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Access to case law in a healthy common law system

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Access to case law in a healthy common law system

Confusion, cost and competition

In Australia the evolving mechanisms for access to case law could be seen as one step forward, two steps back. Electronic publishing technology has opened up many new opportunities and tools for legal research but a fragmented approach to case law management may seriously degrade the efficiency of the legal system. Problems include:

- confusion about the proper source of case law, including the role of traditional law reports;
- high costs caused by poor data management and restricted access to authoritative sources of case law held by commercial publishers; and
- a lack of competitive and comprehensive online access to Australian case law.

It is submitted that the solution to these problems is to think of access to case law as a knowledge management process. This process should begin with the courts and extend to all groups involved in case law publication and dissemination. Our common law legal system is built on precedent derived from decided cases. A successful knowledge management process will enhance this system for the benefit of the Australian community. It will also provide clear benefits to all current and future generations of legal researchers and practitioners.

There are a number of initiatives underway in Australian courts and other agencies that are working in this direction. This paper aims to build on those initiatives.

Background

Before the advent of electronic publishing technology, the framework under which lawyers and other legal researchers gained access to case law was stable. The sources of case law were confined to printed law reports series published by public bodies such as Council's of law reporting and commercial publishers. There was some access to unreported judgments from the courts but this was limited and problematic. The management of copies of judgments was often poor or non-existent.

The development of electronic publishing technologies over the past decade or more opened up new ways in which we may gain access to case law. This is accelerated by the growth of the internet and the increasing dominance of internet related technologies in information retrieval. Now we have access to case law and other legal materials on multiple on line sites, on CD-ROM as well as via the traditional hard copy sources.

Anyone who has tried to research case law on sites such as AustLII (http://www.austlii.edu.au) or SCALE Plus (http://scaleplus.law.gov.au) will know that searches of electronic materials can return a large number of hits. Sorting the relevant

from the irrelevant in these results can be extremely time consuming for the researcher. Each successive researcher investigating the same problem will have to undertake the same research. This is not efficient and it is not knowledge management.

Unfortunately, this is only the beginning of the problem. Most online sites provide access only to recent decisions that have been delivered since judgments have been prepared using personal computers. Authorised reports series such as the CLR or the NSWLR may be available only from a single commercial publisher's online site, if they are available at all. There is no single electronic repository of all the case law a researcher may require. A researcher cannot undertake comprehensive research of case law online.

Competition in Australian legal publishing has produced a large number of printed reports series that provide access to the same materials. At the federal level we have the CLR, ALJR, ALR, FCR, Fam LR, FLC & FLR plus specialist reports for companies, tax, trade practices and other areas. At the state level we have the NSWLR, VR, Qd.R, SASR, WAR, Tas R, NTLR and specialist series for criminal law and planning law.

There are also an increasing number of online sources for case law. Many series are published by commercial publishers and an increasing number by the courts or by public access portals. None of these provides comprehensive access to Australian case law or likely to do so in the foreseeable future.

Questions raised by this include:

- How does a researcher find those cases that are important for their inquiry among all the cases now available online?
- Which version of a case can a researcher use in court?
- Are versions from different sources equivalent?
- Why should someone have to use or purchase access to multiple sources of online case law to be sure of getting comprehensive coverage?

The "law" in case law

It is useful to recall some fundamental principles of our common law system that should be known by any first year law student.

The common law system is based on the legal principle of deciding points in litigation according to precedent. This applies both to application of the common law and interpretation of statute. Under this principle, decisions of courts on matters of law are binding on subordinate courts or tribunals and, if not binding, are highly persuasive on the court itself or equivalent courts [Lord Bingham, 2000].

A companion principle to the doctrine of precedent is that it is only the *ratio decidendi* (ratio) that is binding on other courts or tribunals. The ratio is the principle upon which a case is decided. Other comments made by the judge that may not be strictly necessary

for the decision at hand are obiter dicta and do not have precedent value, although they may be useful in argument in later cases. While simple to state, application of this distinction can be difficult in practice. This can be seen in the selection criteria for reported decisions discussed later.

