# *Comparative Observations on Doing Legal Research in Australia and the United States*

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No one can truly know a legal system other than that of her own country.[2]

## *Introduction*

We do not intend to disprove the skepticism of this quotation, but rather to take up its challenge. The skepticism is healthy in warning against trying to understand another country's law from the outside. From this perspective, law resembles a good wine. Much of its character is the product of soil and climate. What better way of learning about Australian law than a 'tour of the vineyards'?

For example, the High Court of Australia and the U.S. Supreme Court have so much in common that it can be difficult to learn how they differ. A visit to the High Court building and a friendly but highly informative conversation with a knowledgeable attendant generate a better, and surely more entertaining, understanding of the differences than hours of more traditional research. The High Court has adopted more sedentary ways, but it is still capable of resuming its peregrinations. The Supreme Court would not dream of sitting beyond the confines of the District of Columbia. The High Court has seven members; the Supreme Court, nine. The differences in number don't stop there. Neither court sits in divisions, but a 'Full Court' of the High Court can have as few as two Justices, and as we understand it, sometimes one Justice of the High Court can hear a case. The Supreme Court, having without doubt the lightest docket of any national court of last resort in the world, can afford to sit always en banc. Supreme Court Justices "hold their offices during good behaviour." Fortunately, that means life tenure. A Justice of the High Court has to retire "upon his attaining the age of seventy years." Most strikingly, argument in the High Court can go on for several days, or more. The Supreme Court would be horrified. Argument there is limited to half an hour on each side. "Counsel is not required to use all the allotted time."

One of us has just returned from a semester's stay in Australia, the point of which (in addition to experiencing such other essential elements of the culture as the wine and the beaches) was to spend time living the Australian legal system, to absorb enough

[1] We thank Mark Powell, Librarian, Office of the Australian Government Solicitor, Melbourne, and Rosemary Bunnage for their suggestions and comment. Mistakes from which they could not save us are all the more our own.

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of its ambiance, so as to overcome the obstacles to knowledge erected by difference and distance. The other one of us, as a librarian whose job description starts from the precept that it is possible to know another country's law, and in particular, the ways and byways of finding its law, would claim to have gained enough authentic experience of Australian legal research (even if from a distance) to contribute to the comparative reflections we make here

### *Two Samples: Federal Constitution and Legislation*

Finding the text of the Constitution of course is not the problem, although an American would be surprised to learn that, strictly speaking, Australia's Constitution is enacted as part of a statute. The real task of constitutional research in both countries is to find judicial decisions construing the meaning of constitutional provisions in particular cases. In this, Australia and the U.S. share a fundamental trait. In both countries the decisions of the national court of last resort, the High Court and the Supreme Court, have oracular authority when it comes to the meaning of the Constitution. Research in constitutional law means finding the High Court/Supreme Court decisions on point. We can call this the 'leading case method' of research It is very effective. Having found the leading case on point, the researcher has the key to finding later cases dealing with analogous issues arising under the same provision of the Constitution. The court in the later case is obliged to refer to the leading case, whether to rely on it or to distinguish it, so that such methods as using a case citator work wonderfully for carrying research on to the next phase.

In the U.S., a treatise on constitutional law has more value as a compendium of leading cases, than it does as an explanation or analysis of the law. No such treatise in the U.S. enjoys the authority or prestige of Lane's *Commentary* or Quick and Garran.

We come to a difference that speaks well of Australian law and has significant implications for research The High Court often refers to the U.S. Constitution and freely consults the decisions of the U.S. Supreme Court We applaud the High Court's comparative approach, but it has the consequence that an Australian law librarian had better be prepared to do research in U.S. constitutional law A law librarian in the U.S. need not worry The Supreme Court in its parochial ways almost never seeks help in the judgments of the High Court, or of any other foreign court for that matter. A computer search discloses citations by the Supreme Court to High Court judgments in a total of four cases since 1945. In one of those cases, the Supreme Court referred to "our sister common law nations." That sounds like pious hypocrisy If the Court really believed in such a familial bond, shouldn't it adopt the High Court's approach?[3]

