Access to Case Law in a Healthy Common Law System[1]

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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.

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PRECEDENT AND LAW REPORTING

The common law precedent system applies to both 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 at least persuasive for the deciding court and equivalent courts.[2]

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.[3] This majority of decided cases play no role in the system of precedent.

Councils of law reporting and some commercial publishers authorised by the courts[4] gather together cases with precedent value in collections of 'authorised reports' such as the *Commonwealth Law Reports* (CLR), *Federal Court Reports* (FCR), *Victorian Reports* (VR), *New South Wales Law Reports* (NSWLR), and *Queensland Reports* (Qd R). As a result of the selection and editing processes these reports provide a reliable source of precedent for all future users.[5] Law reports avoid the need to re-argue issues, they save research effort and they promote consistency in the law. They are an important part of the knowledge management process

ALTERNATIVE SOURCES FOR CASE LAW

The Australian legal publishing environment has produced a wide range of online and hard copy sources for case reports Online versions are becoming by far the most prolific with perhaps half a dozen possible sources for reports of some

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[2] Lord Bingham, 2000, keynote speech presented to the *Law Reporting, Legal Information and Electronic Media in the New Millennium Seminar*, Cambridge University Law Faculty, 17 March. http://www.lawreports.co.uk/17march.htm

[3] Lord Bingham, *ibid,* Lord Justice Buxton, speech presented to the *Law Reporting ... seminar, ibid.*

[4] e.g *Federal Court Practice Note* no 9 (1993) 45 FCR 8 requires use of the report of decision in the FCRs if it is reported in that series

[5] Huxton, Naida J 1998, 'Law reporting and risk management citing unreported judgments', *Australian Bar Review,* vol 17, p. 84

courts. One case may be published by three or four commercial publishers as well as by AustLII, SCALEplus and LawLink.

Legal publishers 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 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 CLR or the VR 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 my 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 were 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.

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 headnotes. 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 I 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. Copyright is held by the relevant council of law reporting in the series: NSWLR, Qd R, *Western Australian Reports* (WAR) and *Northern Territory Law Reports* (NTLR). I understand that the copyright is held by commercial publishers for the authorised report series: CLR, FCR, VR, *South Australian State Reports* (SASR), *Tasmanian Reports* (Tas R) and *Australian Capital Territory Reports* (ACTR).

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 report 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, which 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 jurisdiction. Only as a copyright holder can they act as an independent licensor of data to multiple publishers.

Councils of law reporting that do not hold copyright in their report 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 an arrangement similar to that of the NSWLR and the Qd R.

As there is no council at federal level, 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, it should acquire copyright in the CLR and the FCR.

Law reporting should not be conducted for the benefit of commercial publishers. It exists for the benefit of the legal system and users of that system. It is hard to see how the production of multiple report 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 report 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, 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 approximately $270 per volume of 600 pages in May 2000. This is an average cost of 45c per page. 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 publishers. Finally, law reporting bodies require access to judgment 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. I have had extensive experience working in a publishing environment with this kind of material. The use of word processing formatted data imposes high costs on publishers because of the cost of translating unstructured data with ever changing proprietary formats into a publishing format. If this is not done published versions are likely to be of poor quality. Examples of formatting and presentation problems with case and other data can be seen on 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, thus there is 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 Standard Generalised Markup Language (SGML)[6] or Extensible Markup Language (XML).[7] This is an extremely important development. Use of SGML or XML will greatly facilitate the efficiency of the publishing process and archival management of case law. Under this model the courts do most of the hard work. 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. Other courts should follow the lead of the Federal Court. It will reduce costs to publishers and facilitate accurate, comprehensive and competitive access at reasonable cost

Digitisation of authorised reports

Digitisation of many authorised report series is incomplete or the sole digital copy is held by a commercial publisher to the exclusion of the copyright holder (Council of Law Reporting). Many older series such as the *New South Wales Reports* and the *State Reports* that precede the NSWLR before 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 CLIRS digitized many report series under an exclusive licence from various governments. When Butterworths purchased Info-One they gained the CLIRS database and thereby the sole digital source for some authorised series such as the VR and the Qd R. Until recently this was also true of the NSWLR. In the case of the VR, Butterworths holds copyright for the authorised reports compilation and also for the electronic data

Even if a council of law reporting wants to grant a licence to other publishers to publish an authorised report series online, they cannot do so without digitizing the reports again. In some cases this has strengthened the monopoly over some online report series.

[6] International standard, ISO 8879
[7] A W3C recommendation, http://www.w3.org/TR/REC-xml

Councils of law reporting who do not hold copyright in the reports should be encouraged to acquire that copyright and to digitize their reports. Councils who do hold copyright should be encouraged to digitize their reports to facilitate competitive licencing.

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 in accordance with Document Type Definitions (DTDs) that it had developed. The Council now offers to licence multiple publishers to publish the NSWLR online. It is expected that at least two publishers will acquire the non-exclusive licences. This model will facilitate many of the developments discussed in this paper.

KNOWLEDGE MANAGEMENT AT SOURCE

Precedent value categorization

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

- 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.[8]

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

[8] *Guide to Uniform Production of Judgments*, 1999, 2nd edn, AIJA

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 categorizations should be attached to judgments as attributes or metadata for all time. In addition, once a judgment is reported in an authorised series, this fact should be recorded with the original 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 categorization by the courts. If the court later changes its categorization, publishers should update their online version.
- Publishers should identify in their online unreported judgments databases those versions that are superseded by a reported version.

This information will assist researchers to quickly distinguish cases with precedent value. 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.[9] 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.

[9] *Guide to Uniform Production of Judgments*, p 4

The AIJA recognizes 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. Some important initiatives are already underway. 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 categorization 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 councils 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 report series, and
- encourage all councils of law reporting to develop licence procedures for licensing their report 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.