The vast majority of decisions of courts and tribunals involve the identification of the facts and issues in dispute and the application of settled law. In these cases, it is not necessary to decide a point of law because the law is well known, usually through earlier decided cases [Lord Bingham, 2000]. This majority of decided cases play no role in the system of precedent. This is not to say that the public should not have access to these decisions or that researchers may not wish to use them.

It follows that if we are looking for case law in our common law system, we have to look in those cases that actually decide a point of law as part of the decision necessary to resolve the dispute between the parties. As will be shown during the discussion of the criteria for selection of reportable cases, it is necessary to look beyond those cases that actually make new law. For example, it can involve explaining the law or confirming that an old decision is still good law.

Core objectives of our knowledge management framework should be to facilitate fast, accurate and economical access to decisions with precedent value. This means that cases with precedent value should be clearly distinguished in case law retrieval systems from those that do not. Fortunately, there is a well established process to assist.

Law reporting

Brief history

Formal law reporting has a long tradition derived from the United Kingdom. The Incorporated Council of Law Reporting for England and Wales was incorporated in 1863 and is responsible for the production of the Weekly Law Reports and the Authorised Reports.

In Australia, all states (South Australia excepted) and the Northern Territory have a Council of Law Reporting that undertakes or administers the law reporting process in that jurisdiction. Most Councils are statutory bodies incorporated under specific legislation [Law reporting legislation]. However, the WA body is not incorporated. The Queensland and Northern Territory bodies are incorporated. There is no federal Council of Law Reporting.

Authorised reports

The terms “authorised” reports or “reported cases” are frequently used but may not be fully understood.

In the UK and Australian systems, authoritative versions of decisions with precedent value have traditionally been found in the "authorised reports" for each jurisdiction. At the federal level, the Commonwealth Law Reports (CLR) and the Federal Court Reports (FCR) are the authorised reports for the High Court and the Federal Court respectively, for example [FCA Practice Note 9, 1993].

At the state level, the New South Wales Law Reports (NSWLR), the Victorian Reports (VR), Queensland Reports (Qd.R), South Australian State Reports (SASR), Western Australia Reports (WAR), Tasmanian Reports (Tas R) and the Northern Territory Law Reports (NTLR) have the status of authorised reports in their jurisdictions.

It is important to note that the authorisation process may occur formally, as in the case of the FCR or informally through long practice and usage, as in the case of the NSWLR.

There is a two step process to the creation of authorised reports. Firstly, a nominated body performs the selection and reporting process. If these reports are then granted formal or informal "authorisation" by court directions or practice, those reports become a preferred or authoritative source of precedent law.

If a case is said to be "reported" it has this status because it is included in one of the authorised report series mentioned earlier.

Selection criteria for reported decisions

In the writer's experience many practitioners are only vaguely aware of the criteria used in the selection of reported decisions. The current editor of the NSWLR, Naida Haxton, has written about the selection criteria used in the NSWLR and generally in law reports [Haxton 1998]:

> "The criteria for reportability are well recognised[1] and applied. They include:
>
> (i) a case which introduces a new principle or new rule of law;
>
> (ii) a case which materially modifies an existing principle of law or settles a doubtful question of law;
>
> (iii) a case which applies an existing principle in a novel area;
>
> (iv) a case in which the language of legislation is definitively interpreted;
>
> (v) a case in which clauses, phrases or words in common use in documents (eg, wills, contracts, insurance policies, charter parties) are construed;
>
> (vi) a case in which the rules of practice of the court are interpreted and their application extended, modified or applied to obscure or unsettled points;
>
> (vii) all cases which for any reason are peculiarly instructive.
>
> [1] Manual on Law Reporting. N J Haxton, 1991, Federation Press Sydney at 11-12."

Naida Haxton's article provides a comprehensive overview for those interested in gaining a better understanding of the reporting process.

The knowledge management process

Once a case is selected for reporting, a considerable amount of work must be done to prepare the case for inclusion in the reports. These steps include [Haxton 1998]:

- preparation of catchwords and headnotes;
- identification of statutes and cases actually considered in the decision and the preparation of case lists
- verification of the accuracy of quotations and citations against the original source material;
- presentation in a consistent style; and
- obtaining approval of the judge to the editorial work.