### *Legislation*

We can say that in the U.S. the comprehensive, heavily annotated, frequently updated, topically arranged compilation or 'codification'[4] of statutes is a publication whose time

[3] For more on the High Court's broad-minded (though judicious) attitude to citation, see Paul von Nessen, "The use of American precedents by the Australian High Court, 1901-1987," (1992)14 *Adelaide Law Review* 181 and Russell Smyth, "Other than 'accepted sources of law'?: a quantitative study of secondary source citations in the High Court," (1999) 22 *University of New South Wales Law Journal* 19 Thanks to Mark Powell for these references

[4] We use quotes because the United States Code in fact satisfies neither of the criteria required of a code, specificity and unity.

has passed, while in Australia its time never came. This is not to disparage the genius of the person who invented the pocket part. Perhaps it succeeded too well. For example, section one of the *Sherman Antitrust Act* (15 U.S.C. § 1) is followed by almost five hundred pages of casenotes in one of the standard commercial editions of the *United States Code*. These casenotes are so extensive they have to be accompanied by their own topical outline and index; otherwise they would be useless. No researcher in her right mind could seriously contemplate ploughing through them all. Moreover, what distinguishes this from a straightforward digest of cases under the topic 'Antitrust'? We note that few if any of the cases in the annotations to the statute have to do with construing its terms. In contrast, the notes in the *Commonwealth Statutes Annotations* to the entire *Trade Practices Act 1974* (Cth), a fair counterpart to the Sherman Act, cover about ninety pages.

A set of the annotated *United States Code* runs to over two hundred volumes. It costs around 1500 dollars to acquire a set (in fact, a bargain meant to hook the buyer on the annual updates) and an equal amount each year to maintain it. To put things into perspective, that is the equivalent of buying a first edition of, say, *The Great Gatsby* every year. It doesn't make a lot of sense, in particular when you consider that an equally massive digest of the same cases stands a few feet away.

In Australia, on the other hand, a compilation of Commonwealth legislation (to 1973) was last published in 1974. This was no ambitious project to reorder the statutes, attempting to put them in a topical arrangement with a novel and completely altered numbering. It is an alphabetical compilation by short title of the statutes as enacted, incorporating amendments. The simplicity of the idea is stunning. It does pose the difficulty of tracking down amendments since the date of compilation. Publication of the reprinted acts solves that problem, but there is a catch, at least from the point of view of a U.S. law librarian. Historically, it has been annoyingly hard for U.S. law libraries to lay hands on the reprinted Australian acts, Commonwealth or state. Apart from that, it is hard for us to pay separately for a subscription to the reprinted acts, when we have already forked over a fair sum for the annual bound volumes of the acts. After all, one without the other is of little use. In terms of practical research, the annual bound volumes in their beautiful blue binding are merely ancillary to the reprints.

The bound volumes look very well on the shelves. So, it is easy to imagine our frustration when on trying to come up with a current text of an Australian law, we learn that "[a]s a principal Act is easier to update if it has been recently reprinted, check if a reprint has been received by your library which may store reprints in alphabetical order in folders or pamphlet boxes."[5]

### *The Impact of the Computer and Internet*

Taking legislation as an example, we see that the efforts of the Australasian Legal Information Institute (AustLII) and SCALEplus have, from our vantage, worked a dramatic change. In the U.S. we don't particularly care whether the text of an Australian law we have in hand is a consolidation, a reprint, an incorporated act, or a pasteup. What we need is a reliable, current text. That is what we can finally get, thanks to

[5] *Researching Australian Law*, North Ryde, NSW : LBC Information Services, 1997 at p. 244.

the Internet and the vision of the producers of these outstanding databases. As far as we are concerned, AustLII and SCALEplus have rendered hard-copy research in Commonwealth legislation obsolete.[6] We look forward to the day when the same can be said for Australian state legislation. We see from a recent visit that AustLII has made significant strides in that direction.

