

An Introduction to the Legal System and Legal Materials of the United States: A Guide for Australians

Paul Von Nessen

McCullough Robertson Professor of Corporate Law
QUT Faculty of Law

Just as it has been said that the United States and England are countries divided by their common language, it can also be said that the United States and all other countries of the common law world are countries divided by their common legal heritage. Although the legal material from the United States is usually quite accessible in Australia in a physical sense, most Australians view the use of the vast American legal collections with trepidation and uncertainty. With an understanding of the similarities and differences in the United States and Australian legal systems, Australian legal academics and librarians can better understand how American materials may be usefully employed. It is in pursuit of this objective that this article will:

- briefly describe the features of the United States legal system;
- explain how the similarities and differences between the Australian and United States systems affect the way one should approach legal research in the different countries; and
- list some of the more important research tools available for United States research (and where possible, describe these by reference to equivalent Australian tools).

THE UNITED STATES LEGAL SYSTEM

Before an Australian can truly understand why the United States legal system is so different from that of Australia, he or she must first appreciate the major differences between these countries in an historical context. One important historical feature that influenced U.S. legal developments was the fact that the North American colonies (including those which eventually became Canada) were not homogenous in any sense. The colonisation of North America occurred as a result of the activity of a number of countries including France (Quebec and Louisiana), the Netherlands (New York) and Spain (Florida and Mexico).

The original group of colonies that formed the United States, although united by their English heritage by the time of the revolution, nevertheless differed in a number of obvious ways. The original thirteen states in the United States were largely settled by those escaping religious persecution. As a result, various states had different predominant religious groups depending upon their dates of settlement. These included Puritans in New England, Quakers in Pennsylvania, and Catholics in Maryland. Slavery in the southern regions resulted in such differences that a significant regional rebellion ensued within the first century of the new nation.

As a result of these differences among the states, the legal system of the United States exhibits a number of features that protect and encourage state diversity in a way that seems quite odd to Australians. Most important of these is the role of the U.S. Supreme

Court. Unlike the Australian High Court, the U.S. Supreme Court is not the final court of appeal for all matters in the United States. Its jurisdiction covers appeals from the Supreme Courts of the various states only if the decision involves matters impacting upon federal (including constitutional) law. The U.S. Supreme Court may not review matters that are solely within the competence of a state. As a consequence, the common law (and different statutory laws, of course) has evolved separately in each jurisdiction in the United States without a unifying influence.

A second structural difference between Australia and the United States also stems from the lack of uniformity among the states. The federal courts of the United States not only exercise jurisdiction based upon subject matter (as occurs in Australia), but these courts are able to exercise jurisdiction based upon diversity of citizenship of the parties. Although now somewhat anomalous, in earlier eras it was feared that out-of-state litigants would not receive a fair hearing in the state courts. Suits could therefore be removed to a federal district court (the entire United States is divided into federal districts) if the parties to the action were from different states. If the matter in dispute raised a non-federal issue, that issue was to be resolved by reference to state law, including state common law.

The final major structural difference between the United States and Australia is also directly attributable to the historical differences in foundation. Because the United States was formed by those escaping persecution and founded in revolution, the United States Constitution includes the Bill of Rights (the first ten amendments to the Constitution) which were adopted as a package to assure accession of a number of the original states to the new federation. This inclusion has resulted in a much more activist role for the judiciary, a role which until recently had not been emulated in Australia.

Two final differences between the United States legal system and that of Australia are worthy of note, primarily because of their considerable effect upon the volume of American material. In the United States contingency fees have been accepted for many years. Additionally, costs are generally not awarded against unsuccessful litigants. The result is that the United States has become, by Australian standards, very litigious. These factors explain why it is not only the difference in populations that results in the massive number of United States court reports in many Australian libraries.