The overall editorial process is important. From discussions with persons involved in law reporting, it is clear that considerable work is often undertaken to verify quotations and citations in judgments delivered by the courts. Often, corrections are required to provide an accurate and consistent report. Extraction of the ratio and writing of a succinct headnote requires skill and experience.

Once a headnote is prepared, it is available for all future legal researchers as a mechanism to quickly determine the relevance of a decision to their needs. It is not hard to see how a quality headnote can save a large number of people substantial research time over many decades.

The reporting process provides a reliable source of precedent for all future users. Law reports avoid the need to re-argue issues, they save research effort, they promote consistency in the law.

It is inconceivable that this information extraction and quality process will be performed on every judgment that is delivered by the courts. It is only worth undertaking for those with precedent value to the legal system. That is knowledge management.

Once this work is completed by experienced persons in an accountable environment, it is easy to see why the courts should prefer that only those decisions that have been reported in this way should be cited in future proceedings. To do otherwise exposes the courts to error and unnecessary effort.

Naturally, every decision in the law reports does not remain good law forever. Some are overruled or disapproved in later cases so one must always work through later decisions to determine the status of earlier decisions.

Unreported decisions

The term unreported decisions may have at least three connotations. Firstly, it can refer to decisions that may be reportable but have not yet appeared in a reports series (reportable but unreported). Secondly, it can refer to those decisions that are not considered by the editors of the law reports to have sufficient precedent value to warrant reporting (not reportable). Thirdly, it may sometimes be used to refer to a source for the decision other than in the law reports (alternative sources). These different uses can cause confusion, particularly as there are now many different online sources for cases.

The "reportable" category is the simplest to consider. Due to the work involved in the reporting process, there will always be some lag between handing down a new decision and its reporting. There is no barrier to citation of reportable decisions if they are not yet reported. It is to be expected that most of the unreported decisions that are cited in the law reports will fall in this category.

Traditionally, the courts have discouraged citation of cases that fall into the "not reportable" category. However, unreported decisions in this category may be useful for some purposes:

- for comparison of quantum awards in damages cases and sentences in criminal cases; or
- for argument, flavour or guide to the approach taken by various courts.

Occasionally, the reportable status of a decision is not recognised until later.

Many unreportable decisions are included in specialty reports series such as Trade Practices, Company and Property reports series offered by commercial publishers. A striking feature of these services is that they do not provide any differentiation between reports with precedent value (those that ought to appear in the law reports) and those that do not. Consequently, researchers who start with one of these series may have to work hard to identify the truly relevant cases.

Alternative sources for case law

The Australian legal publishing environment has produced a wide range of online and hard copy sources for case reports. For example, at the Federal level, there are the Australian Law Journal Reports (ALJR), Commonwealth Law Reports (CLR), Australian Law Reports (ALR), Federal Court Reports (FCR) as well as multiple specialist series for tax, companies, trade practices, intellectual property and family law. Online versions are becoming by far the most prolific with perhaps half a dozen possible sources for reports of some courts. A case could easily be published by three or four commercial publishers, AustLII (http://www.austlii.edu.au), SCALE Plus (http://scaleplus.law.gov.au) and LawLink (http://www.lawlink.nsw.gov.au/lawlink/lawlink_libraries/ll_libraries.nsf/pages/LL_legal_resources_index).

Legal publishers will wish to provide comprehensive access to case law, if possible. If the publisher cannot provide access to an authorised report series, it is natural to expect that the publisher will not be keen to promote the status of that series. Instead, their alternative case series will be offered as sufficient for their customer's purposes.

There are several online sources for High Court reports from 1947 but only LBC Information Services can publish the CLR online. A similar situation occurs with other authorised report series. Essentially, there is a lack of convenient, competitive online access to authorised reports.

In the era before electronic publishing, this did not matter so much. There was only a need for one publisher to produce the CLRs or the VRs and it really did not matter to a researcher who printed the series. Electronic access is different. There is a serious loss of benefits if the researcher has to visit several sites to research a point or if it is necessary to resort to manual processes for a substantial part of the process.