Have AustLII and SCALEplus placed Australia at the forefront internationally in the project to put the power of the Internet to work in making legal information more freely accessible? It is a bold claim, but in our view the burden is on the negative to disprove it. On behalf of our country, we can point to the huge amount of U.S. legal information available gratis on the Internet. But that is just the problem. The information is dispersed over a vast area at dozens of sites, with all the variations and inconsistencies of format, presentation, quality and currency implied in such a situation. The basic job of regularly updating links to the constantly changing URLs alone implies a big investment of time and effort. Of course, the difficulty is largely the inevitable result of our federalism. Australians too are quite familiar with the "multiplier" effect of federalism on legal research. Still, it would be nice to think that someday when the Internet has left adolescence, a central website of U.S. legal information, both state and federal, will be a fixture of online legal research in the U.S. Who knows? Maybe the government would see the value of sponsoring and funding it. At present it seems to us that AustLII and the 'Window on the Law' project, certainly the two in combination, have come closer to achieving this goal in Australia than anything currently underway in the U.S.

Commercial electronic legal research has taken remarkably dissimilar paths in the two countries. In the U.S. Lexis and Westlaw have been wildly successful and generated very healthy profit margins for their parent companies. Much of the success must be attributed to the size of the market. Our impression is that the strategy is to make *LBC Online* and *Butterworths Online* the 'virtual' equivalents in Australia of Westlaw and Lexis, respectively. However, information on both of these is so limited from this side of the Pacific Rim that we hesitate to reach firm conclusions in this regard.

In the academic market, the success of Westlaw/Lexis in the U.S. has had the result that both systems are prepared to offer advantageous arrangements to law schools, motivated in part by the 'loss leader' theory of marketing. In commercial terms, the intense competition between the two systems makes law schools the pipeline of the future paying customer base, in other words, a battleground for name recognition and customer loyalty. However, the arrangement makes good sense from both sides in other terms, as well. After all, law schools do not have the benefit of client accounts to which the expense of commercial online searching can be charged. Yet, if that mode of research takes a central place in the 'repertoire', law schools and law libraries should be expected to teach it. The financial equation makes the appearance of similar arrangements in Australia unlikely. Or does it?

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[6] It is worth mentioning that Australia can rely on a simple mode of citation comprising the short title and date. Throw in the act number for good measure. Thus, the researcher is indifferent to format. In the U.S., an accurate text and simple citation won't do. Saddled with two formats of legislation (act and 'code'), we need two citations, and worse, it can matter a great deal to a particular researcher whether she has the cite to the same text in one format rather than the other.

### *Legal Publishing*

We know that the competition between Lexis and Westlaw (read *Butterworths Online* and *LBC Online*) is just one theatre in a larger war between the publishing giants, Thomson and Reed. Amazing as it seems, it looks more and more like both the U.S. and Australia (not to mention Canada and the U.K.) have been assigned the role of pawns in this struggle between multinational corporations. Consolidation in publishing in general, legal publishing in particular, was already well underway when Reed acquired Butterworths and Lexis, while Thomson swallowed up West and LBC. Now that consolidation in both countries appears to have reached the limits of its logic, libraries and researchers are confronted by a potentially intimidating prospect.

We don't intend to criticize what the law of antitrust, international trade and foreign investment permits. There is a school of thought that identifies publishing as a culturally 'sensitive' branch of commerce that deserves special treatment, and we began by noting the law's rootedness in national culture. Wouldn't we then be justified if we thought domination of national legal publishing by a pair of multinational firms raises concerns that require special attention? Apart from the larger questions that probably lie beyond anyone's control, very practical issues relating to diversity and depth in the catalogue, format of publication, marketing, tying, pricing and billing come to mind immediately. Certainly there is call for vigilance and expanded scope of action by the Committee on Relations with Information Vendors (AALL) and the National Publishers' Liaison Committee (ALLG).

### *Inter-library Loan and Autonomy*

Both practicing and academic lawyers have pressing information needs, to put it mildly. A looming deadline concentrates the mind wonderfully as it simultaneously raises anxiety levels. The advance of digitized information has not made print obsolete. We ought to be amazed at what has already taken place, but a half-century of the computer has made only a small dent in a half-millennium of print. Thus, we can expect that in the foreseeable future much of what people want to read will be available in print and nowhere else. The digital revolution has in fact added to the responsibilities of libraries without appreciably diminishing the burden of continuing to provide the services already expected of them.