DIFFERENCES IN LEGAL RESEARCH

The United States legal system discussed above is different from the Australian system in a number of ways. However, the most obvious difference to be observed by any Australian lawyer is simple - there is much more American law than an Australian would think possible. On any matter within the competence of the states (including common law), there may be fifty authoritative cases - one from each state. The fact that the federal courts must apply state law where applicable means that the federal courts (including the geographically organised Circuit Courts of Appeal and, on the odd occasion, the U.S. Supreme Court) may express views on the application of a particular state's law. These pronouncements are not binding upon the state courts and are often based upon a "what the state Supreme Court might do if they had this case" approach. Given the respect afforded the federal judiciary in the United States, the views of the federal courts on state law matters (though not authoritative) are undoubtedly worthy of consideration.

Add to these structural reasons for numerous cases the litigious nature of American society and the vast volume of American legal material is explained. I have often introduced students to American law by contrasting it to Australian law thus:

In Australia, there may be no authority in relation to a particular point of law. The resolution must often come from inferences and observations in cases where the matter is indirectly addressed. By contrast, in the United States one is likely to find numerous cases on any point of law, all of which are authoritative. Unfortunately, these cases are more often than not inconsistent and contradictory.

The abundance of legal material in the United States is, however, one of the attractions of American law. As a consequence of the independence of each state, the law of the United States can develop rapidly and in experimental ways. A development in one state may take root rapidly (if the solution is effective) or wither away as a misguided frolic (if the solution is ineffective). The benefits and detriments of each view are often well supported by reasoned judgment of the Supreme Courts of the various states.

From a researcher's perspective the great abundance of material means that the legal research tools which have served the United States legal profession are extremely effective. The precision with which cases are digested in the United States, for example, is extremely impressive, but necessarily so. Though many of these tools are equivalent to Australian counterparts, each displays a unique local flavour.

However comfortable one feels in researching legal material from the United States, an understanding and appreciation of the system is essential. In addition to appreciating the federal and state court structures (the hierarchies and interrelationships thereof), one must be able to identify as a first step whether the matter in question is of federal or state competence. Fortunately, except for the role of the highest court, the federal systems of Australia and the United States are not too dissimilar.

THE UNITED STATES RESEARCH TOOLS

Encyclopedias and Other Secondary Sources

As with all common law systems, the law of the United States is based upon cases and statutes. Subject research with United States law conforms to that of Australia, starting with two legal encyclopedias, the *Corpus Juris Secundum* (West Publishing) and *American Jurisprudence* (Lawyers' Cooperative Publishing). Articles may be searched by subject in the *Index to Legal Periodicals*, a United States dominated research tool which also includes some Australian periodicals.

Reporters

Cases in the United States are reported in the same fashion as in Australia. Most law libraries in Australia have one of three reporter series: the official *United States Reports*, the *Supreme Court Reports* (West Publishing) and the *Lawyer's Edition* (Lawyer's Cooperative). The two unofficial reports show the pagination of the official reports within them (copyright law permitting this in the United States).

Decisions of the federal Courts of Appeal appear in the *Federal Reporter* while selected decisions of the federal District Courts appear in the *Federal Supplement*. These reporters include cases from the entire United States federal system and are published by West Publishing.

The state court reports appear in each state in an official reporter series. In Australia, few libraries have official reporters, but most have the regional reporter series published by West Publishing. These are organised by regions, with the decisions of particular state courts appearing in regional reporters (Atlantic, Northeastern, Northwestern, Southeastern, Southern, Pacific, etc.) with the regional boundaries appearing in the front of each volume.

Digests

Due to the predominance of West Publishing (all United States reports can be found in one of the West reporters), the West digesting system is the most comprehensive and is the system most commonly found in law libraries. This system is based upon a key number system that is uniformly used in the reporters, encyclopedia, and digests. The digests are available in the United States by jurisdiction or reporter series; however, in Australia the complete 'general' digest is normally available. It is organised by ten-yearly and five-yearly consolidations and numerous single volumes between the consolidations.