The limited availability of authorised series online, coupled with widespread availability of alternate sources of online case law appears to be creating confusion about the proper source of precedent. It is not uncommon to hear it said that the distinction between reported and unreported decisions is now irrelevant. In the writer's experience, this is often heard from people closely connected to online publishing operations. What can such statements really mean? Surely, unreported decisions with no precedent value should not be accorded the same status in a research system as those determined by professional editors to have precedent value. Surely, a version of a decision that lacks the quality process applied to a reported decision should not be given the same status as one without.

It would be a tragedy for our legal system if the prophecies of increasing irrelevance of reported decisions is borne out. Researchers, practitioners and the courts will all incur increased workloads redundantly sifting through a large number of decisions to determine their relevance, accuracy and authority as legal precedents. Law reporting is the knowledge management process to avoid this problem.

Copyright, competition and the public interest

Copyright in reported judgments

When a judgment is reported, a considerable amount of editorial work is performed on the judgment to produce a new work based on a compilation of the judgment and the additional material, including catchwords and headnote. There seems little doubt that this work is subject of a separate copyright. Whether the judges, the court or the crown in some other capacity owns copyright in original decisions is not material for this discussion. As far as the writer can determine, copyright in reported cases may be held by a body such as a Council of Law Reporting or a commercial publisher under licence from the copyright holder of the original judgment.

The writer understands that copyright in the following authorised report series is held by commercial publishers:

- CLR, FCR, VR, SASR, Tas R and ACTR

Copyright in the following series is believed to be held by a Council of Law Reporting body:

- NSWLR, Qd.R, WAR and NTLR

In a competitive publishing environment, it is extremely unlikely that a rational publisher will licence competitive firms to publish its copyright works such as authorised reports on reasonable terms, or at all. Competing publishers are encouraged, even compelled, to develop competing reports series and to discourage any recognition of the authorised series which they do not publish. In an era of online publishing this will inevitably lead to a weakening of the reporting process.

It is also difficult to see the justification for a court to require citation of cases from a commercial "authorised" series, as happens with the Federal Court and High Court. Surely the creation of private monopoly rights over a primary source for the law is not in the public interest.

It is submitted that the only solution to this is to ensure that an independent body who can deal equitably and openly with all prospective publishers holds copyright in all authorised reports.

Benefits of Councils of Law Reporting

Law reporting is a knowledge management process that requires great skill. The process of selection of decisions to report should be open to scrutiny so that errors can be corrected. Independent Councils of Law Reporting can develop expertise, provide accountability and facilitate competitive online access to authorised reports. To do this, Councils of Law Reporting must hold copyright in the authorised reports in their jurisdictions. Only as a copyright holder can they act as an independent licensee of data to multiple publishers.

Councils of Law Reporting that do not hold copyright in their reports series should be encouraged to acquire those rights, if commercially possible. At the very least, they should not renew current arrangements under which commercial publishers hold copyright. It should be quite practicable to enter into arrangements under which the Council holds future copyright in a similar way as is done for the NSWLR and Qd.R.

At the federal level, there is no Council of Law Reporting. A federal Council of Law Reporting should be established for the High Court and federal jurisdictions to act as an independent copyright holder and to open the reporting process to greater public accountability. If commercially feasible, a new federal Council of Law Reporting should acquire copyright in the CLR and the FCR.

Law reporting should not be conducted for the benefit of commercial publishers. It is undertaken for the benefit of the legal system and users of that system. It is hard to see how the production of multiple reports series does anything other than increase costs, degrade quality and muddy the waters about the proper source of case law. There is no reason why authorised reports series cannot be available from multiple online sites using appropriate electronic publishing methodologies. We can have competitive access to case law but it is difficult to identify a function for competitive versions of case law.

Councils of Law Reporting are non-profit bodies. They can provide extremely cost effective access to case law. For example, at the time of writing (August 2000), a subscription to the NSWLR bound volumes (published by the Council of Law Reporting) costs approximately $129 per volume of 750 pages. This is an average cost of just over 17c per page. A subscription to the CLR (published by a commercial publisher) cost (at May 2000) approximately $270 per volume of 600 pages. This is an average cost of approximately 45c per page, more than twice the cost of the NSWLR. How is this in the public interest?