Inter-library loan is a case in point. The universe of materials likely to prove of interest to researchers in law schools or in law firms is so huge that no one library could be expected to hold more than a representative segment of it. The solution to the problem has traditionally been cooperative arrangements for inter-library loan. It might be thought that a developing virtual reservoir of electronic information waiting be tapped by any library or researcher on demand should lead to decreasing reliance on traditional inter-library service. While we do not have empirically confirmed evidence in hand to prove it, we hold just the contrary position. There is reason to think that as libraries move away from traditional formats, dependence on inter-library loan might well increase. Increased demand will exacerbate the historically unsatisfactory aspects of inter-library service, namely, delay and expense.

Libraries now have to choose among several formats. When they opt for electronic formats, the amount of printed matter held by libraries will drop. Add to this the fact that book budgets have already suffered cutbacks, in part justified by the probably mistaken belief that the advent of electronic formats decreases the need or demand for print materials. The evidence is that the number of books published annually in recent years has not dropped, but rather has increased.[7] As for journals, anecdotal evidence strongly suggests that the upward trend in the appearance of new titles gives no sign of waning. Thus, fewer copies of fewer titles will make their way onto library shelves. We note too that site licenses for electronic formats put stricter limits on the transfer of information from the "licensee" than does the law of copyright with respect to printed matter. (Quaere whether site licences allow a lender to print off text and send it outside the library.) It seems a fair inference that demand on inter-library loan is bound to increase in these circumstances.

The upshot is that dissatisfaction with inter-library service, the source of perennial complaint in both countries, is not likely to abate. In the U.S., academic law libraries enjoy the advantage of not having to rely on the university library's overburdened and understaffed central office. This apparent luxury in fact has implications for the perception of the overall level of service in the law library. Researchers who make inter-library loan requests only to find they have to wait several weeks or to make a substantial cash outlay have been disappointed twice (the item they sought was not there in the first place). Add to this the comparatively intense information needs of lawyers, and you have a recipe for indiscriminate unhappiness.

Autonomy of the law library cannot claim to solve all administrative difficulties. We concede that it creates some problems of its own, since no campus information centre can operate well except by coordinating with all the others, including the central library. Nevertheless, the American experience has been that the trade-off favours autonomy. The public-law notion of subsidiarity supports this view. Authority should be placed at the level of administration that is in the better position to carry out the responsibility. It is a matter of comparative efficiency. In this sense, the law library ought to function much like a Member State of the European Union, or a State of the Commonwealth for that matter. A semester observing the Australian scene has shown us that some creative efforts to implement the principle of subsidiarity in Australian law libraries are now underway. Should they succeed, inter-library loan, along with other aspects of service linked directly to institutional structure, is certain to improve.

## *Conclusion*

These brief reflections have hardly begun to deal with the broad range of current issues in legal research that gain depth and relief when viewed from the comparative perspective. We have not touched on the other sources of law, such as delegated legislation (this phrase would in theory be a constitutional oxymoron in the U.S.), or international agreements (the scandal of non-publication in the U.S.; the State Department has proven

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7 The statement is certainly true in the case of law books, as measured by 'title output'. If not true of books in general, the explanation is flat sales. See Gary Ink "Book title output and average prices: 1997 final and 1998 preliminary figures" *The Bowker Annual* 4th ed., 1999 at p. 529

itself incapable of producing anything faintly comparable to the *Australian Treaty Library*) Nor have we considered developments relating to format-neutral citation rules (Australia clearly in front here). We have scarcely mentioned either secondary sources or finding tools – encyclopaedias, case digests, journal indexes, online catalogues – or updating techniques. These omissions help to prove our point. The wine is heady. We would not think of trying to down an entire bottle at one sitting. We conclude with a quotation that reverses the perspective of the first.

> For only through comparison do we distinguish ourselves and discover who we are, so fully to become what we are meant to be.[8]

[8] Mann, Thomas *Joseph in Egypt*, 1933 (Quoted in Currie, David P *The Constitution of the Federal Republic of Germany*, 1994)