Each point of law in every case is assigned a key number (Example: TortsB345.5)[the actual key symbol is copyright. It is in fact parallel and the reverse direction of the above], and every point of law in a case results in an assigned key number in a headnote. The actual opinion in the West reporters is also divided into sections corresponding to the headnote discussion.

The digests are organised by key number with the headnote from the case appearing as the digest entry. The date and jurisdiction of the case are the first part of the digest entry. An overall outline of each subject can be found in the digests. Additionally, each volume of case reports has a digest of the key numbers and headnotes for the cases appearing in that volume. Cross references by key number also appear in the commentary.

While use of the digests in the United States was in the past a somewhat tedious process, computerised retrieval has now greatly facilitated its usefulness. The service, known as *Westlaw*, is not generally available in Australia; however, this service may be promoted in the future since West Publishing, Lawyer's Cooperative and Australia's LBC are now all part of the Thompson corporate group.

Citators

The United States case updating service is *Shepard's Citator*. Due to the volume of American sources, an Australian will find this service akin to a computer print out (with no commentary or case names whatsoever). The volume and page number of each case appears in the citator with parallel citations and all cases referring to such case listed beneath it by volume, reporter, and page. Small letter references ('d' for distinguished, etc.) are placed beside the volume and page reference of later cases if appropriate. Where possible, the particular headnote reference is included next to the later case so that the aspect of the digested case considered therein will be apparent.

This system is included in Lexis/Nexis to enable quick updating of cases reported in that full text retrieval system. For academics, the Shepards to legal periodicals, operating in the same manner, is a useful research tool (although that service is not a high priority for Australian libraries)

Case Annotations

One particularly useful American research tool is the extensive case annotation service. In these services, recently reported cases are presented with extensive annotations of other relevant cases. The Lawyers Edition of the cases of the U.S. Supreme Court provides such a service for a number of the decisions of that court. However, the American Law Reports Annotated series ('ALR', also by Lawyers Cooperative) is even more useful, annotating as it does all decisions from courts throughout the U.S. under particular topic areas. This series is now in its fourth series, and updates to the annotations to a topic are provided. While all subjects may not be covered, finding an annotation on a particular topic is extremely useful both for an analysis of the recent decision but also for a summary of all relevant cases (by jurisdiction) and secondary source references.

Statutes

Most American states have continuously consolidated statutes. These codes are not usually available in Australia in hard copy (with some exceptions). Most of these codes are, however, now available on Internet websites.

The *United States Code Annotated* (the laws of the Federal Government) and the *Code of Federal Regulations* are found in most law libraries. As indicated, the U.S.C.A. is an annotated code which is also published by the West Group, and it has extensive references to cases included after each code section. This is why the service is so large, not a prodigious productivity by the United States Congress (which is about as inefficient as other parliamentary bodies).

INTERNET AND COMPUTER ACCESS

Primary sources of law in the United States have little copyright protection. For this reason, much of the statutory material not available in Australian libraries is readily available on the Internet. Similarly, full text databases of most case reports are now also available.

One good starting point is the Cornell Library Law Encyclopedia (with extensive cross references to other internet material):

www.lawschool.cornell.edu/library/take1.html

Another very useful guide to the primary source material is FindLaw, found at:

www.findlaw.com

Computer services (Lexis/Nexis and Westlaw) have been available in the United States since the mid-1970s. As a result the American materials on these sophisticated services are quite extensive and rapidly updated. Currently, only Lexis/Nexis is commonly available (on a fee-paying basis).

CONCLUSION

Researching United States law is actually quite straightforward and efficient. As with any research, one's ability improves with practice

The primary impediments to Australians who attempt to use United States materials is the failure to appreciate the differences in the two federal systems. Once the Australian researcher understands the different roles of the U.S. Supreme Court and the High Court of Australia, an appreciation of the authority and importance of the United States judgments will result. At that point, only the 'common' language (particularly apparent where American legal jargon is concerned) will continue to baffle.