Management of electronic data by the courts

There is a clear need to provide convenient online access to unreported judgments. At the very least these are needed to provide access to new "reportable" decisions while the formal reporting process is carried out. Others may be useful also, particularly in assessment of damages and sentencing cases.

Increasingly, the courts will provide online access to their own judgments as part of their overall data and information management strategies. There is also a strong demand for access to unreported judgments by commercial and free to air publishers. Finally, law reporting bodies require access to judgments data for the reporting process.

The courts should adopt electronic data management strategies to facilitate fast, accurate and cost effective access to data for new judgments to meet these needs.

Currently, all judgments provided by the courts are in word processing formats. Each publisher must take this data and re-work it into a suitable format for publication using the publisher's chosen software. The writer has had extensive experience working in a publishing environment with this kind of material. The use of word processing formatted data as an input to the publishing process imposes high costs on publishers. This is due to the cost of translating unstructured data with ever changing proprietary formats into a publishing format. Unless this work is undertaken, published versions are likely to be of poor quality. It is easy to see many examples of formatting and presentation problems with case and other data provided by online sites such as AustLII and some commercial sources. We get what we pay for.

Perhaps up to half a dozen publishers will seek to publish the same judgment on their sites. Each of them must undertake extensive data conversion work on the same data before they can introduce it to their publishing systems. Publishing from this kind of

source data imposes a massive duplication of costs. Ultimately, these costs are borne by consumers.

There is an alternative. Recently the Federal Court announced a proposal to prepare all Federal Court judgments in a non proprietary format designed for automated processing using either the Standard Generalised Markup Language (SGML) [ISO 8879:1986] or Extensible Markup Language (XML) [W3C 1998]. This is an extremely important development. Use of a data format such as SGML or XML will greatly facilitate the efficiency of the publishing process and archival management of case law. It has the potential to offer significant cost savings to publishers and consumers and to improve the quality of presentation and reliability of case law online. Under this model, most of the hard work is done once by the courts. Publishers can concentrate on adding value. This is an essential part of knowledge management for this kind of information. There is no reason why publishers should not pay for access to this kind of high quality data.

Courts should follow the lead announced by the Federal Court and adopt an SGML or XML format for publication of all judgments released for public access. This will reduce costs to publishers and facilitate accurate, comprehensive and competitive access at reasonable cost.

Electronic data for authorised reports

Digitisation of many authorised reports series is incomplete or the sole digital copy is held by a commercial publisher to the exclusion of the copyright holder (a Council of Law Reporting). For example, many older series such as the NSW Reports and the State Reports that precede the NSWLR in 1971 have not been captured in digital form. These reports remain relevant to the common law in New South Wales and elsewhere. During the 1980s many reports series were captured in electronic form by CLIRS under an exclusive licence from various governments. Following the purchase of Info-One by Butterworths they may hold the sole digital source for some authorised series such as the VR and the Qd.R. Until recently this was true also of the NSWLR.

In the case of the VR, Butterworths is both the copyright holder in the authorised reports compilation and the holder of the electronic data.

Even if a Council of Law Reporting wished to grant a licence to other publishers to publish an authorised reports series online, they cannot do so without digitising the reports again. In some cases this has strengthened the online monopoly over some reports series.

Councils of Law Reporting who do not hold copyright in the reports should be encouraged to acquire that copyright and to digitise their reports. Councils who hold copyright should be encouraged to digitise their reports to facilitate competitive licensing.

An example of competitive licensing

Early in 2000 the Council of Law Reporting for NSW announced that it had completed development of an electronic database for the NSWLR using SGML markup in accordance with Document Type Definitions (DTDs) it had developed. The Council now offers to licence multiple publishers to publish the NSWLR online as the NSWLR. It is expected that at least two publishers will acquire non-exclusive NSWLR publishing licenses. This model will facilitate many of the developments discussed in this paper.

