts) Amendment Order 2006 (NSW)

Electronic Transactions (ECM Courts) Order 2005 (NSW)

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Uniform Civil Procedure Rules 2005 (NSW)

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