Knowledge management by the courts

Precedent value categorisation

So far the discussion has covered knowledge management by the law reporting bodies and by the courts in the selection of appropriate data formats. There is much more that the courts can do in this area.

The Australian Institute of Judicial Administration (AIJA) recommends that courts apply a classification to all judgments using the following categories [AIJA 1999]:

> "[NOTE: A possible system of categorisation is as under:
>
> - **Category A**
>
>   Those of significance and/or recurrent interest by virtue of their discussion/application of legal principle.
>
> - **Category B**
>
>   Those which are more routine in nature because they are either essentially decisions on discrete fact situations or are fairly routine examples of the application of well known and understood principles. Such judgments would not normally warrant reporting or uploading into a national database.
>
> - **Category C**
>
>   Those which contain data indicating current levels of assessment of damages …"

It is possible that Category C might be revised or another category added to include sentencing cases in the criminal law area. In addition, Category A should be refined to apply criteria closer to those used by law reporting bodies in the selection of reported cases. However, in the first instance, the classification by the court should include a wider class of cases to ensure that reporting bodies evaluate all realistic candidates for reporting. Editors of law reports should not have to consider cases in categories B and C.

These categorisations should be attached to judgments as attributes or meta data for all time. In addition, once a judgment is reported in an authorised series, this fact should be recorded with the original judgment in the court's database.

The terms of licence of judgments data to publishers should reinforce this process. For example:

- Publishers should include in any publication of judgments a statement of its categorisation by the courts. If the court later changes its categorisation, publishers should update their online versions.
- Publishers should identify in their online unreported judgments databases those versions that are superseded by a reported version.

Preservation of this information will assist researchers to quickly distinguish between cases with precedent value and those that do not. Researchers can then decide how to efficiently apply their research time. It will promote consistency in use of reported decisions and provide maximum benefits from the reporting process. If law reporting bodies offer publishing licences for their reported judgments series on equitable terms, commercial publishers can take no exception to the identification of reported cases in unreported judgments databases. It should be done anyway as part of a professional product.

Indexing and use of a thesaurus

Some courts now apply catchwords to judgments before publication. The AIJA promotes the use of key titles and sub titles provided by LBC Information Services [AIJA 1999].

Catchwords can be useful as a quick way to gain the sense of a judgment. However, in online information systems there is a need for a consistent classification system to augment text search tools that rely on literal word matching.

The AIJA recognises the limitations of these titles for indexing judgments and suggests development of a thesaurus for indexing purposes. This would be an important initiative. Such a thesaurus must not be commercially owned. It is recommended that a public body such as a State Library be encouraged to undertake this development and provide an equitable licensing scheme to provide access to all publishers.

Conclusions

It is not too late to develop a coherent knowledge management framework for Australian case law to deal with the issues discussed. Some important initiatives are already underway and others not mentioned. A body with an overarching responsibility and influence such as the AIJA could pick up this issue. Such a body should:

- encourage greater understanding of the nature of and use of authorised law reports;
- encourage the courts to maintain and even strengthen their requirements for citation of authorised series in preference to unreported versions;

- promote the adoption of publishing friendly data formats such as SGML or XML for judgments published by the courts;
- continue its promotion of categorisation of judgments at source and the development of a thesaurus for indexing judgments;
- encourage courts to require publishers to include the court's judgment classifications in all publications of their judgments;
- promote the formation of a federal Council of Law Reporting and state bodies in those states that do not have such a body;
- encourage all Councils of Law Reporting to acquire copyright in the editorial work created during the reporting process;
- encourage all Councils of Law Reporting to develop digital databases for their reports series; and
- encourage all Councils of Law Reporting to develop licensing procedures for licensing their reports series to publishers for online publication along similar lines to that developed by the Council of Law Reporting for NSW.

These measures will greatly reinforce the role of precedent in the common law system and provide for low cost, efficient and equitable access to case law.

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[Law reporting legislation]

See Council of Law Reporting Act 1969 (NSW), Council of Law Reporting in Victoria Act 1967 (Vic), and Council of Law Reporting Act 1990 (Tas).